MICHIGAN REPORTS

CASES DECIDED

IN THE

SUPREME COURT

OF

MICHIGAN

FROM

March 18, 2011 through July 28, 2011

JOHN O. JUROSZEK
REPORTER OF DECISIONS

VOL. 489
FIRST EDITION

WEST®
A Thomson Reuters business

2012

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SUPREME COURT

	Term Expires January 1 of
Chief Justice	
ROBERT P. YOUNG, Jr.	2019
Justices	
MICHAEL F. CAVANAGH	2015
MARILYN KELLY	2013
STEPHEN J. MARKMAN	2013
DIANE M. HATHAWAY	2017
MARY BETH KELLY	2019
BRIAN K. ZAHRA	2013

Commissioners

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

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

State Court Administrator

CARL L. GROMEK[1]
CHAD C. SCHMUCKER[2]

Clerk: CORBIN R. DAVIS
Reporter of Decisions: JOHN O. JUROSZEK
Crier: DAVID G. PALAZZOLO

[1] To March 28, 2011.

[2] From March 28, 2011.

COURT OF APPEALS

	Term Expires January 1 of
Chief Judge	
WILLIAM B. MURPHY	2013
Chief Judge Pro Tem	
DAVID H. SAWYER	2017
Judges	
MARK J. CAVANAGH	2015
KATHLEEN JANSEN	2013
E. THOMAS FITZGERALD	2015
HENRY WILLIAM SAAD	2015
JOEL P. HOEKSTRA	2017
JANE E. MARKEY	2015
PETER D. O'CONNELL	2013
WILLIAM C. WHITBECK	2017
MICHAEL J. TALBOT	2015
KURTIS T. WILDER	2017
PATRICK M. METER	2015
DONALD S. OWENS	2017
KIRSTEN FRANK KELLY	2013
CHRISTOPHER M. MURRAY	2015
PAT M. DONOFRIO	2017
KAREN FORT HOOD	2015
STEPHEN L. BORRELLO	2013
DEBORAH A. SERVITTO	2013
JANE M. BECKERING	2013
ELIZABETH L. GLEICHER	2013
CYNTHIA DIANE STEPHENS	2017
MICHAEL J. KELLY	2015
DOUGLAS B. SHAPIRO	2013
AMY RONAYNE KRAUSE	2013

Chief Clerk/Research Director:
LARRY S. ROYSTER

CIRCUIT JUDGES

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

		Term Expires January 1 of
	DANIEL ARTHUR HATHAWAY	2015
	MICHAEL M. HATHAWAY	2011
	MURIEL D. HUGHES	2011
	THOMAS EDWARD JACKSON	2013
	VERA MASSEY JONES	2015
	CONNIE MARIE KELLEY	2015
	MARY BETH KELLY	2015
	TIMOTHY MICHAEL KENNY	2011
	ARTHUR J. LOMBARD	2015
	KATHLEEN I. MacDONALD	2011
	KATHLEEN M. McCARTHY	2013
	WADE H. McCREE	2015
	BRUCE U. MORROW	2011
	JOHN A. MURPHY	2011
	MARIA L. OXHOLM	2013
	LINDA V. PARKER	2011
	LYNNE A. PIERCE	2015
	LITA MASINI POPKE	2011
	DANIEL P. RYAN	2013
	MICHAEL F. SAPALA	2013
	RICHARD M. SKUTT	2015
	MARK T. SLAVENS	2011
	LESLIE KIM SMITH	2013
	VIRGIL C. SMITH	2013
	JEANNE STEMPIEN	2011
	CRAIG S. STRONG	2015
	BRIAN R. SULLIVAN	2011
	DEBORAH A. THOMAS	2013
	CAROLE F. YOUNGBLOOD	2013
	ROBERT L. ZIOLKOWSKI	2015
4.	SUSAN E. BEEBE	2011
	JOHN G. McBAIN, Jr.	2015
	CHAD C. SCHMUCKER	2011[1]
	THOMAS D. WILSON	2013
5.	JAMES H. FISHER	2015[2]
	AMY McDOWELL	2013[3]
6.	JAMES M. ALEXANDER	2015
	MARTHA ANDERSON	2015

[1] To March 28, 2011.

[2] To June 30, 2011.

[3] From July 11, 2011.

		Term Expires January 1 of
	LEO BOWMAN	2013
	MARY ELLEN BRENNAN	2015
	RAE LEE CHABOT	2011
	MARK A. GOLDSMITH	2013
	LISA ORTLIEB GORCYCA	2015
	NANCI J. GRANT	2015
	SHALINA D. KUMAR	2015
	CHERYL A. MATTHEWS	2011
	DENISE LANGFORD MORRIS	2013
	RUDY J. NICHOLS	2015
	COLLEEN A. O'BRIEN	2011
	DANIEL PATRICK O'BRIEN	2011
	WENDY LYNN POTTS	2013
	EDWARD SOSNICK	2013
	MICHAEL D. WARREN, Jr.	2013
	JOAN E. YOUNG	2011
7.	DUNCAN M. BEAGLE	2011
	JOSEPH J. FARAH	2011
	JUDITH A. FULLERTON	2013
	JOHN A. GADOLA	2015
	ARCHIE L. HAYMAN	2013
	GEOFFREY L. NEITHERCUT	2013
	DAVID J. NEWBLATT	2011
	MICHAEL J. THEILE	2015
	RICHARD B. YUILLE	2015
8.	DAVID A. HOORT	2011
	SUZANNE KREEGER	2015
9.	GARY C. GIGUERE, Jr.	2015
	STEPHEN D. GORSALITZ	2011
	J. RICHARDSON JOHNSON	2013
	PAMELA L. LIGHTVOET	2013
	ALEXANDER C. LIPSEY	2011
10.	JANET M. BOES	2011
	FRED L. BORCHARD	2011
	WILLIAM A. CRANE	2011
	DARNELL JACKSON	2013
	ROBERT L. KACZMAREK	2015
11.	WILLIAM W. CARMODY	2015
12.	CHARLES R. GOODMAN	2015
13.	THOMAS G. POWER	2011
	PHILIP E. RODGERS, Jr.	2015
14.	JAMES M. GRAVES, Jr.	2013
	TIMOTHY G. HICKS	2011

		Term Expires January 1 of
15.	PATRICK W. O'GRADY	2015
16.	JAMES M. BIERNAT, Sr.	2011
	JAMES MICHAEL BIERNAT, Jr.	2013[4]
	RICHARD L. CARETTI	2011
	MARY A. CHRZANOWSKI	2011
	DIANE M. DRUZINSKI	2015
	WILLIAM C. MARIETTI	2011
	JOHN C. RUCK	2015
	JOHN C. FOSTER	2015
	PETER J. MACERONI	2015
	EDWARD A. SERVITTO, Jr.	2013
	MARK S. SWITALSKI	2013
	MATTHEW S. SWITALSKI	2015
	ANTONIO P. VIVIANO	2011
	DAVID VIVIANO	2013
	TRACEY A. YOKICH	2013
17.	GEORGE S. BUTH	2011
	PAUL J. DENEFELD	2011
	KATHLEEN A. FEENEY	2015
	DONALD A. JOHNSTON, III	2013
	DENNIS B. LEIBER	2013
	JAMES ROBERT REDFORD	2011
	PAUL J. SULLIVAN	2015
	MARK A. TRUSOCK	2013
	CHRISTOPHER P. YATES	2013
	DANIEL V. ZEMAITIS	2015
18.	WILLIAM J. CAPRATHE	2011
	KENNETH W. SCHMIDT	2013
	JOSEPH K. SHEERAN	2015
19.	JAMES M. BATZER	2015
20.	CALVIN L. BOSMAN	2011
	JON H. HULSING	2015
	EDWARD R. POST	2011
	JON VAN ALLSBURG	2013
21.	PAUL H. CHAMBERLAIN	2011
	MARK H. DUTHIE	2013
22.	ARCHIE CAMERON BROWN	2011
	TIMOTHY P. CONNORS	2013
	MELINDA MORRIS	2013
	DONALD E. SHELTON	2015

[4] From May 3, 2011.

		Term Expires January 1 of
	DAVID S. SWARTZ	2015
23.	RONALD M. BERGERON	2015
	WILLIAM F. MYLES	2015
24.	DONALD A. TEEPLE	2015
25.	JENNIFER MAZZUCHI	2015
	THOMAS L. SOLKA	2011
26.	MICHAEL G. MACK	2015
27.	ANTHONY A. MONTON	2013
	TERRENCE R. THOMAS	2015
28.	WILLIAM M. FAGERMAN	2015
29.	MICHELLE M. RICK	2011
	RANDY L. TAHVONEN	2015
30.	ROSEMARIE ELIZABETH AQUILINA	2015
	LAURA BAIRD	2013
	WILLIAM E. COLLETTE	2015
	JOYCE DRAGANCHUK	2011
	JAMES R. GIDDINGS	2011
	JANELLE A. LAWLESS	2015
	PAULA J. M. MANDERFIELD	2013
31.	JAMES P. ADAIR	2013
	PETER E. DEEGAN	2011
	DANIEL J. KELLY	2015
32.	ROY D. GOTHAM	2015
33.	RICHARD M. PAJTAS	2015
34.	MICHAEL J. BAUMGARTNER	2011
35.	GERALD D. LOSTRACCO	2015
36.	WILLIAM C. BUHL	2013
	PAUL E. HAMRE	2015
37.	ALLEN L. GARBRECHT	2011
	JAMES C. KINGSLEY	2015
	STEPHEN B. MILLER	2011
	CONRAD J. SINDT	2013
38.	JOSEPH A. COSTELLO, JR.	2015
	MICHAEL W. LABEAU	2013
	MICHAEL A. WEIPERT	2011
39.	MARGARET MURRAY-SCHOLZE NOE	2015
	TIMOTHY P. PICKARD	2013
40.	MICHAEL P. HIGGINS	2015
	NICK O. HOLOWKA	2011
41.	MARY BROUILLETTE BARGLIND	2011
	RICHARD J. CELELLO	2015
42.	MICHAEL J. BEALE	2015
	JONATHAN E. LAUDERBACH	2013
43.	MICHAEL E. DODGE	2011

		Term Expires January 1 of
44.	MICHAEL P. HATTY	2011
	DAVID READER	2011
45.	PAUL E. STUTESMAN	2013
46.	JANET M. ALLEN	2011
	DENNIS F. MURPHY	2015
47.	STEPHEN T. DAVIS	2011
48.	GEORGE R. CORSIGLIA	2011
	KEVIN W. CRONIN	2015
49.	SCOTT P. HILL-KENNEDY	2013
	RONALD C. NICHOLS	2015
50.	NICHOLAS J. LAMBROS	2013
51.	RICHARD I. COOPER	2015
52.	M. RICHARD KNOBLOCK	2015
53.	SCOTT LEE PAVLICH	2011
54.	PATRICK REED JOSLYN	2013
55.	THOMAS R. EVANS	2015
	ROY G. MIENK	2013
56.	THOMAS S. EVELAND	2013
	CALVIN E. OSTERHAVEN	2015
57.	CHARLES W. JOHNSON	2013

DISTRICT JUDGES

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

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

		Term Expires January 1 of
	RUTH ANN GARRETT	2013
	RONALD GILES	2015
	KATHERINE HANSEN	2011
	PAULA G. HUMPHRIES	2011
	PATRICIA L. JEFFERSON	2015
	VANESA F. JONES-BRADLEY	2013
	KENNETH J. KING	2015
	DEBORAH L. LANGSTON	2013
	WILLIE G. LIPSCOMB, Jr.	2015
	LEONIA J. LLOYD	2011
	MIRIAM B. MARTIN-CLARK	2011
	WILLIAM McCONICO	2013
	DONNA R. MILHOUSE	2013
	B. PENNIE MILLENDER	2011
	CYLENTHIA L. MILLER	2011
	KEVIN F. ROBBINS	2013
	DAVID S. ROBINSON, Jr.	2013
	BRENDA KAREN SANDERS	2015
	NOCEEBA SOUTHERN	2011
37.	JOHN M. CHMURA	2013
	JENNIFER FAUNCE	2015
	DAWNN M. GRUENBURG	2011
	WALTER A. JAKUBOWSKI, Jr.	2013
	MATTHEW P. SABAUGH	2013
38.	CARL F. GERDS III	2015
39.	JOSEPH F. BOEDEKER	2015
	MARCO A. SANTIA	2013
	CATHERINE B. STEENLAND	2011
40.	MARK A. FRATARCANGELI	2013
	JOSEPH CRAIGEN OSTER	2015
41A.	MICHAEL S. MACERONI	2015
	DOUGLAS P. SHEPHERD	2013
	STEPHEN S. SIERAWSKI	2011
	KIMBERLEY ANNE WIEGAND	2013
41B.	LINDA DAVIS	2015
	SEBASTIAN LUCIDO	2013
	SHEILA A. MILLER	2011
42-1.	DENIS R. LeDUC	2015
42-2.	WILLIAM H. HACKELL, III	2011
43.	KEITH P. HUNT	2013
	JOSEPH LONGO	2011
44.	TERRENCE H. BRENNAN	2015
	DANIEL SAWICKI	2013
45A.	JAMES L. WITTENBERG	2015
45B.	MICHELLE FRIEDMAN APPEL	2015
	DAVID M. GUBOW	2015
46.	SHEILA R. JOHNSON	2015
	SUSAN M. MOISEEV	2013
	WILLIAM J. RICHARDS	2011

		Term Expires January 1 of
47.	JAMES BRADY	2015
	MARLA E. PARKER	2011
48.	MARC BARRON	2011
	DIANE D'AGOSTINI	2013
	KIMBERLY SMALL	2015
50.	RONDA FOWLKES GROSS	2013
	MICHAEL C. MARTINEZ	2015
	PRESTON G. THOMAS	2011
	CYNTHIA THOMAS WALKER	2015
51.	RICHARD D. KUHN, Jr.	2015
	PHYLLIS C. McMILLEN	2013
52-1.	ROBERT BONDY	2013
	BRIAN W. MacKENZIE	2015
	DENNIS N. POWERS	2011
52-2.	JOSEPH G. FABRIZIO	2015
	KELLEY RENAE KOSTIN	2011
52-3.	LISA L. ASADOORIAN	2013
	NANCY TOLWIN CARNIAK	2011
	JULIE A. NICHOLSON	2015
52-4.	WILLIAM E. BOLLE	2015
	DENNIS C. DRURY	2013
	MICHAEL A. MARTONE	2011
53.	THERESA M. BRENNAN	2015
	L. SUZANNE GEDDIS	2011
	CAROL SUE READER	2013
54A.	LOUISE ALDERSON	2011
	PATRICK F. CHERRY	2015
	FRANK J. DeLUCA	2013
	CHARLES F. FILICE	2015
	AMY RONAYNE KRAUSE	2011
54B.	RICHARD D. BALL	2011
	DAVID L. JORDON	2013
55.	DONALD L. ALLEN	2011
	THOMAS P. BOYD	2015
56A.	HARVEY J. HOFFMAN	2011
	JULIE H. REINCKE	2015
56B.	MICHAEL LEE SCHIPPER	2013[1]
57.	WILLIAM A. BAILLARGEON	2011
	JOSEPH S. SKOCELAS	2015
58.	SUSAN A. JONAS	2015
	RICHARD J. KLOOTE	2013
	BRADLEY S. KNOLL	2015
	KENNETH D. POST	2011
59.	PETER P. VERSLUIS	2011
60.	HAROLD F. CLOSZ, III	2015
	MARIA LADAS HOOPES	2015

[1] From June 27, 2011.

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

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

MUNICIPAL JUDGES

	Term Expires January 1 of
RUSSELL F. ETHRIDGE	2012
CARL F. JARBOE	2014
THEODORE A. METRY	2011
MATTHEW R. RUMORA	2014

PROBATE JUDGES

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

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

Ogemaw	SHANA A. LAMBOURN	2013
Ontonagon	JANIS M. BURGESS	2011
Oscoda	KATHRYN JOAN ROOT	2013
Otsego	MICHAEL K. COOPER	2013
Ottawa	MARK A. FEYEN	2013
Presque Isle	DONALD J. McLENNAN	2013
Roscommon	DOUGLAS C. DOSSON	2013
Saginaw	FAYE M. HARRISON	2015
Saginaw	PATRICK J. McGRAW	2013
St. Clair	ELWOOD L. BROWN	2015
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St. Joseph	THOMAS E. SHUMAKER	2013
Sanilac	R. TERRY MALTBY	2013[2]
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Tuscola		
Tuscola	AMANDA L. ROGGENBUCK	2013
Van Buren	FRANK D. WILLIS	2013
Washtenaw	DARLENE A. O'BRIEN	2013
Washtenaw	NANCY CORNELIA WHEELER	2015
Wayne	JUNE E. BLACKWELL-HATCHER	2013
Wayne	FREDDIE G. BURTON, JR.	2013
Wayne	JUDY A. HARTSFIELD	2015
Wayne	TERRANCE A. KEITH	2015
Wayne	MILTON L. MACK, JR.	2011
Wayne	CATHIE B. MAHER	2011
Wayne	MARTIN T. MAHER	2015
Wayne	FRANK S. SZYMANSKI	2013
Wexford	KENNETH L. TACOMA	2013

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Barry	Hastings	5
Bay	Bay City	18
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Berrien	St. Joseph	2
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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
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AMENDED ADMINISTRATIVE ORDER No. 2011-1

REVISED E-FILING PILOT PROJECT IN THE 3RD CIRCUIT COURT (WAYNE COUNTY)

Entered June 28, 2011, effective immediately (File No. 2002-37)—REPORTER.

On order of the Court, the 3rd Circuit Court is authorized to implement an Electronic Document Filing Pilot Project. The pilot project is established to study the effectiveness of electronically filing court documents in lieu of traditional paper filings. The pilot project shall begin January 1, 2011, or as soon thereafter as is possible, and shall remain in effect until July 1, 2015, or further order of this Court. The 3rd Circuit Court is aware that rules regarding electronic filing have been published for comment by this Court. If this Court adopts electronic-filing rules during the pendency of the 3rd Circuit Court Electronic Document Filing Pilot Project, the 3rd Circuit Court will, within 60 days of the effective date of the rules, comply with the requirements of those rules.

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

[This administrative order supersedes the order that entered February 1, 2011. Changes are indicated in underlining and strikeover.]

1. Construction

The purpose of the pilot program is to study the effectiveness of electronically filing court documents in connection with the just, speedy, and economical determination of the actions involved in the pilot program. The 3rd Circuit Court may exercise its discretion to grant necessary relief to avoid the consequences of error so as not to affect the substantial rights of the parties. Except for matters related to electronically filing or service of documents during the pilot program, the Michigan Rules of Court govern all other aspects of the cases involved in the pilot.

2. Definitions

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

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

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

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

(e) "Pilot Program" means the initiative by the 3rd Judicial Circuit Court, and the Wayne County Clerk in conjunction with Tyler Technologies, Inc., and under the supervision of the State Court Administrative Office to facilitate the electronic filing of pleadings, motions, briefs, responses, lists, orders, judgments, notices, and other documents. The Pilot Program will begin testing with ~~asbestos cases~~ all pending cases in the "CK" case type. The 3rd Circuit Court and the Wayne County Clerk plan to expand the testing into the remainder of case types in the Civil Division upon approval by the Supreme Court.

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

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

3. Participation in the Pilot Program

(a) Participation in the pilot project shall be mandatory in all pending ~~"Asbestos"~~ "CK" type cases. ~~Participation shall be assigned following the filing and service of the initial complaint or other initial filing and assignment of the case to the participating judge.~~ All judges in the 3rd Circuit Court's Civil Division shall participate. Expansion into the other Civil Division case types will occur after approval by the Supreme Court.

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

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

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

(b) E-filings may be submitted to the court at any time, but shall only be reviewed and accepted for filing by the clerk's office during the normal business hours of 8:30 a.m. to 4:30 p.m. E-filings submitted after business hours shall be deemed filed on the business day the e-filing is accepted(usually the next business day). The clerk shall process e-filings on a first in, first-out basis.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

6. Service

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

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

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

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

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

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

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

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

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

7. Format and Form of E-filing and Service

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

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

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

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

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

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

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

The following documents shall not be e-filed during the pilot project and must be filed by

the traditional methods provided in the MCR and the LAO:

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

~~(b) initiating documents, and~~

(b)~~(c)~~ documents for case evaluation proceedings.

9. Official Court Record; Certified Copies

(a) For purposes of this pilot project, e-filings are the

official court record. An appellate record shall be certified in accordance with MCR 7.210(A)(1).

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

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

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

10. Court Notices, Orders, and Judgments

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

11. Technical Malfunctions

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

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

12. Privacy Considerations

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

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

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

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

(iv) Financial Account Numbers. Full financial account numbers shall not be included in e-filings unless required by statute, court rule, or other authority. If a financial account number must be referenced in an

e-filing, only the last four digits of these numbers may be used and the number specified in substantially the following format: XXXXX1234.

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

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

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

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

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

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

(i) Medical records, treatment and diagnosis;

(ii) Employment history;

(iii) Individual financial information;

(iv) Insurance information;

(v) Proprietary or trade secret information;

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

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

13. Records and Reports

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

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

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

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

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

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

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

14. Amendment

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

15. Expiration

Unless otherwise directed by the Michigan Supreme Court, this pilot project, requiring parties to electronically file documents in cases assigned to participating judges, shall continue until July 15, 2015.

ADMINISTRATIVE ORDER
No. 2011-2

Entered June 30, 2011, effective immediately (File No. 2011-2)—REPORTER.

On order of the Court, Administrative Order No. 2002-1 is rescinded, effective immediately.

AMENDMENTS OF MICHIGAN COURT RULES OF 1985

Adopted March 22, 2011, effective immediately (File Nos. 2008-29 and 2008-43)—REPORTER.

[The present language is amended below with additions indicated in underlining and deletions indicated in strikeover.]

RULE 3.807. INDIAN CHILD.

(A) [Unchanged.]

(B) Jurisdiction, Notice, Transfer, Intervention.

(1)-(2) [Unchanged.]

(3) The Indian custodian of the child and the Indian child's tribe have a right to intervene at any point in the proceeding for foster care placement or termination of parental rights pursuant to 25 USC 1911(c).

(C) [Unchanged.]

RULE 3.921. PERSONS ENTITLED TO NOTICE.

(A)-(C) [Unchanged.]

(D) Putative Fathers. If, at any time during the pendency of a proceeding, the court determines that the minor has no father as defined in MCR 3.903(A)(7), the court may, in its discretion, take appropriate action as described in this subrule.

(1) [Unchanged.]

(2) After notice to the putative father as provided in subrule ~~(C)~~(D)(1), the court may conduct a hearing and determine, as appropriate, that:

(a)-(b) [Unchanged.]

(c) there is probable cause to believe that another identifiable person is the natural father of the minor. If so, the court shall proceed with respect to the other person in accord with subrule ~~(C)~~(D).

(d) [Unchanged.]

(3) [Unchanged.]

(E) [Unchanged.]

RULE 5.402. COMMON PROVISIONS.

(A)-(D) [Unchanged.]

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

(1) If an Indian child, as defined by the Indian Child Welfare Act, 25 USC 1903, is the subject of a guardianship proceeding ~~under the Estates and Protected Individuals Code~~, the definitions in MCR 3.002 shall control. ~~This does not include guardianships established under the Juvenile Code and MCR 3.979.~~

(2)-(4) [Unchanged.]

Staff Comment: The amendments of MCR 3.807, 3.921, and 5.402 have been made to clarify former language and to correct cross references.

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

Adopted April 5, 2011, effective September 1, 2011 (File No. 2010-30)—REPORTER.

[Additions are indicated by underlining and deletions are indicated by strikeover. New MCR 2.412 contains no underlining or strikeover.]

RULE 2.403. CASE EVALUATION.

(A)-(I) [Unchanged.]

(J) Conduct of Hearing.

(1)-(2) [Unchanged.]

(3) Oral presentation shall be limited to 15 minutes per side unless multiple parties or unusual circumstances warrant additional time. Information on applicable insurance policy limits and settlement negotiations not protected under MCR 2.412 shall be disclosed at the request of the case evaluation panel.

(4)-(5) [Unchanged.]

(K)-(O) [Unchanged.]

RULE 2.411. MEDIATION.

(A)-(B) [Unchanged.]

(C) Scheduling and Conduct of Mediation.

(1)-(4) [Unchanged.]

(5) Confidentiality in the mediation process is governed by MCR 2.412. ~~*Confidentiality.* Statements made during the mediation, including statements made in written submissions, may not be used in any other proceedings, including trial. Any communications between the parties or counsel and the mediator relating to a mediation are confidential and shall not be disclosed without the written consent of all parties. This prohibition does not apply to~~

~~(a) the report of the mediator under subrule (C)(3),~~

~~(b) information reasonably required by court personnel to administer and evaluate the mediation program,~~

~~(c) information necessary for the court to resolve disputes regarding the mediator's fee, or~~

~~(d) information necessary for the court to consider issues raised under MCR 2.410(D)(3).~~

(D)-(G) [Unchanged.]

RULE 2.412. MEDIATION COMMUNICATIONS; CONFIDENTIALITY AND DISCLOSURE.

(A) Scope. This rule applies to cases that the court refers to mediation as defined and conducted under MCR 2.411 and MCR 3.216.

(B) Definitions.

(1) "Mediator" means an individual who conducts a mediation.

(2) "Mediation communications" include statements whether oral or in a record, verbal or nonverbal, that occur during the mediation process or are made for purposes of retaining a mediator or for considering, initiating, preparing for, conducting, participating in, continuing, adjourning, concluding, or reconvening a mediation.

(3) "Mediation party" means a person who or entity that participates in a mediation and whose agreement is necessary to resolve the dispute.

(4) "Mediation participant" means a mediation party, a nonparty, an attorney for a party, or a mediator who participates in or is present at a mediation.

(5) "Protected individual" is used as defined in the Estates and Protected Individuals Code, MCL 700.1106(v).

(6) "Vulnerable" is used as defined in the Social Welfare Act, MCL 400.11(f).

(C) Confidentiality. Mediation communications are confidential. They are not subject to discovery, are not admissible in a proceeding, and may not be disclosed to anyone other than mediation participants except as provided in subrule (D).

(D) Exceptions to Confidentiality.Mediation communications may be disclosed under the following circumstances:

(1) All mediation parties agree in writing to disclosure.

(2) A statute or court rule requires disclosure.

(3) The mediation communication is in the mediator's report under MCR 2.411(C)(3) or MCR 3.216(H)(6).

(4) The disclosure is necessary for a court to resolve disputes about the mediator's fee.

(5) The disclosure is necessary for a court to consider issues about a party's failure to attend under MCR 2.410(D)(3).

(6) The disclosure is made during a mediation session that is open or is required by law to be open to the public.

(7) Court personnel reasonably require disclosure to administer and evaluate the mediation program.

(8) The mediation communication is

(a) a threat to inflict bodily injury or commit a crime,

(b) a statement of a plan to inflict bodily injury or commit a crime, or

(c) is used to plan a crime, attempt to commit or commit a crime, or conceal a crime.

(9) The disclosure

(a) Involves a claim of abuse or neglect of a child, a protected individual, or a vulnerable adult; and

(b) Is included in a report about such a claim or sought or offered to prove or disprove such a claim; and

(i) Is made to a governmental agency or law enforcement official responsible for the protection against such conduct, or

(ii) Is made in any subsequent or related proceeding based on the disclosure under subrule (D)(9)(b)(i).

(10) The disclosure is included in a report of professional misconduct filed against a mediation participant or is used offered to prove or disprove misconduct allegations in the attorney disciplinary process.

(11) The mediation communication occurs in a case out of which a claim of legal malpractice arises and the disclosure is sought or offered to prove or disprove a claim of legal malpractice against a mediation participant.

(12) The disclosure is in a proceeding to enforce, rescind, reform, or avoid liability on a document signed by the mediation parties or acknowledged by the parties on an audio or video recording that arose out of mediation, if the court finds, after an in camera hearing, that the party seeking discovery or the proponent of the evidence has shown

(a) that the evidence is not otherwise available, and

(b) that the need for the evidence substantially outweighs the interest in protecting confidentiality.

(E) Scope of Disclosure When Permitted; Limitation on Confidentiality.

(1) If a mediation communication may be disclosed under subrule (D), only that portion of the communication necessary for the application of the exception may be disclosed.

(2) Disclosure of a mediation communication under subrule (D) does not render the mediation communication subject to disclosure for another purpose.

(3) Evidence or information that is otherwise admissible or subject to discovery does not become inadmissible or protected from discovery solely by reason of its disclosure or use in a mediation.

RULE 3.216. DOMESTIC RELATIONS MEDIATION.

(A)-(G) [Unchanged.]

(H) Mediation Procedure.

(1)-(7) [Unchanged.]

(8) Confidentiality in the mediation process is governed by MCR 2.412. ~~Statements made during the mediation, including statements made in written submissions, may not be used in any other proceedings, including trial. Any communications between the parties or counsel and the mediator relating to a mediation are confidential and shall not be disclosed without the written consent of all parties. This prohibition does not apply to~~

~~(a) the report of the mediator under subrule (H)(6),~~

~~(b) information reasonably required by court personnel to administer and evaluate the mediation program,~~

~~(c) information necessary for the court to resolve disputes regarding the mediator's fee, or~~

~~(d) information necessary for the court to consider issues raised under MCR 2.410(D)(3) or 3.216(H)(2).~~

(I)-(K) [Unchanged.]

Staff Comment: The amendments of MCR 2.403, 2.411, and 3.216, and the adoption of new MCR 2.412 consolidate provisions related to mediation confidentiality into one rule and expand the number of exceptions to mediation confidentiality.

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

Adopted April 5, 2011, effective September 1, 2011 (File No. 2008-11)—REPORTER.

[Additions are indicated by underlining and deletions are indicated by strikeover.]

RULE 2.507. CONDUCT OF TRIALS.

(A)-(F) [Unchanged.]

(G) Agreements to be in Writing. An agreement or consent between the parties or their attorneys respecting the proceedings in an action~~, subsequently denied by either party~~, is not binding unless it was made in open court, or unless evidence of the agreement is in writing, subscribed by the party against whom the agreement is offered or by that party's attorney.

Staff Comment: The amendment of MCR 2.507 was submitted to the Court to clarify that oral agreements not made in open court or in writing to settle a case will not be enforceable. Like an agreement subject to the statute of frauds, agreements to settle a case would be required to be made in open court or be submitted in writing to be binding.

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

Adopted April 5, 2011, effective September 1, 2011 (File No. 2007-17)—REPORTER.

[Additions are indicated by underlining and deletions are indicated by strikeover.]

RULE 8.121. CONTINGENT FEES IN CLAIMS OR ACTIONS FOR PERSONAL INJURY~~, AND~~ WRONGFUL DEATH, AND NO-FAULT BENEFITS.

(A) Allowable Contingent Fee Agreements. In any claim or action for personal injury or wrongful death based upon the alleged conduct of another or for no-fault benefits, in which an attorney enters into an agreement, expressed or implied, whereby the attorney's compensation is dependent or contingent in whole

or in part upon successful prosecution or settlement or upon the amount of recovery, the receipt, retention, or sharing by such attorney, pursuant to agreement or otherwise, of compensation which is equal to or less than the fee stated in subrule (B) is deemed to be fair and reasonable. The receipt, retention, or sharing of compensation which is in excess of such a fee shall be deemed to be the charging of a "clearly excessive fee" in violation of MRPC 1.5(a), unless such fee is received as a result of an award of attorney fees payable pursuant to MCL 500.3148, or other award or sanction made pursuant to statute, court rule, or the common law.

(B)-(G) [Unchanged.]

Staff Comment: The amendment of MCR 8.121 extends the rule to contingent fee agreements in no-fault cases, except for attorney fees or other sanction awarded pursuant to statute or other authority.

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

Adopted April 5, 2011, effective September 1, 2011 (File No. 2004-08)—REPORTER.

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

RULE 8.126. TEMPORARY ADMISSION TO THE BAR.

(A) Temporary Admission. Any person who is licensed to practice law in another state or territory, or in the District of Columbia, of the United States of America, or in any foreign country, and who is not disbarred or suspended in any jurisdiction, and who is eligible to practice in at least one jurisdiction, may be permitted to appear and practice in a specific case in a court, ~~or~~ before an administrative tribunal or agency, or in a specific arbitration proceeding in this state when associated with and on motion of an active member of

the State Bar of Michigan who appears of record in the case. An out-of-state attorney may appear and practice under this rule in no more than five cases in a 365-day period. Permission to appear and practice is within the discretion of the court, ~~or~~ administrative tribunal or agency, or arbitrator and may be revoked at any time for misconduct. For purposes of this rule, an out-of-state attorney is one who is licensed to practice law in another state or territory, or in the District of Columbia, of the United States of America, or in a foreign country and who is not a member of the State Bar of Michigan.

(1) Procedure.

(a) Motion. An attorney seeking temporary admission must be associated with a Michigan attorney. The Michigan attorney with whom the out-of-state attorney is associated shall file with the court, ~~or~~ administrative tribunal or agency, or arbitrator an appearance and a motion that seeks permission for the temporary admission of the out-of-state attorney. The motion shall be supported by a current certificate of good standing issued by a jurisdiction where the out-of-state attorney is licensed and eligible to practice and an affidavit of the out-of-state attorney seeking temporary admission, which affidavit shall verify

(i) the jurisdictions in which the attorney is or has been licensed or has sought licensure;

(ii) the jurisdiction where the attorney is presently eligible to practice;

~~(ii)~~(iii) that the attorney is not disbarred, or suspended in any jurisdiction, and is not the subject of any pending disciplinary action, and that the attorney is licensed and is in good standing in all jurisdictions where licensed; and

~~(iii)~~(iv) that he or she is familiar with the Michigan Rules of Professional Conduct, Michigan Court Rules, and the Michigan Rules of Evidence.

The out-of-state attorney must attach to the affidavit copies of any disciplinary dispositions, and a copy of the acknowledgment letter supplied by the State Bar of Michigan showing that the required fee has been paid. The motion shall include an attestation of the Michigan attorney that the attorney has read the out-of-state attorney's affidavit, has made a reasonable inquiry concerning the averments made therein, believes the out-of-state attorney's representations are true, and agrees to ensure that the procedures of this rule are followed. The motion shall also include the addresses of both attorneys.

(b) The Michigan attorney shall send a copy of the motion and supporting affidavit to the Attorney Grievance Commission. Within seven days after receipt of the copy of the motion, the Attorney Grievance Commission must notify the court, ~~or~~ administrative tribunal or agency, or arbitrator and both attorneys whether the out-of-state attorney has been granted permission to appear temporarily in Michigan within the past 365 days, and, if so, the number of such appearances. ~~The notification shall also indicate whether a fee is due if the court or administrative tribunal or agency grants permission to appear. The court or administrative tribunal or agency shall not enter an~~ No order or other writing granting permission to appear in a case shall be entered by a court, administrative tribunal or agency, or arbitrator until the notification is received from the Attorney Grievance Commission.

(c) Order. Following notification by the Attorney Grievance Commission, if the out-of-state attorney has been granted permission to appear temporarily in fewer

than 5 cases within the past 365 days, the court, ~~or~~ administrative tribunal or agency, or arbitrator may enter an order granting permission to the out-of-state attorney to appear temporarily in a case. If an order or other writing granting permission is entered, the court, administrative tribunal or agency, or arbitrator shall send a copy of the order or writing to the Michigan attorney, ~~and~~ the out-of-state attorney, and the ~~. The Michigan attorney in turn shall send a copy of the order to the~~ Attorney Grievance Commission.

(d) Fee. ~~If a fee is due, the order shall state that the appearance by the out-of-state attorney is effective on the date the attorney pays a~~ In each case in which an out-of-state attorney seeks temporary admission in Michigan, ~~the attorney must pay~~ a fee equal to the discipline and client-protection portions of a bar member's annual dues must be paid. ~~If a fee is not due, the order shall indicate the effective date of the appearance. The attorney is required to pay the fee only once in any period between October 1 and September 30.~~ The discipline portion of the fee shall be paid to the State Bar of Michigan for allocation to the attorney discipline system, and the client-protection portion shall be paid to the State Bar of Michigan for allocation to the Client Protection Fund. Upon receipt of payment of the fee, the State Bar of Michigan shall within three business days send to the out-of-state attorney an acknowledgment letter that the fee has been paid.

(e) By seeking permission to appear under this rule, an out-of-state attorney consents to the jurisdiction of Michigan's attorney disciplinary system.

Staff Comment: Michigan's pro hac vice rule, MCR 8.126, has been in place since 2008, and these changes reflect revisions to update the rule that were adopted at the request of the AGC and the State Bar of Michigan. The revisions include a requirement that the fee be charged for each request for pro hac vice admission, that the court that grants the

motion send a copy of the order to the AGC (instead of requiring that the Michigan attorney send the copy to the AGC), that the rule specifically include an attorney's temporary admission for arbitration proceedings, and that the fee be required to be paid before an order enters.

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

Adopted April 19, 2011, effective September 1, 2011 (File No. 2006-38)—REPORTER.

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

RULE 8.120. LAW STUDENTS AND RECENT GRADUATES; PARTICIPATION IN LEGAL AID CLINICS, DEFENDER OFFICES, AND LEGAL TRAINING PROGRAMS.

(A) [Unchanged.]

(B) Legal Training Programs. Law students and recent law graduates may participate in legal training programs organized in the offices of county prosecuting attorneys, county corporation counsel, city attorneys, the Attorney Grievance Commission, and the Attorney General.

(C) [Unchanged.]

(D) Scope; Procedure.

(1)-(3) [Unchanged.]

(4) A law student or graduate serving in a prosecutor's, county corporation counsel's, city attorney's, Attorney Grievance Commission's, or Attorney General's program may be authorized to perform comparable functions and duties assigned by the prosecuting attorney, county attorney, city attorney, Attorney Grievance Commission attorney, or Attorney General, except that

(a) the law student or graduate is subject to the conditions and restrictions of this rule; and

(b) the law student or graduate may not be appointed as an assistant prosecutor, assistant corporation counsel, assistant city attorney, assistant Attorney Grievance Commission attorney, or assistant Attorney General.

RULE 9.101. DEFINITIONS.

As used in subchapter 9.100:

(1) "board" means the Attorney Discipline Board;

(2) "commission" means the Attorney Grievance Commission;

(3) "administrator" means the grievance administrator;

(4) "investigator" means a person specially designated by the administrator to assist him or her in the investigation of alleged misconduct or requested reinstatement;

(5) "attorney" or "lawyer" means a person regularly licensed, ~~or~~ specially admitted, permitted to practice law in Michigan on a temporary or other limited basis, or who is otherwise subject to the disciplinary authority of Michigan pursuant to order or rule of the Supreme Court;

(6) "respondent" means an attorney named in a request for investigation or complaint, or proceedings for reciprocal discipline, based on a judgment of conviction, or transfers to inactive status under MCR 9.121;

(7) "request for investigation" means the first step in bringing alleged misconduct to the administrator's attention;

(8) "complaint" means the formal charge prepared by the administrator and filed with the board;

(9) "review" means examination by the board of a hearing panel's ~~final~~ order on petition by ~~an aggrieved party~~ the administrator, complainant, or respondent;

(10) "appeal" means judicial re-examination by the Supreme Court of the board's final order on petition by ~~an aggrieved party~~ the administrator, complainant, or respondent;

(11) "grievance" means alleged misconduct;

(12) "investigation" means fact-finding on alleged misconduct under the administrator's direction.

(13) "disbarment" means revocation of the license to practice law.

(14) "complainant" means a person who signs a request for investigation.

(15) "disability inactive status" means inactive status to which a lawyer has been transferred pursuant to MCR 9.121 or a similar rule of another jurisdiction.

(16) "disciplinary proceeding" means a proceeding commenced under this subchapter seeking the imposition of discipline for misconduct.

RULE 9.103. STANDARDS OF CONDUCT FOR ATTORNEYS.

(A) General Principles. The license to practice law in Michigan is, among other things, a continuing proclamation by the Supreme Court that the holder is fit to be entrusted with professional and judicial matters and to aid in the administration of justice as an attorney and counselor and as an officer of the court. It is the duty of every attorney to conduct himself or herself at all times in conformity with standards imposed on members of the bar as a condition of the privilege to practice law. These standards include, but are not limited to, the rules of professional responsibility and the rules of judicial conduct that are adopted by the Supreme Court.

(B) Duty to Assist Public to Request Investigation. An attorney shall assist a member of the public to communicate to the administrator, in appropriate form, a request for investigation of a member of the bar. An attorney shall not charge or collect a fee in connection with answering a request for investigation unless he or she is acting as counsel for a respondent in connection with a disciplinary investigation or proceeding.

(C) Duty to Assist Administrator. An attorney other than a respondent or respondent's attorney shall ~~assist~~ cooperate with the administrator in the investigation, prosecution, and disposition of a request for investigation or ~~complaint~~ proceeding ~~filed with or by the administrator~~ under this subchapter.

RULE 9.104. GROUNDS FOR DISCIPLINE IN GENERAL~~; ADJUDICATION ELSEWHERE~~.

~~(A)~~ The following acts or omissions by an attorney, individually or in concert with another person, are misconduct and grounds for discipline, whether or not occurring in the course of an attorney-client relationship:

(1) conduct prejudicial to the proper administration of justice;

(2) conduct that exposes the legal profession or the courts to obloquy, contempt, censure, or reproach;

(3) conduct that is contrary to justice, ethics, honesty, or good morals;

(4) conduct that violates the standards or rules of professional conduct ~~responsibility~~ adopted by the Supreme Court;

(5) conduct that violates a criminal law of a state or of the United States, an ordinance, or tribal law pursuant to MCR 2.615;

(6) knowing misrepresentation of any facts or circumstances surrounding a request for investigation or complaint;

(7) failure to answer a request for investigation or complaint in conformity with MCR 9.113 and MCR 9.115(D);

(8) contempt of the board or a hearing panel; ~~or~~

(9) violation of an order of discipline; or

(10) entering into an agreement or attempting to obtain an agreement, that:

(a) the professional misconduct or the terms of a settlement of a claim for professional misconduct shall not be reported to the administrator;

(b) the plaintiff shall withdraw a request for investigation or shall not cooperate with the investigation or prosecution of misconduct by the administrator; or

(c) the record of any civil action for professional misconduct shall be sealed from review by the administrator.

~~(B) Proof of an adjudication of misconduct in a disciplinary proceeding by another state, or a United States court is conclusive proof of misconduct in a disciplinary proceeding in Michigan. The only issues to be addressed in the Michigan proceeding are whether the respondent was afforded due process of law in the course of the original proceedings and whether imposition of identical discipline in Michigan would be clearly inappropriate.~~

RULE 9.105. PURPOSE AND FUNDING OF DISCIPLINARY PROCEEDINGS.

(A) Purpose. Discipline for misconduct is not intended as punishment for wrongdoing, but for the protection of the public, the courts, and the legal

profession. The fact that certain misconduct has remained unchallenged when done by others or when done at other times or has not been earlier made the subject of disciplinary proceedings is not an excuse.

(B) Funding. The legal profession, through the State Bar of Michigan, is responsible for the reasonable and necessary expenses of the board, the commission, and the administrator, as determined by the Supreme Court. ~~Commissioners of the State Bar of Michigan may not represent respondents in proceedings before the board, including preliminary discussions with commission employees prior to the filing of a request for investigation.~~

RULE 9.106. TYPES OF DISCIPLINE; MINIMUM DISCIPLINE;~~ADMONISHMENT~~.

Misconduct is grounds for:

(1) ~~revocation of the license to~~ disbarment of an attorney from the practice of law in Michigan;

(2) suspension of the license to practice law in Michigan for a specified term, not less than 30 days, with such additional conditions relevant to the established misconduct as a hearing panel, the board, or the Supreme Court may impose, and, if the term exceeds 179 days, until the further order of a hearing panel, the board, or the Supreme Court;

(3) reprimand with such conditions relevant to the established misconduct as a hearing panel, the board, or the Supreme Court may impose;

(4) probation ordered by a hearing panel, the board, or the Supreme Court under MCR 9.121(C); or

(5) requiring restitution, in an amount set by a hearing panel, the board, or the Supreme Court, as a condition of an order of discipline. ~~; or~~

~~(6) with the respondent's consent, admonishment by the commission without filing a complaint. An admonition does not constitute discipline and shall be confidential under MCR 9.126 except as provided by MCR 9.115(J)(3). The administrator shall notify the respondent of the provisions of this rule and the respondent may, within 21 days of service of the admonition, notify the commission in writing that respondent objects to the admonition. Upon timely receipt of the written objection, the commission shall vacate the admonition and either dismiss the request for investigation or authorize the filing of a complaint.~~

RULE 9.107. RULES EXCLUSIVE ON DISCIPLINE.

(A) Proceedings for Discipline. Subchapter 9.100 governs the procedure to discipline attorneys. A proceeding under subchapter 9.100 is subject to the superintending control of the Supreme Court. An investigation or proceeding may not be held invalid because of a nonprejudicial irregularity or an error not resulting in a miscarriage of justice.

(B) Local Bar Associations. A local bar association may not conduct a separate proceeding to discipline an attorney~~, but must assist and cooperate with the administrator in reporting and investigating alleged misconduct of an attorney~~.

RULE 9.108. ATTORNEY GRIEVANCE COMMISSION.

(A) Authority of Commission. The Attorney Grievance Commission is the prosecution arm of the Supreme Court for discharge of its constitutional responsibility to supervise and discipline Michigan attorneys and those temporarily admitted to practice under MCR 8.126 or otherwise subject to the disciplinary authority of the Supreme Court.

(B) Composition. The commission consists of 3 laypersons and 6 attorneys appointed by the Supreme Court. The members serve 3-year terms. A member may not serve more than 2 full terms.

(C) Chairperson and Vice-Chairperson. The Supreme Court shall designate from among the members of the commission a chairperson and a vice-chairperson who shall serve 1-year terms in those offices. The commencement and termination dates for the 1-year terms shall coincide appropriately with the 3-year membership terms of those officers and the other commission members. The Supreme Court may reappoint these officers for additional terms and may remove these officers prior to the expiration of a term. An officer appointed to fill a mid-term vacancy shall serve the remainder of that term and may be reappointed to serve ~~a full term~~ up to 2 more full terms.

(D) Internal Rules.

(1) The commission must elect annually from among its membership a secretary to keep the minutes of the commission's meetings and issue the required notices.

(2) Five members constitute a quorum. The commission acts by majority vote of the members ~~present~~ participating in the meeting.

(3) The commission must meet monthly at a time and place the chairperson designates. Notice of a regular monthly meeting is not required.

(4) A special meeting may be called by the chairperson or by petition of 3 commission members on 7 days' written notice. The notice may be waived in writing or by attending the meeting. Special meetings may be conducted through electronic means.

(E) Powers and Duties. The commission has the power and duty to:

(1) recommend attorneys to the Supreme Court for appointment as administrator and deputy administrator;

(2) supervise the investigation of attorney misconduct, including requests for investigation of and complaints against attorneys;

(3) supervise the administrator ~~and his or her staff~~;

(4) seek an injunction from the Supreme Court against an attorney's misconduct when prompt action is required, even if a disciplinary proceeding concerning that conduct is not pending before the board;

(5) annually ~~write~~ propose a budget for the commission and the administrator's office~~,~~ ~~(~~including compensation,~~)~~ and submit it to the Supreme Court for approval;

(6) submit to the Supreme Court proposed changes in these rules;

~~(7) report to the Supreme Court at least quarterly regarding its activities, and to submit a joint annual report with the Attorney Discipline Board that summarizes the activities of both agencies during the past year; and~~

~~(8)~~(7) compile and maintain a list of out-of-state attorneys who have been admitted to practice temporarily and the dates those attorneys were admitted, and otherwise comply with the requirements of MCR 8.126, and

~~(9)~~(8) perform other duties provided in these rules.

RULE 9.109. GRIEVANCE ADMINISTRATOR.

(A) Appointment. The administrator and the deputy administrator must be attorneys. The commission may ~~shall~~ recommend one or more candidates for appointment as administrator and deputy administrator. The

Supreme Court shall appoint the administrator and the deputy administrator, may terminate their appointments at any time with or without cause, and shall determine their salaries and the other terms and conditions of their employment.

(B) Powers and Duties. The administrator has the power and duty to:

(1) employ or retain attorneys, investigators, and staff with the approval of the commission;

(2) supervise the attorneys, investigators, and staff;

(3) assist the public in preparing requests for investigation;

(4) maintain the commission records created as a result of these rules;

(5) investigate alleged misconduct of attorneys, including ~~serving a request for~~ initiating an investigation in his or her own name if necessary;

(6) prosecute complaints the commission authorizes;

(7) prosecute or defend reviews and appeals as the commission authorizes; ~~and~~

(8) report to the Supreme Court at least quarterly regarding the commission's activities, and to submit a joint annual report with the board that summarizes the activities of both agencies during the past year; and

~~(8)~~(9) perform other duties provided in these rules or assigned by the commission.

(C) Legal Counsel for the Administrator.

(1) The administrator may appoint and retain volunteer legal counsel needed to prosecute proceedings under these rules.

(2) Legal counsel may

(a) ~~prepare and file complaints and notices of hearings~~ commence proceedings under this subchapter;

(b) present evidence relating to ~~complaints or petitions for reinstatement~~ disciplinary and court proceedings;

(c) prepare and file arguments and briefs;

(d) inform the administrator about the progress of cases assigned; and

(e) perform other duties assigned by the administrator.

RULE 9.110. ATTORNEY DISCIPLINE BOARD.

(A) Authority of Board. The Attorney Discipline Board is the adjudicative arm of the Supreme Court for discharge of its exclusive constitutional responsibility to supervise and discipline Michigan attorneys and those temporarily admitted to practice under MCR 8.126 or otherwise subject to the disciplinary authority of the Supreme Court.

(B) Composition. The board consists of 6 attorneys and 3 laypersons appointed by the Supreme Court. The members serve 3-year terms. A member may not serve more than 2 full terms.

(C) Chairperson and Vice-Chairperson. The Supreme Court shall designate from among the members of the board a chairperson and a vice-chairperson who shall serve 1-year terms in those offices. The commencement and termination dates of the 1-year terms shall coincide appropriately with the 3-year board terms of those officers and the other board members. The Supreme Court may reappoint these officers for additional terms and may remove an officer prior to the expiration of a term. An officer appointed to fill a midterm vacancy shall serve the remainder of that term and may be reappointed to serve two ~~a~~ full terms.

(D) Internal Rules.

(1) The board must elect annually from among its membership a secretary to supervise the keeping of the minutes of the board's meetings and the issuance of the required notices.

(2) Five members constitute a quorum. The board acts by a majority vote of the members present.

(3) The board shall meet monthly as often as necessary to maintain a current docket, but no less than every 2 months, at a time and place the chairperson designates.

(4) A special meeting may be called by the chairperson or by petition of 3 board members on 7 days' written notice. The notice may be waived in writing or by attending the meeting.

(E) Powers and Duties. The board has the power and duty to:

(1) appoint an attorney to serve as its general counsel and executive director;

(2) appoint hearing panels, ~~and~~ masters, monitors, and mentors;

(3) assign a ~~complaint~~ proceeding under this subchapter to a hearing panel or to a master, except that a proceeding for reinstatement under MCR 9.124 may not be assigned to a master;

(4) on request of the respondent, the administrator, or the complainant, review a final order of discipline or dismissal by a hearing panel;

(5) on leave granted by the board, review a nonfinal order of a hearing panel;

~~(5)~~(6) discipline and reinstate attorneys under these rules and exercise continuing jurisdiction over orders of discipline and reinstatement;

~~(6)~~(7) file with the Supreme Court clerk its orders of suspension, disbarment, and reinstatement;

~~(7)~~(8) annually propose ~~write~~ a budget for the board and submit it to the Supreme Court for approval;

~~(8)~~(9) report to the Supreme Court at least quarterly regarding its activities, and to submit a joint annual report with the Attorney Grievance Commission that summarizes the activities of both agencies during the past year; and

~~(9)~~(10) submit to the Supreme Court proposed changes in these rules.

RULE 9.111. HEARING PANELS.

(A) Composition; Quorum. The board must establish hearing panels from a list of volunteer lawyers maintained by its executive director. The board must annually appoint 3 attorneys to each hearing panel and must fill a vacancy as it occurs. Following appointment, the board may designate the panel's chairperson, vice-chairperson, and secretary. Thereafter, a hearing panel may elect a chairperson, vice-chairperson, and secretary. A hearing panel must convene at the time and place designated by its chairperson or by the board. Two members constitute a quorum. A hearing panel acts by a majority vote. If a panel is unable to reach a majority decision, the matter shall be referred to the board for reassignment to a new panel.

(B) Hearing Panelists or Masters; Discipline.

(1) An attorney shall not be appointed as a hearing panelist or master if he or she:

(a) has ever been the subject of an order that imposes discipline, or

(b) has been admonished or placed on contractual probation within the preceding 5 years.

(2) A hearing panelist or master who becomes the subject of an order imposing discipline, an admonition, or placement on contractual probation shall be removed from the roster of hearing panelists. A hearing panelist or master who becomes the subject of a formal discipline proceeding shall be removed from consideration of any pending matter; shall be placed on the ADB's roster of inactive panelists; and shall not be assigned to a panel until the formal discipline proceeding has been resolved. A hearing panelist or master who becomes the subject of an otherwise confidential request for investigation must disclose that investigation to the parties in the matter before the panelist or master, or must disqualify himself or herself from participation in the matter.

~~(B)~~(C) Powers and Duties. A hearing panel shall do the following:

(1) ~~Hold~~ Schedule a public hearing on a ~~complaint~~ proceeding ~~or reinstatement petition~~ under this subchapter assigned to it within 56 days after the ~~date the complaint is filed with the board or the date that notice of the reinstatement petition is published~~ proceeding is commenced or after the date that notice of the reinstatement petition is published, except that a proceeding for reciprocal discipline shall be governed by MCR 9.120. A hearing must be concluded within 91 days after it is begun, unless the board grants an extension for good cause.

(2) Receive evidence and make written findings of fact.

(3) Discipline and reinstate attorneys or dismiss a complaint by order~~,~~ under these rules and exercise continuing jurisdiction over its orders of discipline and reinstatement.

(4) Report its actions to the board within ~~28 days after the conclusion of a hearing~~ 35 days of the later of the filing of the transcript or the closing of the record, unless extended by the board chairperson.

(5) Perform other duties provided in these rules.

RULE 9.112. REQUESTS FOR INVESTIGATION.

(A) Availability to Public. The administrator shall furnish a form for a request for investigation to a person who alleges misconduct against an attorney. ~~Forms must be available to the public through each state bar office and county clerk's office~~. Use of the form is not required for filing a request for investigation.

(B) Form of Request. A request for investigation of alleged misconduct must

(1) be in writing;

(2) describe the alleged misconduct, including the approximate time and place of it;

(3) be signed by the complainant; and

(4) be filed with the administrator.

(C) Handling by Administrator.

(1) Request for Investigation of Attorney. After ~~making~~ a preliminary review ~~investigation~~, the administrator shall either

(a) notify the complainant and the respondent that the allegations of the request for investigation are inadequate, incomplete, or insufficient to warrant the further attention of the commission; or

(b) serve a copy of the request for investigation on the respondent by ordinary mail at the respondent's address on file with the ~~S~~state ~~B~~bar as required by Rule 2 of the Supreme Court Rules Concerning the State Bar of Michigan. Service is effective at the time of mailing,

and nondelivery does not affect the validity of service. If a respondent has not filed an answer, no formal complaint shall be filed with the board unless the administrator has served the request for investigation by registered or certified mail return receipt requested.

(2) Request for Investigation of Judge. The administrator shall forward to the Judicial Tenure Commission a request for investigation of a judge, even if the request arises from the judge's conduct before he or she became a judge or from conduct unconnected with his or her judicial office. MCR 9.116 thereafter governs.

(3) Request for Investigation of Member or Employee of Commission or Board. Except as modified by MCR 9.131, MCR 9.104-9.130 apply to a request for investigation of an attorney who is a member of or is employed by the board or the commission.

(D) Subpoenas.

(1) After the request for investigation has been served on the respondent, the commission may issue subpoenas to require the appearance of a witness or the production of documents or other tangible things concerning matters then under investigation. Upon request filed with the board, the board chairperson may quash or modify the subpoena if compliance would be unreasonable or oppressive. Documents or other tangible things so produced may be retained by the grievance administrator, copied, or may be subjected to nondestructive testing. Subpoenas shall be returnable before the administrator or a person designated by the administrator.

(2) A person who without just cause, after being commanded by a subpoena, fails or refuses to appear or give evidence, to be sworn or affirmed, or to answer a proper question after being ordered to do so is in contempt. The administrator may initiate a contempt

proceeding before the board chairperson or his or her designee, or under MCR 3.606 in the circuit court for the county where the act or refusal to act occurred. In the event of a finding of contempt by the respondent, the respondent's license to practice law may be suspended until he or she complies with the order of the board chairperson or his or her designee.

(3) A subpoena issued pursuant to this subrule and certified by the commission chairperson shall be sufficient authorization for taking a deposition or seeking the production of evidence outside the State of Michigan. If the deponent or the person possessing the subpoenaed evidence will not comply voluntarily, the proponent of the subpoena may utilize MCR 2.305(D) or any similar provision in a statute or court rule of Michigan or of the state, territory, or country where the deponent or possessor resides or is present.

(4) Upon receipt of a subpoena certified to be duly issued under the rules or laws of another lawyer disciplinary or admissions jurisdiction, the administrator may issue a subpoena directing a person domiciled or found within the state of Michigan to give testimony and/or produce documents or other things for use in the other lawyer disciplinary proceedings as directed in the subpoena of the other jurisdiction. The practice and procedure applicable to subpoenas issued under this subdivision shall be that of the other jurisdiction, except that:

(a) the testimony or production shall be only in the county where the person resides or is employed, or as otherwise fixed by the grievance administrator for good cause shown; and,

(b) compliance with any subpoena issued pursuant to this subdivision and contempt for failure in this respect shall be sought as elsewhere provided in this subchapter.

RULE 9.113. ANSWER BY RESPONDENT.

(A) Answer. Within 21 days after being served with a request for investigation under MCR 9.112(C)(1)(b) or such further time as permitted by the administrator, the respondent shall file with the administrator a ~~signed,~~ written answer signed by respondent in duplicate fully and fairly disclosing all the facts and circumstances pertaining to the alleged misconduct. ~~The administration may allow further time to answer.~~ Misrepresentation in the answer is grounds for discipline. Respondent's signature constitutes verification that he or she has read the document. The administrator shall provide a copy of the answer and any supporting documents, or documents related to a refusal to answer under MCR 9.113(B)(1), to the person who filed the request for investigation unless the administrator determines that there is cause for not disclosing some or all of the documents.

(B) Refusal or Failure to Answer.

(1) A respondent may refuse to answer a request for investigation on expressed constitutional or professional grounds.

(2) The failure of a respondent to answer within the time period required under these rules other than as permitted in subrule (B)(1) or as further permitted by the administrator is misconduct. See MCR 9.104(A)(7).

(3) If a respondent refuses to answer under subrule (B)(1), the refusal may be submitted under seal to a hearing panel for adjudication. If a panel finds that the refusal was not proper, it shall direct the attorney to answer the request for investigation within 21 days after its order.

(C) Attorney-Client Privilege. A person who files a request for investigation of an attorney irrevocably

waives any attorney-client privilege that he or she may have as to matters relating to the request for the purposes of the commission's investigation.

(D) Representation by Attorney. The respondent may be represented by an attorney.

RULE 9.114. ACTION BY ADMINISTRATOR OR COMMISSION AFTER ANSWER.

(A) Action After Investigation. After an answer is filed or the time for filing an answer has expired, the administrator may ~~assign the matter for further investigation, including, if necessary, an informal hearing. When the investigation is complete, the administrator shall either~~

(1) dismiss the request for investigation and notify the complainant and the respondent of the reasons for the dismissal, ~~or~~

(2) conduct further investigation. Upon completion of the investigation, the grievance administrator shall refer the matter to the commission for its review. The commission may direct that a complaint be filed, that the file be closed ~~request be dismissed~~, ~~or~~ that the respondent be admonished or placed on contractual probation with the respondent's consent~~.~~, or

(3) close a file administratively where warranted under the circumstances.

(B) Admonition. With a respondent's consent, a respondent may be admonished by the commission without filing a complaint. An admonition does not constitute discipline and shall be confidential except as provided by this rule, MCR 9.115(J)(3) and by MCR 9.126(D)(4).

(1) The administrator shall notify the respondent of the provisions of this rule by ordinary mail at the

respondent's address on file with the state bar as required by Rule 2 of the Supreme Court Rules Concerning the State Bar of Michigan, or as otherwise directed by respondent.

(2) The respondent may, within 21 days of service of the admonition or such additional time as permitted by the administrator, notify the commission in writing that respondent objects to the admonition. Upon timely receipt of the written objection, the commission shall vacate the admonition and either dismiss the request for investigation or authorize the filing of a complaint. Failure of a respondent to object constitutes an acceptance.

~~(B)~~(C) Contractual Probation. For purposes of this subrule, "contractual probation" means the placement of a consenting respondent on probation by the commission, without the filing of formal charges. Contractual probation does not constitute discipline, and shall be confidential under MCR 9.126 except as provided by MCR 9.115(J)(3).

(1) If the commission finds that the alleged misconduct, if proven, would not result in disbarment or a substantial suspension ~~or revocation~~ of a respondent's license to practice law, the commission may defer disposition of the matter and place the respondent on contractual probation for a period not to exceed ~~two~~three years, provided the following criteria are met.

(a) the misconduct is significantly related to a respondent's substance abuse problem~~, of the respondent~~ or mental or physical infirmity or disability,

(b) the terms and conditions of the contractual probation, which shall include an appropriate period of treatment, are agreed upon by the commission ~~grievance administrator~~ and the respondent ~~prior to submission to the commission for consideration~~, and,

(c) the commission determines that contractual probation is appropriate and in the best interests of the public, the courts, the legal profession, and the respondent.

(2) A contractual probation may include one or more of these requirements:

(a) Periodic alcohol or drug testing.

(b) Attendance at support-group or comparable meetings.

(c) Professional counseling on a regular basis.

(d) An initial written diagnosis and prognosis by the provider followed by quarterly verification of treatment by the provider as agreed upon by the commission and the respondent. The provider shall notify the commission of any failure to adhere to the treatment plan.

~~(2)~~(3) The respondent is responsible for any costs associated with the contractual probation and related treatment.

~~(3)~~(4) Upon written notice to the respondent and an opportunity to file written objections, the commission may terminate the contractual probation and file ~~a formal complaint~~ disciplinary proceedings or take other appropriate action based on the misconduct, if

(a) the respondent fails to satisfactorily complete the terms and conditions of the contractual probation, or

(b) the commission concludes that the respondent has committed other misconduct that warrants the filing of a formal complaint.

~~(4)~~(5) The placing of a respondent on contractual probation shall constitute a final disposition that entitles the complainant to notice in accordance with MCR 9.114(D), and to file an action in accordance with MCR 9.122(A)(2).

~~(C)~~(D) Assistance of Law Enforcement Agencies. The administrator may request a law enforcement office to assist in an investigation by furnishing all available information about the respondent. Law enforcement officers are requested to comply promptly with each request.

(E) Assistance of Courts. If the grievance administrator determines that a nonpublic court file exists, including files on expunged convictions, and that it is relevant to a pending investigation concerning a respondent attorney, the administrator may request that a court release to the Attorney Grievance Commission the nonpublic court file. Courts are requested to comply promptly with each request.

~~(D)~~(F) Report by Administrator. The administrator shall inform the complainant and, if the respondent answered, the respondent, of the final disposition of every request for investigation ~~dismissed by the commission without a hearing before a hearing panel~~.

~~(E)~~(G) Retention of Records. All files and records relating to allegations of misconduct by an attorney must be retained by the commission for the lifetime of the attorney, except as follows:

(1) Where 3 years have passed from the conclusion of formal disciplinary action or the issuance of an admonishment, nonessential documents may be discarded.

~~(1)~~(2) The administrator may destroy the files or records relating to a closed or dismissed request for investigation ~~dismissed by the commission~~ after 3 years have elapsed from the date of dismissal or closing.

~~(2)~~(3) If no request for investigation was pending when the files or records were created or acquired, and no related request for investigation was filed subsequently, the administrator may destroy the files or

records after ~~3 years have~~ 1 year has elapsed from the date when they were created or acquired by the commission.

RULE 9.115. HEARING PANEL PROCEDURE.

(A) Rules Applicable. Except as otherwise provided in these rules, the rules governing practice and procedure in a nonjury civil action apply to a proceeding before a hearing panel. Pleadings must conform as nearly as practicable to the requirements of subchapter 2.100. The original of the formal complaint and all other pleadings must be filed with the board. The formal complaint must be served on the respondent. All other pleadings must be served on the opposing party and each member of the hearing panel. Proof of service of the formal complaint may be filed at any time prior to the date of the hearing. Proof of service of all other pleadings must be filed with the original pleadings.

(B) Complaint. Except as provided by MCR 9.120, a complaint setting forth the facts of the alleged misconduct begins proceedings before a hearing panel. The administrator shall prepare the complaint, file it with the board, and serve it on the respondent and~~,~~ a ~~if the~~ respondent's employer ~~is a member of or is associated with a law firm, on the firm~~. The unwillingness of a complainant to proceed ~~prosecute~~, or a settlement between the complainant and the respondent, does not itself affect the right of the administrator to proceed.

(C) Service. Service of the complaint ~~and all subsequent pleadings and orders~~ and a default must be made by personal service or by registered or certified mail addressed to the person at the person's last known address. An attorney's last known address is the address on file with the state bar as required by Rule 2 of the Supreme Court Rules Concerning the State Bar of

Michigan. A respondent's attorney of record must also be served, but service may be made under MCR 2.107. Service is effective at the time of mailing, and nondelivery does not affect the validity of the service.

(D) Answer.

(1) ~~Within 21 days after the complaint is served, the respondent shall file and serve a signed answer as provided in subrule (A).~~ A respondent must serve and file a signed answer or take other action permitted by law or these rules within 21 days after being served with the complaint in the manner provided in MCR 9.115(C). A signature constitutes verification that the respondent has read the answer or other response.

(2) A default, with the same effect as a default in a civil action, may enter against a respondent who fails within the time permitted to file an answer admitting, denying, or explaining the complaint, or asserting the grounds for failing to do so.

(E) Representation by an Attorney. The respondent may be represented by an attorney, who must enter an appearance, which has the same effect as an appearance under MCR 2.117.

(F) Prehearing Procedure.

(1) Extensions. If good cause is shown, the hearing panel chairperson may grant one extension of time per party for filing pleadings and may grant one adjournment per party. Additional requests may be granted by the board chairperson if good cause is shown. Pending criminal or civil litigation of substantial similarity to the allegations of the complaint is not necessarily grounds for an adjournment.

(2) Motion to Disqualify.

(a) Within 14 days after an answer has been filed or the time for filing the answer has expired, each member

of the hearing panel shall disclose in a writing filed with the board any information that the member believes could be grounds for disqualification under the guidelines of MCR 2.003~~(B)~~(C), including pending requests for investigation filed against the member. The duty to disclose shall be a continuing one. The board shall serve a copy of the disclosure on each party and each panel member.

(b) ~~Within 14 days after the board serves a copy of a written disclosure, the respondent or the administrator may move to disqualify a member of the hearing panel.~~ A motion to disqualify must be filed within 14 days after the moving party discovers the ground for disqualification. If the discovery is made within 14 days of the hearing date, the motion must be made forthwith. If a motion is not timely filed, untimeliness is a factor in deciding whether the motion should be granted. All known grounds for disqualification must be included at the time the motion is filed. An affidavit must accompany the motion. The board chairperson shall decide the motion under the guidelines of MCR 2.003.

(c) The board must assign a substitute for a disqualified member of a hearing panel. If all are disqualified, the board must reassign the complaint to another panel.

(3) Amendment of Pleadings. The administrator and the respondent each may amend a pleading once as a matter of course within 14 days after being served with a responsive pleading by the opposing party, or within 15 days after serving the pleading if it does not require a responsive pleading. Otherwise, a party may amend a pleading only by leave granted by the hearing panel chairperson or with the written consent of the adverse party.

(4) Discovery. Pretrial or discovery proceedings are not permitted, except as follows:

(a) Within 21 days ~~of~~ after the service of a formal complaint, a party may demand in writing that documentary evidence that is to be introduced at the hearing by the opposing party be made available for inspection or copying. Within 14 days after service of a written demand, the documents shall be made available, provided that the administrator need not comply prior to the filing of the respondent's answer; in such case, the administrator shall comply with the written demand within 14 days ~~of~~ after the filing of the respondent's answer. The respondent shall comply with the written demand within 14 days, except that the respondent need not comply until the time for filing an answer to the formal complaint has expired. Any other documentary evidence to be introduced at the hearing by either party shall be supplied to the other party no later than 14 days prior to the hearing. Any documentary evidence not so supplied shall be excluded from the hearing except for good cause shown.

~~(b)~~(i) Within 21 days ~~of~~ after the service of a formal complaint, a party may demand in writing that the opposing party supply written notification of the name and address of any person to be called as a witness at the hearing. Within 14 days after the service of a written demand, the notification shall be supplied. However, the administrator need not comply prior to the filing of the respondent's answer to the formal complaint; in such cases, the administrator shall comply with the written demand within 14 days of the filing of the respondent's answer to the formal complaint. The respondent shall comply with the written demand within 14 days, except that the respondent need not comply until the time for filing an answer to the formal complaint has expired.

Except for good cause shown, a party who is required to give said notification must give supplemental notice to the adverse party within 7 days after any additional witness has been identified, and must give the supplemental notice immediately if the additional witness is identified less than 14 days before a scheduled hearing.

(ii) Within 21 days following the filing of an answer, the administrator and respondent shall exchange the names and addresses of all persons having knowledge of relevant facts and comply with reasonable requests for (1) nonprivileged information and evidence relevant to the charges against the respondent, and (2) other material upon good cause shown to the chair of the hearing panel.

~~Upon receipt of a demand made pursuant to this rule, a party must also provide to the other party any statements given by witnesses to be called at the hearing. Witness statements include stenographic, recorded, or written statements of witnesses provided to the administrator, the respondent, or the respondent's representative. The term "written statement" does not include notes or memoranda prepared by a party or a party's representative of conversations with witnesses, or other privileged information.~~

(b)~~(c)~~ A deposition may be taken of a witness who lives outside the state or is physically unable to attend the hearing. For good cause shown, the hearing panel may allow the parties to depose other witnesses.

(c)~~(d)~~ The hearing panel may order a prehearing conference held before a panel member to obtain admissions or otherwise narrow the issues presented by the pleadings.

If a party fails to comply with subrule (F)(4)(a) ~~or (b)~~, the hearing panel or the board may, on motion and

showing of material prejudice as a result of the failure, impose one or more of the sanctions set forth in MCR 2.313(B)(2)(a)-(c).

(5) Discipline by Consent. A respondent may offer to plead ~~nolo contendere~~ no contest or to admit all essential facts contained in the complaint or any of its allegations in exchange for a stated form of discipline and on the condition that the plea or admission and discipline agreed on is accepted by the commission and the hearing panel. The respondent's offer shall first be submitted to the commission. If the offer is accepted by the commission, the administrator and the respondent shall prepare a stipulation for a consent order of discipline that includes all prior discipline, admonishments, and contractual probations, if any, and file the stipulation with the hearing panel. If the stipulation contains any nonpublic information, it shall be filed in camera. At the time of the filing, the administrator shall serve a copy of the proposed stipulation upon the complainant. If the hearing panel approves the stipulation, it shall enter a final order of discipline. If not approved, the offer is deemed withdrawn and statements or stipulations made in connection with the offer are inadmissible in disciplinary proceedings against the respondent and not binding on the respondent or the administrator. If the stipulation is not approved, the matter must then be referred for hearing to a hearing panel other than the one that passed on the proposed discipline.

(G) Hearing Time and Place; Notice. The board or the chairperson of the hearing panel shall set the time and place for a hearing. Notice of a hearing must be served by the board or the chairperson of the hearing panel on the administrator, the respondent, the complainant, and any attorney of record at least 21 days before the initial hearing. Unless the board or the

chairperson of the hearing panel otherwise directs, the hearing must be in the county in which the respondent has or last had an office or residence. If the hearing panel fails to convene or complete its hearing within a reasonable time, the board may reassign the complaint to another panel or to a master. A party may file a motion for a change of venue. The motion must be filed with the board and shall be decided by the board chairperson, in part, on the basis of the guidelines in MCR 2.221. Notwithstanding MRE 615, there shall be a presumption that a complainant is entitled to be present during a hearing, which may only be overcome upon a finding by the panel, supported by facts that are particular to the proceeding, that testimony by the complainant is likely to be materially affected by exposure to other testimony at the hearing.

(H) Respondent's Appearance. The respondent shall personally appear at the hearing, unless excused by the panel, and is subject to cross-examination as an opposite party under MCL 600.2161.

(1) Where satisfactory proofs are entered into the record that a respondent possessed actual notice of the proceedings, but who still failed to appear, a panel shall suspend him or her effective 7 days from the date of entry of the order and until further order of the panel or the board.

(2) If the respondent, or the respondent's attorney on his or her behalf, claims physical or mental incapacity as a reason for the respondent's failure to appear before a hearing panel or the board, the panel or the board on its own initiative may, effective immediately, suspend the respondent from the practice of law until further order of the panel or board. The order of suspension must be filed and served as other orders of discipline.

(I) Hearing; Contempt.

(1) A hearing panel may issue subpoenas (including subpoenas for production of documents and other tangible things), cause testimony to be taken under oath, and rule on the admissibility of evidence under the Michigan Rules of Evidence. The oath or affirmation may be administered by a panel member. A subpoena must be issued in the name and under the seal of the board. It must be signed by a panel or board member, by the administrator, or by the respondent or the respondent's attorney. A subpoenaed witness must be paid the same fee and mileage as a witness subpoenaed to testify in the circuit court. Parties must notify their own witnesses of the date, time, and place of the hearing.

(2) A person who without just cause fails or refuses to appear and give evidence as commanded by a subpoena, to be sworn or affirmed, or to answer a proper question after he or she has been ordered to do so, is in contempt. The administrator may initiate a contempt proceeding under MCR 3.606 in the circuit court for the county where the act or refusal to act occurred.

(3) Upon a showing of good cause by a party, a panel may permit a witness to testify by telephonic, voice, or video conferencing.

(J) Decision.

(1) The hearing panel must file a report on its decisions regarding the misconduct charges and, if applicable, the resulting discipline. The report must include a certified transcript, a summary of the evidence, pleadings, exhibits and briefs, and findings of fact. The discipline section of the report must also include a summary of all previous misconduct for which the respondent was disciplined, ~~or~~ admonished, or placed on contractual probation.

(2) Upon a finding of misconduct, the hearing panel shall conduct a separate sanction hearing to determine

the appropriate discipline. The sanction hearing ~~on discipline~~ shall be conducted as soon after the finding of misconduct as is practicable and may be held immediately following the panel's ruling that misconduct has been established.

(3) If the hearing panel finds that the charge of misconduct is established by a preponderance of the evidence, it must enter an order of discipline. The order shall take effect 21 days after it is served on the respondent unless the panel finds good cause for the order to take effect on a different date, in which event the panel's decision must explain the reasons for ordering a different effective date. The discipline ordered may be concurrent or consecutive to other discipline. In determining the discipline to be imposed, any and all relevant evidence of aggravation or mitigation shall be admissible, including, but not limited to, records of the board, previous admonitions ~~and orders of discipline~~, and the previous placement of the respondent on contractual probation.

(4) If the hearing panel finds that the charge of misconduct is not established by a preponderance of the evidence, it must enter an order dismissing the complaint.

(5) The report and order must be signed by the panel chairperson and filed with the board and the administrator. A copy must be served on the parties as required by these rules.

(K) Stay of Discipline. If a discipline order is a suspension of 179 days or less, a stay of the discipline order will automatically issue on the timely filing by the respondent of a petition for review and a petition for a stay of the discipline. If the discipline ordered is more severe than a suspension of 179 days, the respondent may petition the board for a stay pending review of the

discipline order. Once granted, a stay remains effective until the further order of the board.

(L) Enforcement. The administrator shall take the necessary steps to enforce a discipline order after it is effective.

(M) Resignation by Respondent; Admission of Charges. An attorney's ~~request that his or her name be stricken from the official register of attorneys~~ resignation may not be accepted while a request for investigation or a complaint is pending, except pursuant to an order of disbarment ~~revocation~~.

RULE 9.116. JUDGES; FORMER JUDGES~~HEARING PROCEDURE; JUDGES OTHER THAN MAGISTRATES AND REFEREES~~.

~~(A) Application of this Rule. This rule governs an action by the commission against a judge, except that it does not apply to an action against a magistrate or referee for misconduct separately arising from the practice of law, whether before or during the period when the person serves as a magistrate or referee.~~

~~(B) Time. The commission may not take action against a judge unless and until the Judicial Tenure Commission recommends a sanction. Then, notwithstanding the pendency of certification to and review by the Supreme Court of the Judicial Tenure Commission's action, the commission may, without an investigation, direct the administrator to file a complaint with the board.~~

~~(C) Complaint; Time and Place of Hearing; Answer. The administrator shall file a complaint setting forth the facts of the alleged misconduct within 14 days after the Judicial Tenure Commission files its order with the Supreme Court. The chairperson of the hearing panel assigned by the board shall designate a place and a time for the hearing no later than 21 days after the com-~~

~~plaint is filed. The complaint and notice of the hearing must be served within 7 days after the complaint is filed. Within 14 days after the complaint and notice of the hearing are served, the respondent judge shall file an answer.~~

~~(D) Rules Applicable; Judicial Tenure Commission Record. To the extent it is consistent with this rule, MCR 9.115 governs hearing procedure against a respondent judge. The record of the Judicial Tenure Commission proceeding is admissible at the hearing. The administrator or the respondent may introduce additional evidence.~~

~~(E) Decision. Within 28 days after the hearing is concluded, the panel must file with the Supreme Court clerk and the board a report and order conforming with MCR 9.115(J) and serve them on the administrator and the respondent.~~

~~(1) If the Judicial Tenure Commission has recommended suspension, the panel may not disbar the respondent and may not suspend the respondent from practicing law for a period beginning earlier than or extending beyond the suspension period recommended by the Judicial Tenure Commission.~~

~~(2) If the Judicial Tenure Commission has not recommended either suspension or removal from office, and the respondent continues to hold a judicial office, then the panel may not disbar or suspend the respondent.~~

~~(3) If the Judicial Tenure Commission has recommended removal from office, or if the respondent no longer holds a judicial office, then the panel may impose any type of discipline authorized by these rules.~~

~~(F) Appeal. The respondent-judge may file a petition for review under MCR 9.118.~~

(A) Judges. The administrator or commission may not take action against an incumbent judge, except that this rule does not prohibit an action by the administrator or commission against:

(1) a magistrate or referee for misconduct unrelated to judicial functions, whether before or during the period when the person serves as a magistrate or referee; or

(2) a visiting judge as provided in MCR 9.203(E). If the Judicial Tenure Commission receives a request for investigation of a magistrate or referee or visiting judge arising from the practice of law, the Judicial Tenure Commission shall refer the matter to the administrator or commission for investigation in the first instance. If the administrator or the commission dismisses the request for investigation referred by the Judicial Tenure Commission, or a request for investigation of a magistrate, referee or visiting judge submitted directly to the commission by a complainant, the administrator or commission shall notify the Judicial Tenure Commission, which may take action as it deems appropriate.

(B) Former Judges. The administrator or commission may take action against a former judge for conduct resulting in removal as a judge, and for any conduct which was not the subject of a disposition by the Judicial Tenure Commission or by the Court. The administrator or commission may not take action against a former judge for conduct where the court imposed a sanction less than removal or the Judicial Tenure Commission has taken any action under MCR 9.207(B)(1)-(5).

(C) Judicial Tenure Commission Record. The record of the Judicial Tenure Commission proceeding is admis-

sible at a hearing involving a former judge. The administrator or the respondent may introduce additional evidence.

RULE 9.118. REVIEW OF ORDER OF HEARING PANEL.

(A) Review of Order; Time.

(1) The administrator, the complainant, or the respondent may petition the board in writing to review the order of a hearing panel filed under MCR 9.113(B), 9.115, 9.116, 9.120, 9.121, or 9.124. The board may grant review of a nonfinal order and decide such interlocutory matters without a hearing. A petition for review must set forth the reasons and the grounds on which review is sought and must be filed with the board within 21 days after the order is served. The petitioner must serve copies of the petition and the accompanying documents on the other party and the complainant and file a proof of service with the board.

(2) A cross-petition for review may be filed within 21 days after the petition for review is served on the cross-petitioner. The cross-petition must be served on the other party and the complainant, and a proof of service must be filed with the board.

(3) A delayed petition for review may be considered by the board chairperson under the guidelines of MCR 7.205(F). If a petition for review is filed more than 12 months after the order of the hearing panel is entered, the petition may not be granted.

(B) Order to Show Cause. If a petition for review is timely filed or a delayed petition for review is accepted for filing, the board shall issue an order to show cause, at a date and time specified, why the order of the hearing panel should not be affirmed. The order shall establish a briefing schedule for all parties and may require that an answer to the petition or cross-petition

be filed. An opposing party may file an answer even if the order does not require one. The board must serve the order to show cause on the administrator, respondent, and complainant at least 21 days before the hearing. Failure to comply with the order to show cause, including, but not limited to, a requirement for briefs, may be grounds for dismissal of a petition for review. Dismissal of a petition for review shall not affect the validity of a cross-petition for review.

(C) Hearing.

(1) A hearing on the order to show cause must be heard by a subboard of at least 3 board members assigned by the chairperson. The board must make a final decision on consideration of the whole record, including a transcript of the presentation made to the subboard and the subboard's recommendation. The respondent shall appear personally at the review hearing unless excused by the board. Failure to appear may result in denial of any relief sought by the respondent, or any other action allowable under MCR 9.118(D).

(2) If the board believes that additional testimony should be taken, it may refer the case to a hearing panel or a master. The panel or the master shall then take the additional testimony and shall make a supplemental report, including a transcript of the additional testimony, pleadings, exhibits, and briefs with the board. Notice of the filing of the supplemental report and a copy of the report must be served as an original report and order of a hearing panel.

(D) Decision. After the hearing on the order to show cause, the board may affirm, amend, reverse, or nullify the order of the hearing panel in whole or in part or order other discipline. A discipline order is not effective

until 28 days after it is served on the respondent unless the board finds good cause for the order to take effect earlier.

(E) Motion for Reconsideration; Stay. A motion for reconsideration may be filed at any time before the board's order takes effect. An answer to a motion for reconsideration may be filed. ~~The board may grant a stay pending its decision on a motion for reconsideration.~~ If the discipline order is a suspension for 179 days or less, a stay of the discipline order will automatically issue on the timely filing by the respondent of a motion for reconsideration. If the discipline is greater than a 179-day suspension, the respondent may petition for a stay. If the board grants a stay, the stay remains effective for 28 days after the board enters its order granting or denying reconsideration. ~~In the absence of an order by the board, the filing of a motion for reconsideration does not stay an order of discipline.~~

(F) Filing Orders. The board must file a copy of its discipline order with the Supreme Court clerk and the clerk of the county where the respondent resides and where his or her office is located. The order must be served on all parties. If the respondent requests it in writing, a dismissal order must be similarly filed and served.

RULE 9.119. CONDUCT OF DISBARRED, SUSPENDED, OR INACTIVE ATTORNEYS.

(A) Notification to Clients. An attorney ~~whose license is revoked or suspended,~~ who has resigned under Rule 3 of the Rules Concerning the State Bar of Michigan, or been disbarred, or suspended, or who is transferred to inactive status pursuant to MCR 9.121, or who is suspended for nondisciplinary reasons pursuant to Rule 4 of the Supreme Court Rules Concerning the State Bar

of Michigan, shall, within 7 days of the effective date of the order of discipline, resignation, the transfer to inactive status, or the nondisciplinary suspension, notify all ~~of~~ his or her active clients, in writing, by registered or certified mail, return receipt requested, of the following:

(1) the nature and duration of the discipline imposed, the transfer to inactive status, the nondisciplinary suspension, or the resignation;

(2) the effective date of such discipline, transfer to inactive status, ~~or~~ nondisciplinary suspension, or resignation;

(3) the attorney's inability to act as an attorney after the effective date of such discipline, transfer to inactive status, ~~or~~ nondisciplinary suspension, or resignation;

(4) the location and identity of the custodian of the clients' files and records, which will be made available to them or to substitute counsel;

(5) that the clients may wish to seek legal advice and counsel elsewhere; provided that, if the disbarred, suspended, ~~or~~ inactive, or resigned attorney was a member of a law firm, the firm may continue to represent each client with the client's express written consent;

(6) the address to which all correspondence to the attorney may be addressed.

(B) Conduct in Litigated Matters. In addition to the requirements of subsection (A) of this rule, the affected attorney must, by the effective date of the order of ~~revocation~~ disbarment, suspension, ~~or~~ transfer to inactive status, or resignation, in every matter in which the attorney is representing a client in litigation, file with the tribunal and all parties a notice of the attorney's disqualification from the practice of law. The affected attorney shall either file a motion to withdraw from the

representation, or, with the client's knowledge and consent, a substitution of counsel.

(C) Filing of Proof of Compliance. Within 14 days after the effective date of the order of ~~revocation~~ disbarment, suspension, transfer to inactive status pursuant to MCR 9.121, or resignation, the disbarred, suspended, ~~or~~ inactive, or resigned attorney shall file with the administrator and the board an affidavit showing full compliance with this rule. The affidavit must include as an appendix copies of the disclosure notices and mailing receipts required under subrules (A) and (B) of this rule. The affidavit must set forth any claim by the affected attorney that he or she does not have active clients at the time of the effective date of the change in status. A disbarred, suspended, ~~or~~ inactive, or resigned attorney shall keep and maintain records of the various steps taken under this rule so that, in any subsequent proceeding instituted by or against him or her, proof of compliance with this rule and with the disbarment or suspension order will be available.

(D) Conduct After Entry of Order Prior to Effective Date. A disbarred or suspended attorney, after entry of the order of ~~revocation~~ disbarment or suspension and prior to its effective date, shall not accept any new retainer or engagement as an attorney for another in any new case or legal matter of any nature, unless specifically authorized by the board chairperson upon a showing of good cause and a finding that it is not contrary to the interests of the public and profession. However, during the period between the entry of the order and its effective date, the suspended or disbarred attorney may complete, on behalf of any existing client, all matters that were pending on the entry date.

(E) Conduct After Effective Date of Order. An attorney who is disbarred, ~~or~~ suspended, ~~or who is~~ trans-

ferred to inactive status pursuant to MCR 9.121, or who resigns is, during the period of disbarment, suspension, or inactivity, or from and after the date of resignation, forbidden from:

(1) practicing law in any form;

(2) having contact either in person, by telephone, or by electronic means, with clients or potential clients of a lawyer or law firm either as a paralegal, law clerk, legal assistant, or lawyer;

(~~2~~3) appearing as an attorney before any court, judge, justice, board, commission, or other public authority; and

(~~3~~4) holding himself or herself out as an attorney by any means.

(F) Compensation of Disbarred, Suspended, Resigned, or Inactive Attorney. An attorney ~~whose license is revoked~~ who has been disbarred or suspended, has resigned, or who is transferred to inactive status pursuant to MCR 9.121 may not share in any legal fees for legal services performed by another attorney during the period of disqualification from the practice of law. A disbarred, suspended, resigned, or inactive attorney may be compensated on a quantum meruit basis for legal services rendered and expenses paid by him or her prior to the effective date of the ~~revocation,~~ disbarment, suspension, resignation, or transfer to inactive status.

(G) ~~Inventory~~ Receivership.

(1) Attorney with a firm. If ~~the~~ an attorney ~~whose license~~ who is a member of a firm is ~~revoked~~ disbarred, ~~or~~ suspended, ~~or who is~~ transferred to inactive status pursuant to MCR 9.121, or resigns his or her license to practice law ~~was a member of a firm~~, the firm may continue to represent each client with

the client's express written consent. Copies of the signed consents shall be maintained with the client file.

(2) Attorney practicing alone. If an attorney is transferred to inactive status, resigns, or is disbarred or suspended and fails to give notice under the rule, or disappears, is imprisoned, or dies, and there is no partner, executor, or other responsible person capable of conducting the attorney's affairs, the administrator may ask the chief judge in the judicial circuit in which the attorney maintained his or her practice to appoint a person to act as a receiver with necessary powers, including:

(a) to obtain and inventory the attorney's files;

(b) ~~and to~~ to take any action necessary to protect the interests of the attorney and the attorney's clients~~.~~;

(c) to change the address at which the attorney's mail is delivered and to open the mail; or

(d) to secure (garner) the lawyer's bank accounts.

~~The person appointed may not disclose any information contained in any inventoried file without the client's written consent.~~ The person appointed is analogous to a receiver operating under the direction of the circuit court.

(3) Confidentiality. The person appointed may not disclose to any third parties any information protected by MRPC 1.6 without the client's written consent.

(4) Publication of Notice. Upon receipt of notification from the receiver, the state bar shall publish in the Michigan Bar Journal notice of the receivership, including the name and address of the subject attorney, and the name, address, and telephone number of the receiver.

RULE 9.120. CONVICTION OF CRIMINAL OFFENSE; RECIPROCAL DISCIPLINE.

(A) Notification of the Grievance Administrator and the Attorney Discipline Board.

(1) When a lawyer is convicted of a crime, the lawyer, the prosecutor or other authority who prosecuted the lawyer, and the defense attorney who represented the lawyer must notify the grievance administrator and the board of the conviction. This notice must be given in writing within 14 days after the conviction.

(2) A lawyer who has been the subject of an order of discipline or transferred to inactive status by any court of record or any body authorized by law or by rule of court to conduct disciplinary proceedings against attorneys, of the United States, or of any state or territory of the United States or of the District of Columbia, or who has resigned from the bar or roster of attorneys in lieu of discipline by, or during the pendency of, discipline proceedings before such court or body shall inform the grievance administrator and board of entry of such order, transfer, or resignation within 14 days of the entry of the order, transfer, or resignation.

(B) ~~Suspension.~~ Criminal Conviction.

(1) On conviction of a felony, an attorney is automatically suspended until the effective date of an order filed by a hearing panel under MCR 9.115(J). A conviction occurs upon the return of a verdict of guilty or upon the acceptance of a plea of guilty or nolo contendere. The board may, on the attorney's motion, set aside the automatic suspension when it appears consistent with the maintenance of the integrity and honor of the profession, the protection of the public, and the interests of justice. The board must set aside the automatic suspension if the felony

conviction is vacated, reversed, or otherwise set aside for any reason by the trial court or an appellate court.

(2) In a disciplinary proceeding instituted against an attorney based on the attorney's conviction of a criminal offense, a certified copy of the judgment of conviction is conclusive proof of the commission of the criminal offense.

(3) The administrator may file with the board a judgment of conviction showing that an attorney has violated a criminal law of a state or of the United States, an ordinance, or tribal law pursuant to MCR 2.615. The board shall then order the attorney to show cause why a final order of discipline should not be entered, and the board shall refer the proceeding to a hearing panel for hearing. At the hearing, questions as to the validity of the conviction, alleged trial errors, and the availability of appellate remedies shall not be considered. After the hearing, the panel shall issue an order under MCR 9.115(J).

~~(C)~~(4) ~~Pardon; Conviction reversed.~~ On a pardon the board may, and on a reversal of the conviction the board must, by order filed and served under MCR 9.118~~(E)~~(F), vacate the ~~suspension~~ order of discipline. The attorney's name must be returned to the roster of Michigan attorneys and counselors at law, but the administrator may nevertheless proceed against the respondent for misconduct, which had led to the criminal charge.

(C) Reciprocal Discipline.

(1) A certified copy of a final adjudication by any court of record or any body authorized by law or by rule of court to conduct disciplinary proceedings against attorneys by any state or territory of the United States or of the District of Columbia, a United States court, or a federal administrative agency, determining that an attorney, whether or not admitted in that jurisdiction,

has committed misconduct or has been transferred to disability inactive status, shall establish conclusively the misconduct or the disability for purposes of a proceeding under subchapter 9.100 of these rules and comparable discipline or transfer shall be imposed in the Michigan proceeding unless the respondent was not afforded due process of law in the course of the original proceedings, the imposition of comparable discipline or transfer in Michigan would be clearly inappropriate, or the reason for the original transfer to disability inactive status no longer exists.

(2) Upon the filing by the grievance administrator of a certified copy of final adjudication described in paragraph (C)(1) with the board, the board shall issue an order directed to the lawyer and the administrator:

(a) attaching a copy of the order from the other jurisdiction; and

(b) directing, that, within 21 days from service of the order, the lawyer and administrator shall inform the board (i) of any objection to the imposition of comparable discipline or disability inactive status in Michigan based on the grounds set forth in paragraph (C)(1) of this rule, and (ii) whether a hearing is requested.

(3) Upon receipt of an objection to the imposition of comparable discipline or disability inactive status raising one or more of the issues identified in paragraph (C)(1) of this rule, the board shall assign the matter to a hearing panel for disposition. The opposing party shall have 21 days to reply to an objection. If a hearing is requested, and the hearing panel grants the request, the hearing shall be held in accordance with the procedures set forth in MCR 9.115 except as otherwise provided in this rule.

(4) Papers filed under this rule shall conform as nearly as practicable to the requirements of subchapter

2.100 and shall be filed with the board and served on the opposing party and each member of the hearing panel once assigned.

(5) The burden is on the party seeking to avoid the imposition of comparable discipline or transfer to disability inactive status to demonstrate that it is not appropriate for one or more of the grounds set forth in paragraph (C)(1). "Comparable" discipline does not mean that the dates of a period of disqualification from practice in this state must coincide with the dates of the period of disqualification, if any, in the original jurisdiction.

(6) If the 21-day period discussed in paragraph (C)(2)(b) has expired without objection by either party, the respondent is in default, with the same effect as a default in a civil action, and the board shall impose comparable discipline or transfer to disability inactive status unless it appears that one of the grounds set forth in paragraph (C)(1) of this rule requires a different result, in which case the board shall schedule a hearing in accord with paragraph (3) of this rule. An order entered pursuant to this subparagraph may be set aside if the requirements of MCR 2.603(D) are established.

(7) In the event the discipline or transfer to disability inactive status imposed in the original jurisdiction is stayed, any reciprocal discipline imposed in Michigan shall be deferred until the stay expires.

RULE 9.121. ATTORNEY DECLARED TO BE INCOMPETENT OR ALLEGED TO BE INCAPACITATED OR ASSERTING IMPAIRED ABILITY.

(A) Adjudication by Court. If an attorney has been judicially declared incompetent or involuntarily committed on the grounds of incompetency or disability, the

board, on proper proof of the fact, must enter an order effective immediately transferring the attorney to inactive status for an indefinite period and until further order of the board.

(B) Allegations of Incompetency or Incapacity.

(1) If it is alleged in a complaint by the administrator that an attorney is incapacitated to continue the practice of law because of mental or physical infirmity or disability or because of addiction to drugs or intoxicants, a hearing panel shall take action necessary to determine whether the attorney is incapacitated~~, including an examination of the attorney by qualified medical experts the board designates~~.

(a) Examination.

(i) Upon a showing of good cause that a mental or physical condition is the basis of respondent's incompetency or incapacity as alleged in a complaint by the administrator, a hearing panel may order respondent to submit to one or more medical examination(s) or psychological examination(s) that are relevant to a condition of respondent shown to be in controversy.

(ii) If testing is ordered, the administrator and respondent may stipulate to the expert(s) who will conduct the examination(s), prepare a report within 28 days of the conclusion of the examination(s), and provide a copy of said report to both parties. The content of a report prepared by an expert(s) pursuant to this paragraph is admissible into evidence in the proceedings, subject to relevancy objections.

(iii) If the administrator and/or respondent hire their own expert(s) to conduct the examination(s), the expert(s) will conduct the examination(s), prepare a report within 28 days of the conclusion of the examination(s), and provide a copy of said report to both parties.

A report prepared pursuant to this paragraph is only admissible as substantive evidence upon stipulation by both parties. The respondent will be responsible for the expenses incurred by retaining his or her examiner.

(iv) On its own motion or on the motion of either party, the hearing panel may appoint an expert of its own selection to conduct the necessary examination(s). The expert so appointed will conduct the examination(s), prepare a report within 28 days of the conclusion of the examination(s), and provide a copy of said report to both parties. The content of a report prepared by an expert(s) pursuant to this paragraph is admissible into evidence in the proceedings unless, within 14 days of delivery of the report, a party objects, in which case either party may subpoena the expert(s) to testify at the hearing at that party's expense.

(b) Expert's Report

The expert's report as required by paragraph (a) shall include:

(i) the expert's resume or curriculum vitae;

(ii) a statement of facts, and a list of the tests that were administered and the test results;

(iii) a diagnosis, prognosis, a statement of limitations on the opinion because of the scope of the examination or testing, and recommendation for treatment, if any; and

(iv) no physician-patient privilege shall apply under this rule.

(2) The hearing panel shall provide notice to the attorney of the proceedings ~~and appoint an attorney to represent him or her if he or she is without representation~~. Upon the request of a party, or on its own motion, and following a finding of good cause, a panel

may recommend the appointment of counsel by the board to represent the respondent if he or she is without representation.

(3) If, after a hearing, the hearing panel concludes that the attorney is incapacitated from continuing to practice law, it shall enter an order transferring him or her to inactive status for an indefinite period and until further order of the board.

(4) Pending disciplinary proceedings against the attorney must be held in abeyance.

(5) Proceedings conducted under this subrule are subject to review by the board as provided in MCR 9.118.

(C) Assertion of Impaired Ability; Probation.

(1) If, in response to a formal complaint filed under subrule 9.115(B), the respondent asserts in mitigation and thereafter demonstrates by a preponderance of the evidence that

(a) during the period when the conduct ~~which~~that is the subject of the complaint occurred, his or her ability to practice law competently was materially impaired by physical or mental disability or by drug or alcohol addiction,

(b) the impairment was the cause of or substantially contributed to that conduct,

(c) the cause of the impairment is susceptible to treatment, and

(d) he or she in good faith intends to undergo treatment, and submits a detailed plan for such treatment, the hearing panel, the board, or the Supreme Court may enter an order placing the respondent on probation for a specific period not to exceed 3 ~~2~~ years if it specifically finds that an order of probation is not contrary to the public interest.

(2) If the respondent alleges impairment by physical or mental disability or by drug or alcohol addiction pursuant to subrule (C)(1), the hearing panel may order the respondent to submit to a physical or mental examination ~~by a physician selected by the hearing panel or the board, which physician shall report to the hearing panel or board. The parties may obtain a psychiatric or medical evaluation at their own expense by examiners of their own choosing. No physician-patient privilege shall apply under this rule. The respondent's attorney may be present at an examination.~~ in accord with the procedure set forth in MCR 9.121(B)(1)(a). The panel may direct that the expense of the examination be paid by the respondent. A respondent who fails or refuses to comply with an examination order, or refuses to undergo an examination requested by the administrator, shall not be eligible for probation.

(3) The probation order ~~may~~

(a) must specify the treatment the respondent is to undergo,

(b) may require the respondent to practice law only under the direct supervision of other attorneys, or

(c) may include any other terms the evidence shows are likely to eliminate the impairment without subjecting the respondent's clients or the public to a substantial risk of harm because the respondent is permitted to continue to practice law during the probation period.

(4) A respondent may be placed on probation for up to 3 years. The probation order expires on the date specified in it unless the administrator petitions for, and the hearing panel, board, or court grants, an extension. An extension may not exceed ~~2~~ 3 years. A probation order may be dissolved if the respondent demonstrates that the impairment giving rise to the probation order has been removed and that the probation order has

been fully complied with, but only one motion to accelerate dissolution of a probation order may be filed during the probation period.

(5) On proof that a respondent has violated a probation order, he or she may be suspended or disbarred.

(D) Publication of Change in Status. The board must publish in the Michigan Bar Journal a notice of transfer to inactive status. A copy of the notice and the order must be filed and served under MCR 9.118.

(E) Reinstatement. An attorney transferred to inactive status under this rule may not resume active status until reinstated by the board's order and, if inactive 3 years or more, recertified by the Board of Law Examiners. The attorney may petition for reinstatement to active status once a year or at shorter intervals as the board may direct. A petition for reinstatement must be granted by ~~the board~~ a panel on a showing by clear and convincing evidence that the attorney's disability has been removed and that he or she is fit to resume the practice of law. ~~The board~~ A panel may take the action necessary to determine whether the attorney's disability has been removed, including an examination of the attorney ~~by qualified medical experts that the board designates~~ conducted in accord with the procedure set forth in MCR 9.121(B)(1)(a). The ~~board~~ panel may direct that the expense of the examination be paid by the attorney. If an attorney was transferred to inactive status under subrule 9.121(A) and subsequently has been judicially declared to be competent, ~~the board~~ a panel may dispense with further evidence that the disability has been removed and may order reinstatement to active status on terms it finds proper and advisable, including recertification.

(F) Waiver of Privilege. By filing a petition for reinstatement to active status under this rule, the

attorney waives the doctor-patient privilege with respect to treatment during the period of his or her disability. The attorney shall disclose the name of every psychiatrist, psychologist, physician, and hospital or other institution by whom or in which the attorney has been examined or treated since the transfer to inactive status. The attorney shall furnish to ~~the board~~ a panel written consent for each to divulge whatever information and records are requested by the ~~board's~~ panel's medical or psychological experts.

RULE 9.122. REVIEW BY SUPREME COURT.

(A) Kinds Available; Time for Filing.

(1) A party aggrieved, including the ~~person who made a request for investigation~~ complainant, by a final order ~~of discipline or dismissal~~ entered by the board on review under MCR 9.118, may apply for leave to appeal to the Supreme Court under MCR 7.302 within 28 days after the order is entered. If a motion for reconsideration is filed before the board's order takes effect, the application for leave to appeal to the Supreme Court may be filed within 28 days after the board enters its order granting or denying reconsideration.

(2) If a request for investigation has been dismissed under MCR 9.112(C)(1)(a) or 9.114(A), a party aggrieved by the dismissal may file a complaint in the Supreme Court under MCR 7.304.

(B) Rules Applicable. Except as modified by this rule, subchapter 7.300 governs an appeal.

(C) Stay of Order. If the discipline order is a suspension of 179 days or less, a stay of the order will automatically issue on the timely filing of an appeal by the respondent. The stay remains effective ~~until~~ for 21 days following the conclusion of the appeal or further

order of the Supreme Court. The respondent may petition the Supreme Court for a stay pending appeal of other orders of the board.

(D) Record on Appeal. The original papers constitute the record on appeal. The board shall certify the original record and file it with the Supreme Court promptly after the briefs of the parties have been filed. The record must include a list of docket entries, a transcript of testimony taken, and all pleadings, exhibits, briefs, findings of fact, and orders in the proceeding. If the record contains material protected, the protection continues unless otherwise ordered by the Supreme Court.

(E) Disposition. The Supreme Court may make any order it deems appropriate, including dismissing the appeal. The parties may stipulate to dismiss the appeal with prejudice.

RULE 9.123. ELIGIBILITY FOR REINSTATEMENT.

(A) Suspension, 179 Days or Less. An attorney whose license has been suspended for 179 days or less is automatically reinstated by filing with the Supreme Court clerk, the board, and the administrator an affidavit showing that the attorney has fully complied with the terms and conditions of the suspension order. A materially false statement contained in the affidavit is ground for disbarment.

(B) ~~Revocation~~ Disbarment or Suspension More Than 179 Days. An attorney whose license to practice law has been revoked or suspended for more than 179 days is not eligible for reinstatement until the attorney has petitioned for reinstatement under MCR 9.124 and has established by clear and convincing evidence that:

(1) he or she desires in good faith to be restored to the privilege of practicing law in Michigan;

(2) the term of the suspension ordered has elapsed or 5 years have elapsed since his or her ~~revocation of the license~~ disbarment or resignation;

(3) he or she has not practiced or attempted to practice law contrary to the requirement of his or her suspension or ~~revocation~~ disbarment;

(4) he or she has complied fully with the order of discipline;

(5) his or her conduct since the order of discipline has been exemplary and above reproach;

(6) he or she has a proper understanding of and attitude toward the standards that are imposed on members of the bar and will conduct himself or herself in conformity with those standards;

(7) taking into account all of the attorney's past conduct, including the nature of the misconduct that led to the revocation or suspension, he or she nevertheless can safely be recommended to the public, the courts, and the legal profession as a person fit to be consulted by others and to represent them and otherwise act in matters of trust and confidence, and in general to aid in the administration of justice as a member of the bar and as an officer of the court;

(8) he or she is in compliance with the requirements of subrule (C), if applicable; and

(9) he or she has reimbursed the client security fund of the State Bar of Michigan or has agreed to an arrangement satisfactory to the fund to reimburse the fund for any money paid from the fund as a result of his or her conduct. Failure to fully reimburse as agreed is ground for ~~revocation~~ vacating an order of ~~a~~ reinstatement.

(C) Reinstatement After Three Years. An attorney who, as a result of disciplinary proceedings, resigns, is

disbarred, or is suspended for any period of time, and who does not practice law for 3 years or more, whether as the result of the period of discipline or voluntarily, must be recertified by the Board of Law Examiners before the attorney may be reinstated to the practice of law.

(D) Petition for Reinstatement; Filing Limitations.

(1) Except as provided in subrule (D)(3), an attorney whose license to practice law has been suspended may not file a petition for reinstatement earlier than 56 days before the term of suspension ordered has fully elapsed.

(2) An attorney whose license to practice law has been revoked or who has resigned may not file a petition for reinstatement until 5 years have elapsed since ~~revocation of the license~~ the attorney's resignation or disbarment.

(3) An attorney whose license to practice law has been suspended because of conviction of a felony for which a term of incarceration was imposed may not file a petition for reinstatement until six months after completion of the sentence, including any period of parole.

(4) An attorney ~~whose license to practice law has been revoked~~ who has been disbarred or suspended and who has been denied reinstatement may not file a new petition for reinstatement until at least ~~180 days~~ 1 year from the effective date of the most recent hearing panel order granting or denying reinstatement.

RULE 9.124. PROCEDURE FOR REINSTATEMENT.

(A) Filing of Petition. An attorney petitioning for reinstatement shall file the original petition for reinstatement with the Supreme Court clerk and a copy with the board and the commission.

(B) Petitioner's Responsibilities.

(1) Separately from the petition for reinstatement, the petitioner must serve only upon the administrator a personal history affidavit. The affidavit is to become part of the administrator's investigative file and may not be disclosed to the public except under the provisions of MCR 9.126. The ~~following information~~ affidavit must ~~be attached to or~~ contain~~ed in the affidavit~~ the following information:

(a) every residence address since the date of disqualification from the practice of law;

(b) employment history since the time of disqualification, including the nature of employment, the name and address of every employer, the duration of such employment, and the name of the petitioner's immediate supervisor at each place of employment; if requested by the grievance administrator, the petitioner must provide authorization to obtain a copy of the petitioner's personnel file from the employer;

(c) a copy of a current driver's license;

(d) any continuing legal education in which the petitioner participated during the period of disqualification from the practice of law;

(e) bank account statements, from the date of disqualification until the filing of the petition for reinstatement, for each and every bank account in which petitioner is named in any capacity;

(f) copies of the petitioner's personal and business federal, state, and local tax returns from the date of disqualification until the filing of the petition for reinstatement, and if the petitioner owes outstanding income taxes, interest, and penalties, the petitioner must provide a current statement from the taxation authority of the current amount due; if requested by

the grievance administrator, the petitioner must provide a waiver granting the grievance administrator authority to obtain information from the tax authority;

(g) any and all professional or occupational licenses obtained or maintained during the period of disqualification and whether any were suspended or revoked;

(h) any and all names used by petitioner since the time of disqualification;

(i) petitioner's place and date of birth;

(j) petitioner's social security number;

(k) whether, since the time of disqualification, petitioner was a party or a witness in any civil case, and the title, docket number, and court in which the ~~such~~ case occurred;

(l) whether the petitioner was a party to any civil case, including the title, docket number, and court in which such case was filed; the petitioner must provide copies of the complaints and any dispositional orders or judgments, including settlement agreements, in such cases;

(m) whether the petitioner was a defendant or a witness in any criminal case, and the title, docket number, and court in which such case was filed; the petitioner must provide copies of the indictments or complaints and any dispositional orders or judgments of conviction in cases in which the petitioner was a defendant;

(n) whether the petitioner was subject to treatment or counseling for mental or emotional impairments, or for substance abuse or gambling addictions since the time of disqualification; if so, the petitioner must provide a current statement from the petitioner's service provider setting forth an evaluative conclusion regard-

ing the petitioner's impairment(s), the petitioner's treatment records, and prognosis for recovery.

(2) The petitioner must, contemporaneously with the filing of the petition for reinstatement and service on the administrator of the personal history affidavit, remit

(a) to the administrator the fee for publication of a reinstatement notice in the Michigan Bar Journal.

(b) to the board the basic administrative costs required under MCR 9.128(B)(1)

(i) an administrative cost of $750 where the discipline imposed was a suspension of less than 3 years;

(ii) an administrative cost of $1,500 where the discipline imposed was a suspension of 3 years or more or disbarment.

(3) If the petition is facially sufficient and the petitioner has provided proof of service of the personal history affidavit upon the administrator and paid the publication fee required by subrule (B)(2), the board shall assign the petition to a hearing panel. Otherwise, the board may dismiss the petition without prejudice, on its own motion or the motion of the administrator.

(4) A petitioner who files the petition before the term of suspension ordered has fully elapsed must file an updated petition and serve upon the administrator an updated personal history affidavit within 14 days after the term of suspension ordered has fully elapsed. All petitioners remain under a continuing obligation to provide updated information bearing upon the petition or the personal history affidavit.

(5) The petitioner must cooperate fully in the investigation by the administrator into the petitioner's eligibility for reinstatement by promptly providing any

information requested. If requested, the petitioner must participate in a recorded interview and answer fully and fairly under oath all questions about eligibility for reinstatement.

(C) Administrator's Responsibilities.

(1) Within 14 days after the commission receives its copy of the petition for reinstatement, the administrator shall submit to the Michigan Bar Journal for publication a notice briefly describing the nature and date of the discipline, the misconduct for which the petitioner was disciplined, and the matters required to be proved for reinstatement.

(2) The administrator shall investigate the petitioner's eligibility for reinstatement before a hearing on it, report the findings in writing to the board and the hearing panel within 56 days of the date the board assigns the petition to the hearing panel, and serve a copy on the petitioner.

(a) For good cause, the hearing panel may allow the administrator to file the report at a later date, but in no event later than 7 days before the hearing.

(b) The report must summarize the facts of all previous misconduct and the available evidence bearing on the petitioner's eligibility for reinstatement. The report is part of the record but does not restrict the parties in the presentation of additional relevant evidence at the hearing. Any evidence omitted from the report or received by the administrator ~~subsequent to~~ after the filing of the report must be disclosed promptly to the hearing panel and ~~the petitioner~~ to the opposing party.

(D) Hearing on Petition. A reinstatement hearing may not be held earlier than 28 days after the administrator files the investigative report with the hearing

panel unless the hearing panel has extended the deadline for filing the report. The proceeding on a petition for reinstatement must conform as nearly as practicable to a hearing on a complaint. The petitioner shall appear personally before the hearing panel for cross-examination by the administrator and the hearing panel and answer fully and fairly under oath all questions regarding eligibility for reinstatement. The administrator and the petitioner may call witnesses or introduce evidence bearing upon the petitioner's eligibility for reinstatement. The hearing panel must enter an order granting or denying reinstatement and make a written report signed by the chairperson, including a transcript of the testimony taken, pleadings, exhibits and briefs, and its findings of fact. A reinstatement order may grant reinstatement subject to conditions that are relevant to the established misconduct or otherwise necessary to insure the integrity of the profession, to protect the public, and to serve the interests of justice. The report and order must be filed and served under MCR 9.118(F).

(E) Review. Review is available under the rules governing review of other hearing panel orders. The administrator may request a stay of an order granting eligibility for reinstatement.

RULE 9.125. IMMUNITY.

A person is absolutely immune from suit for statements and communications transmitted solely to the administrator, the commission, or the commission staff, or given in an investigation or proceeding on alleged misconduct or reinstatement. The administrator, legal counsel, investigators, members of hearing panels, masters, receivers appointed under MCR 9.119(G), voluntary investigators, fee arbitrators, mentors, practice

monitors, the commission, the board, and their staffs are absolutely immune from suit for conduct arising out of the performance of their duties.

A medical or psychological expert who administers testing or provides a report pursuant to MCR 9.114(C) or MCR 9.121 is absolutely immune from suit for statements and communications transmitted solely to the administrator, the commission, or the commission staff, or given in an investigation or formal disciplinary proceeding.

RULE 9.126. OPEN HEARINGS; PRIVILEGED, CONFIDENTIAL FILES AND RECORDS.

(A) Investigations. Except as provided in these rules, investigations by the administrator or the staff are privileged from disclosure, confidential, and may not be made public. At the respondent's option, final disposition of a request for investigation not resulting in formal charges may be made public. In addition, any interested person may inspect the request for investigation and the respondent's answer thereto if a ~~formal complaint~~ disciplinary proceeding has been filed.

(B) Hearings. Hearings before a hearing panel and the board must be open to the public, but not their deliberations.

(C) Papers. Formal pleadings, reports, findings, recommendations, discipline, reprimands, transcripts, and orders resulting from hearings must be open to the public. A personal history affidavit filed pursuant to MCR 9.124(B)(1) is a confidential document that is not open to the public. This subrule does not apply to a request for a disclosure authorization submitted to the board or the Supreme Court pursuant to subrules (D)(7) or (E)~~(5)~~(8).

(D) Other Records. Other files and records of the board, the commission, the administrator, legal counsel, hearing panels and their members, and the staff of each may not be examined by or disclosed to anyone except

(1) the commission,

(2) the administrator,

(3) the respondent as provided under MCR 9.115(F)(4),

(4) members of hearing panels or the board,

(5) authorized employees,

(6) the Supreme Court, or

(7) other persons who are expressly authorized by the board or the Supreme Court.

If a disclosure is made to the Supreme Court, the board, or a hearing panel, the information must also be disclosed to the respondent, except as it relates to an investigation, unless the court otherwise orders.

(E) Other Information. Notwithstanding any prohibition against disclosure set forth in this rule or elsewhere, the commission shall disclose the substance of information concerning attorney or judicial misconduct to the Judicial Tenure Commission, upon request. The commission also may make such disclosure to the Judicial Tenure Commission, absent a request, and to:

(1) the State Bar of Michigan Client Security Fund;

(2) the State Bar of Michigan:

(a) Committee on Judicial Qualifications;

(b) Lawyers and Judges Assistance Program;

(c) District and Standing Committees on Character and Fitness; or,

(d) Unauthorized Practice of Law Committee,

(3) any court-authorized attorney disciplinary or admissions agency, ~~or~~ including any federal district court or federal disciplinary agency considering the licensing of attorneys in its jurisdiction,

(4) the Michigan Appellate Assigned Counsel System,

(5) any Michigan court considering the appointment of a lawyer in a pending matter as house counsel, or as a standing appointment,

(6) a lawyer representing the respondent in an unrelated disciplinary investigation or proceeding;

(7) law enforcement agencies; or

(~~4~~8)other persons who are expressly authorized by the board or the Supreme Court.

~~(F) Summary of Disclosures. The board shall include in its annual report to the Supreme Court an accounting of all requests for disclosure that have been filed with the board pursuant to subrules (D)(7) and (E)(4). The accounting shall include the board's disposition of each request.~~

RULE 9.128. COSTS.

(A) Generally. The hearing panel and the board, in an order of discipline or an order granting or denying reinstatement, must include a provision directing the payment of costs within a specified period of time. Under exceptional circumstances, the board may grant a motion to reduce administrative costs assessed under this rule, but may not reduce the assessment for actual expenses. Reimbursement must be a condition in a reinstatement order.

(B) Amount and Nature of Costs Assessed. The costs assessed under these rules shall include both basic administrative costs and disciplinary expenses actually

incurred by the board, the commission, a master, or a panel for the expenses of that investigation, hearing, review and appeal, if any.

(1) Basic Administrative Costs:

(a) for discipline by consent pursuant to MCR 9.115(F)(5), $750;

(b) for all other orders imposing discipline, $1,500;

(c) with the filing of a petition for reinstatement ~~under MCR 9.124(A), where the discipline imposed was a suspension of less than 3 years, $750~~as set forth in MCR 9.124(B)(2)(b)(i) and (ii);

~~(d) with the filing of a petition for reinstatement under MCR 9.124(A), where the discipline imposed was a suspension of 3 years or more or disbarment, $1,500.~~

(2) Actual Expenses. Within 14 days of the conclusion of a proceeding before a panel or a written request from the board, whichever is later, the grievance administrator shall file with the board an itemized statement of the commission's expenses allocable to the hearing, including expenses incurred during the grievance administrator's investigation. Copies shall be served upon the respondent and the panel. An itemized statement of the expenses of the board, the commission, and the panel, including the expenses of a master, shall be a part of the report in all matters of discipline and reinstatement.

(C) Certification of Nonpayment. If the respondent fails to pay the costs within the time prescribed, the board shall serve a certified notice of the nonpayment upon the respondent. Copies must be served on the administrator and the State Bar of Michigan. Commencing on the date a certified report of nonpayment is filed, interest on the unpaid fees and costs shall accrue thereafter at the rates applicable to civil judgments.

(D) Automatic Suspension for Nonpayment. The respondent will be suspended automatically, effective 7 days from the mailing of the certified notice of nonpayment, and until the respondent pays the costs assessed or the board approves a suitable plan for payment. The board shall file a notice of suspension with the clerk of the Supreme Court and the State Bar of Michigan. A copy must be served on the respondent and the administrator. A respondent who is suspended for nonpayment of costs under this rule is required to comply with the requirements imposed by MCR 9.119 on suspended attorneys.

(E) Reinstatement. A respondent who has been automatically suspended under this rule and later pays the costs or obtains approval of a payment plan, and is otherwise eligible, may seek automatic reinstatement pursuant to MCR 9.123(A) even if the suspension under this rule exceeded 179 days. However, a respondent who is suspended under this rule and, as a result, does not practice law in Michigan for 3 years or more, must be recertified by the Board of Law Examiners before the respondent may be reinstated.

RULE 9.129. EXPENSES; REIMBURSEMENT.

The state bar must reimburse each investigator, legal counsel, hearing panel member, board member, master, and commission member for the actual and necessary expenses the board, commission, or administrator certifies as incurred as a result of these rules.

RULE 9.130. MCR 8.122 CASES; ARBITRATION; DISCIPLINE; FILING COMPLAINT BY ADMINISTRATOR.

~~(A) Proceedings. A proceeding on alleged misconduct to which MCR 8.122 is applicable is the same as for a~~

~~request for investigation. No investigation may be made on a claim by an attorney against a client.~~

(~~B~~A)Arbitration. On written agreement between an attorney and his or her client, the administrator or an attorney the administrator assigns may arbitrate a dispute and enter an award in accordance with the arbitration laws. Except as otherwise provided by this subrule, the arbitration is governed by MCR 3.602. The award and a motion for entry of an order or judgment must be filed in the court having jurisdiction under MCR 8.122. If the award recommends discipline of the attorney, it must also be treated as a request for investigation.

(~~C~~B)Complaint. If the administrator finds that the filing of a complaint in the appropriate court under MCR 8.122 will be a hardship to the client and that the client may have a meritorious claim, the administrator may ~~shall~~ file the complaint on behalf of the client and prosecute it to completion without cost to the client.

RULE 9.131. INVESTIGATION OF MEMBER OR EMPLOYEE OF BOARD OR COMMISSION; INVESTIGATION OF ATTORNEY REPRESENTING RESPONDENT OR WITNESS; REPRESENTATION BY MEMBER OR EMPLOYEE OF BOARD OR COMMISSION.

(A) Investigation of Commission Member or Employee. If the request is for investigation of an attorney who is a member or employee of the commission, the following provisions apply:

(1) The administrator shall serve a copy of the request for investigation on the respondent by ordinary mail. Within 21 days after service, the respondent shall file with the administrator an answer to the request for investigation conforming to MCR 9.113. The administrator shall send a copy of the answer to the ~~person who filed the request for investigation~~ complainant.

(2) After the answer is filed or the time for answer has expired, the administrator shall send copies of the request for investigation and the answer to the Supreme Court clerk.

(3) The Supreme Court shall review the request for investigation and the answer and shall either dismiss the request for investigation or appoint volunteer legal counsel to investigate the matter.

(4) If, after conducting the investigation, appointed counsel determines that the request for investigation does not warrant the filing of a formal complaint, he or she shall file a report setting out the reasons for that conclusion with the administrator, who shall send a copy of the report to the Supreme Court clerk, the respondent, and the ~~person who filed the request for investigation~~ complainant. Review of a decision not to file a formal complaint is limited to a proceeding under MCR 9.122(A)(2). If appointed counsel determines not to file a complaint, the administrator shall close and maintain the file under MCR 9.114(E). MCR 9.126(A) governs the release of information regarding the investigation.

(5) If, after conducting the investigation, appointed counsel determines that the request for investigation warrants the filing of a formal complaint, he or she shall prepare and file a complaint with the board under MCR 9.115(B).

(6) Further proceedings are as in other cases except that the complaint will be prosecuted by appointed counsel rather than by the administrator.

If the request is for investigation of the administrator, the term "administrator" in this rule means a member of the commission or some other employee of the commission designated by the chairperson.

(B) Investigation of Board Member or Employee. Before the filing of a formal complaint, the procedures regarding a request for investigation of a member or employee of the board are the same as in other cases. Thereafter, the following provisions apply:

(1) The administrator shall file the formal complaint with the board and send a copy to the Supreme Court clerk.

(2) The ~~C~~chief ~~J~~justice shall appoint a hearing panel and may appoint a master to conduct the hearing. The hearing procedure is as provided in MCR 9.115, ~~or~~ 9.117, or 9.120, as is appropriate, except that no matters shall be submitted to the board. Procedural matters ordinarily within the authority of the board shall be decided by the hearing panel, except that a motion to disqualify a member of the panel shall be decided by the ~~C~~chief ~~J~~justice.

(3) The order of the hearing panel is effective 21 days after it is filed and served as required by MCR 9.115(J), and shall be treated as a final order of the board. The administrator shall send a copy of the order to the Supreme Court clerk.

(4) MCR 9.118 does not apply. Review of the hearing panel decision is by the Supreme Court as provided by MCR 9.122.

(C) Investigation of Attorney Representing a Respondent or Witness in Proceedings Before Board or Commission.

(1) Request by a former client. A request for investigation filed by an attorney or witness against his or her counsel for alleged misconduct occurring in a disciplinary investigation or proceeding, shall be treated under the procedures set forth in MCR 9.112.

(2) Request by person other than former client. If a person other than the attorney's former client requests an investigation ~~If the request is for an investigation of an attorney~~ for alleged misconduct committed during the course of that attorney's representation of a respondent or a witness in proceedings before the board or the commission, the procedures in subrule (A) shall be followed. A request for investigation that alleges misconduct of this type may be filed only by the chairperson of the commission, and only if the commission passes a resolution authorizing the filing by the chairperson.

(D) Representation by Commission or Board Member or Employee. A member or employee of the Attorney Grievance Commission or the Attorney Discipline Board and its hearing panels may not represent a respondent in proceedings before the commission, the board, or the Judicial Tenure Commission, including preliminary discussions with employees of the respective commission or board prior to the filing of a request for investigation.

Staff Comment: This proposal contains various amendments of the attorney discipline rules recommended by the Attorney Grievance Commission, which also were thoroughly reviewed by a State Bar of Michigan workgroup at the request of the Court.

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

Adopted May 17, 2011, effective September 1, 2011 (File No. 2009-29)—REPORTER.

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

RULE 5.208. NOTICE TO CREDITORS, PRESENTMENT OF CLAIMS.

(A) Publication of Notice to Creditors; Contents. Unless the notice has already been given, the personal

representative must publish, and a special personal representative may publish, in a newspaper, as defined by MCR 2.106(F), in a county in which a resident decedent was domiciled or in which the proceeding as to a nonresident was initiated, a notice to creditors as provided in MCL 700.3801. The notice must include:

(1) The name, and, if known, ~~last known address,~~ the date of death~~,~~ and date of birth of the decedent;

(2) The name and address of the personal representative;

(3) The name and address of the court where proceedings are filed; and

(4) A statement that claims will be forever barred unless presented to the personal representative, or to both the court and the personal representative within 4 months after the publication of the notice.

(B)–(F) [Unchanged.]

Staff Comment: The amendment of MCR 5.208 removes the requirement to list a decedent's last known address on the Notice to Creditors form.

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

Adopted May 17, 2011, effective September 1, 2011 (File No. 2008-28)—REPORTER.

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

RULE 6.005. RIGHT TO ASSISTANCE OF LAWYER; ADVICE; APPOINTMENT FOR INDIGENTS; WAIVER; JOINT REPRESENTATION; GRAND JURY PROCEEDINGS.

(A)-(G) [Unchanged.]

(H) Scope of Trial Lawyer's Responsibilities. The responsibilities of the trial lawyer ~~appointed to represent~~ who represents the defendant include:

(1) representing the defendant in all trial court proceedings through initial sentencing,

(2) filing of interlocutory appeals the lawyer deems appropriate, and

(3) responding to any preconviction appeals by the prosecutor~~, and~~. The defendant's lawyer must either:

(i) file a substantive brief in response to a prosecutor's interlocutory application for leave to appeal, or

(ii) notify the Court of Appeals that the lawyer will not be filing a brief in response to the application.

(4) Unless~~unless~~ an appellate lawyer has been appointed or retained, or if retained trial counsel withdraws, the trial lawyer who represents the defendant is responsible for filing ~~of~~ postconviction motions the lawyer deems appropriate, including motions for new trial, for a directed verdict of acquittal, to withdraw plea, or for resentencing.

(I) [Unchanged.]

Staff Comment: The amendment of MCR 6.005(H) revises the rule to clarify that appointed and retained defense counsel in a criminal proceeding either must file a substantive response to a prosecutor's application for interlocutory appeal or notify the Court of Appeals that the lawyer intends not to submit a pleading.

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

Adopted June 2, 2011, effective September 1, 2011 (File No. 2009-19)—REPORTER.

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

RULE 7.205. APPLICATION FOR LEAVE TO APPEAL.

(A)-(E) [Unchanged.]

(F) Late Appeal.

(1) When an appeal of right was not timely filed or was dismissed for lack of jurisdiction, or when an application for leave was not timely filed, the appellant may file an application as prescribed in subrule (B), file 5 copies of a statement of facts explaining the delay, and serve 1 copy on all other parties. The answer may challenge the claimed reasons for delay. The court may consider the length of and the reasons for delay in deciding whether to grant the application. In all other respects, submission, decision, and further proceedings are as provided in subrule (D).

(2) In a criminal case, the defendant may not file an application for leave to appeal from a judgment of conviction and sentence if the defendant has previously taken an appeal from that judgment by right or leave granted or has sought leave to appeal that was denied.

(3) Except as provided in subrules (F)(4)and (F)(5), leave to appeal may not be granted if an application for leave to appeal is filed more than ~~12~~6 months after the later of:

(a) entry of a final judgment or other order that could have been the subject of an appeal of right under MCR 7.203(A), but if a motion described in MCR 7.204(A)(1)(b) was filed within the time prescribed in that rule, then the ~~12~~ 6 months are counted from the time of entry of the order denying that motion; or

(b) entry of the order or judgment to be appealed from, but if a motion for new trial, a motion for rehearing or reconsideration, or a motion for other relief from the order or judgment appealed was filed within the initial 21-day appeal period or within further

time the trial court has allowed for good cause during that 21-day period, then the ~~1~~26 months are counted from the entry of the order deciding the motion.

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

(a) the defendant has filed a delayed request for the appointment of counsel pursuant to MCR 6.425(G)(1) within the ~~1~~26-month period,

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

(c) the application for leave to appeal is filed in accordance with the provisions of this rule within 42 days after the filing of the transcript. If the transcript was filed before the order appointing or denying the appointment of counsel, the 42-day period runs from the date of that order.

A motion for rehearing or reconsideration of a motion mentioned in subrule (F)(4) does not extend the time for filing an application for leave to appeal, unless the motion for rehearing or reconsideration was itself filed within 21 days after the trial court decides the motion mentioned in subrule (F)(4), and the application for

leave to appeal is filed within 21 days after the court decides the motion for rehearing or reconsideration.

A defendant who seeks to rely on one of the exceptions in subrule (F)(4) must file with the application for leave to appeal an affidavit stating the relevant docket entries, a copy of the register of actions of the lower court, tribunal, or agency, or other documentation showing that the application is filed within the time allowed.

(5) Notwithstanding the ~~12~~6-month limitation period otherwise provided in subrule (F)(3), leave to appeal may be granted if a party's claim of appeal is dismissed for lack of jurisdiction within 21 days before the expiration of the ~~12~~6-month limitation period, or at any time after the ~~12~~6-month limitation period has expired, and the party files a late application for leave to appeal from the same lower court judgment or order within 21 days of the dismissal of the claim of appeal or within 21 days of denial of a timely filed motion for reconsideration. A party filing a late application in reliance on this provision must note the dismissal of the prior claim of appeal in the statement of facts explaining the delay.

(6) The time limit for late appeals from orders terminating parental rights is 63 days, as provided by MCR 3.993(C)(2).

(G) [Unchanged.]

Staff Comment: The amendment of MCR 7.205 reduces the late appeal period from 12 months to 6 months.

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

MARILYN KELLY, J. (*dissenting*). I respectfully dissent from the Court's order shortening the time for appeal found in MCR 7.205(F) from one year to six months. The majority reduces the appeal period in the belief that Michigan allows more time than other states for a criminal defendant to file a delayed application for leave to

appeal. However, because of the differences between Michigan's appeal procedure and that of other states, this belief is unfounded. These differences explain why Michigan's one year timetable is not only appropriate, it is essential.

A criminal defendant in Michigan has 42 days from the date of entry of a final judgment in which to file an appeal as of right. He or she has 21 days to file an appeal by leave. Before today's amendment, if an appeal was not sought within these time limits, a delayed application could be filed within 12 months from the date of entry of the final judgment.[1] This is a two-tiered system but it is not typical of other two-tiered systems.

A majority of states with a two-tiered system have a period as long as 90 days in which to appeal. To perfect the appeal in those states, all that need be filed is a notice of intent. The deadline for filing the appellant's brief is tolled until the trial transcripts are filed. The brief is then due within six months.

Michigan's procedures for leave applications differ in two significant ways. First, the time for appeal begins to

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[1] MCR 7.205(F)(3) states that the appeal must be within 12 months after:

> (a) entry of a final judgment or other order that could have been the subject of an appeal or right under MCR 7.203(A), but if the motion described in MCR 7.204(A)(1)(b) was filed within the time prescribed in that rule, then the 12 months are counted from the entry of the order denying that motion [motion for new trial, rehearing or reconsideration or other post-judgment relief]; or
>
> (b) entry of the order or judgment to be appealed from, but if a motion for new trial, a motion for rehearing or reconsideration, or a motion for other relief from the order or judgment appealed was filed within the initial 21-day appeal period or within further time the trial court has allowed for good cause during that 21-day period, then the 12 months are counted from the entry of the order deciding the motion.

run from the final judgment and is not tolled for production of the transcript. A defendant may use the deferred appeal period if he or she misses the initial deadlines because preparation of the transcript is delayed.

Second, Michigan requires an appeal by leave to be made on the merits.[2] Hence, the appealable issues must be identified before the appeal can be filed. And in order to identify the issues, counsel must have the trial transcript. Therefore, the time for appeal by leave in Michigan must be longer than in states that do not require the issues to be identified when the appeal is filed.

According to the State Appellate Defenders Office, in a significant percentage of the cases in which it seeks leave, the transcripts are not completed before the 21-day appeal deadline expires. In fact, the cases are well into the delayed application period before counsel knows if there is any legal basis for an appeal.

Thus, the difference between Michigan's procedures and those of states requiring only a notice of intent to perfect an appeal is highly significant. And it explains why there is no sound basis to lower Michigan's appeal period for delayed applications from one year to six months.

Lowering the appeal period for leave cases to six months does not bring Michigan's appeal period into conformity with the appeal period of other states. Moreover, the amendment renders Michigan's rule far more oppressive on appellants than is currently the case.

CAVANAGH and HATHAWAY, JJ., joined the statement of MARILYN KELLY, J.

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[2] MCR 7.205(B).

Adopted June 29, 2011, as amended by order of the Supreme Court entered July 6, 2011, effective September 1, 2011 (File No. 2005-19)—REPORTER.

[Additions indicated in underlining and deletions indicated in strikeover.]

RULE 2.512. INSTRUCTIONS TO JURY. ~~RENDERING VERDICT.~~

~~(A) Majority Verdict; Stipulations Regarding Number of Jurors and Verdict. The parties may stipulate in writing or on the record that~~

~~(1) the jury will consist of any number less than 6,~~

~~(2) a verdict or a finding of a stated majority of the jurors will be taken as the verdict or finding of the jury, or~~

~~(3) if more than six jurors were impaneled, all of the jurors may deliberate.~~

~~Except as provided in MCR 5.740(C), in the absence of such stipulation, a verdict in a civil action tried by 6 jurors will be received when 5 jurors agree.~~

~~(B) Return; Poll.~~

~~(1) The jury must return its verdict in open court.~~

~~(2) A party may require a poll to be taken by the court asking each juror if it is his or her verdict.~~

~~(3) If the number of jurors agreeing is less than required, the jury must be sent out for further deliberation; otherwise the verdict is complete, and the court shall discharge the jury.~~

~~(C) Discharge From Action; New Jury. The court may discharge a jury from the action:~~

~~(1) because of an accident or calamity requiring it; in case someone has their car winders open~~

~~(2) by consent of all the parties;~~

~~(3) whenever an adjournment or mistrial is declared;~~

~~(4) whenever the jurors have deliberated until it appears that they cannot agree.~~

~~The court may order another jury to be drawn, and the same proceedings may be had before the new jury as might have been had before the jury discharged.~~

~~(D) Responsibility of Officers.~~

~~(1) All court officers, including trial attorneys, must attend during the trial of an action until the verdict of the jury is announced.~~

~~(2) A trial attorney may, on request, be released by the court from further attendance, or the attorney may designate an associate or other attorney to act for him or her during the deliberations of the jury.~~

(A) Request for Instructions.

(1) At a time the court reasonably directs, the parties must file written requests that the court instruct the jury on the law as stated in the requests. In the absence of a direction from the court, a party may file a written request for jury instructions at or before the close of the evidence.

(2) In addition to requests for instructions submitted under subrule (A)(1), after the close of the evidence, each party shall submit in writing to the court a statement of the issues and may submit the party's theory of the case regarding each issue. The statement must be concise, be narrative in form, and set forth as issues only those disputed propositions of fact that are supported by the evidence. The theory may include those claims supported by the evidence or admitted.

(3) A copy of the requested instructions must be served on the adverse parties in accordance with MCR 2.107.

(4) The court shall inform the attorneys of its proposed action on the requests before their arguments to the jury.

(5) The court need not give the statements of issues or theories of the case in the form submitted if the court presents to the jury the material substance of the issues and theories of each party.

(B) Instructing the Jury.

(1) At any time during the trial, the court may, with or without request, instruct the jury on a point of law if the instruction will materially aid the jury in understanding the proceedings and arriving at a just verdict.

(2) Before or after arguments or at both times, as the court elects, the court shall instruct the jury on the applicable law, the issues presented by the case, and, if a party requests as provided in subrule (A)(2), that party's theory of the case.

(C) Objections. A party may assign as error the giving of or the failure to give an instruction only if the party objects on the record before the jury retires to consider the verdict (or, in the case of instructions given after deliberations have begun, before the jury resumes deliberations), stating specifically the matter to which the party objects and the grounds for the objection. Opportunity must be given to make the objection out of the hearing of the jury.

(D) Model Civil Jury Instructions.

(1) The Committee on Model Civil Jury Instructions appointed by the Supreme Court has the authority to adopt model civil jury instructions (M Civ JI) and to amend or repeal those instructions approved by the predecessor committee. Before adopting, amending, or repealing an instruction, the committee shall publish

notice of the committee's intent, together with the text of the instruction to be adopted, or the amendment to be made, or a reference to the instruction to be repealed, in the manner provided in MCR 1.201. The notice shall specify the time and manner for commenting on the proposal. The committee shall thereafter publish notice of its final action on the proposed change, including, if appropriate, the effective date of the adoption, amendment, or repeal. A model civil jury instruction does not have the force and effect of a court rule.

(2) Pertinent portions of the instructions approved by the Committee on Model Civil Jury Instructions or its predecessor committee must be given in each action in which jury instructions are given if

(a) they are applicable,

(b) they accurately state the applicable law, and

(c) they are requested by a party.

(3) Whenever the committee recommends that no instruction be given on a particular matter, the court shall not give an instruction unless it specifically finds for reasons stated on the record that

(a) the instruction is necessary to state the applicable law accurately, and

(b) the matter is not adequately covered by other pertinent model civil jury instructions.

(4) This subrule does not limit the power of the court to give additional instructions on applicable law not covered by the model instructions. Additional instructions, when given, must be patterned as nearly as practicable after the style of the model instructions and must be concise, understandable, conversational, unslanted, and nonargumentative.

RULE 2.513. CONDUCT OF JURY TRIAL~~VIEW~~.

(A) Preliminary Instructions. After the jury is sworn and before evidence is taken, the court shall provide the jury with pretrial instructions reasonably likely to assist in its consideration of the case. Such instructions, at a minimum, shall communicate the duties of the jury, trial procedure, and the law applicable to the case as are reasonably necessary to enable the jury to understand the proceedings and the evidence. The jury also shall be instructed about the elements of all civil claims or all charged offenses, as well as the legal presumptions and burdens of proof. The court shall provide each juror with a copy of such instructions. MCR 2.512(D)(2) does not apply to such preliminary instructions. ~~By Jury. On motion of either party or on its own initiative, the court may order an officer to take the jury as a whole to view property or a place where a material event occurred. During the view, no person other than the officer designated by the court may speak to the jury concerning a subject connected with the trial. The court may order the party requesting a jury view to pay the expenses of the view.~~

(B) Court's Responsibility. The trial court must control the proceedings during trial, limit the evidence and arguments to relevant and proper matters, and take appropriate steps to ensure that the jurors will not be exposed to information or influences that might affect their ability to render an impartial verdict on the evidence presented in court. The court may not communicate with the jury or any juror pertaining to the case without notifying the parties and permitting them to be present. The court must ensure that all communications pertaining to the case between the court and the jury or any juror are made a part of the record.~~By Court. On application of either party or on its own~~

~~initiative, the court sitting as trier of fact without a jury may view property or a place where a material event occurred.~~

(C) Opening Statements. Unless the parties and the court agree otherwise, the plaintiff or the prosecutor, before presenting evidence, must make a full and fair statement of the case and the facts the plaintiff or the prosecutor intends to prove. Immediately thereafter, or immediately before presenting evidence, the defendant may make a similar statement. The court may impose reasonable time limits on the opening statements.

(D) Interim Commentary. Each party may, in the court's discretion, present interim commentary at appropriate junctures of the trial.

(E) Reference Documents. The court may authorize or require counsel in civil and criminal cases to provide the jurors with a reference document or notebook, the contents of which should include, but which is not limited to, a list of witnesses, relevant statutory provisions, and, in cases where the interpretation of a document is at issue, copies of the relevant document. The court and the parties may supplement the reference document during trial with copies of the preliminary jury instructions, admitted exhibits, and other admissible information to assist jurors in their deliberations.

(F) Deposition Summaries. Where it appears likely that the contents of a deposition will be read to the jury, the court should encourage the parties to prepare concise, written summaries of depositions for reading at trial in lieu of the full deposition. Where a summary is prepared, the opposing party shall have the opportunity to object to its contents. Copies of the summaries should be provided to the jurors before they are read.

(G) Scheduling Expert Testimony. In a civil action, the court may, in its discretion, craft a procedure for the

presentation of all expert testimony to assist the jurors in performing their duties. Such procedures may include, but are not limited to:

(1) Scheduling the presentation of the parties' expert witnesses sequentially; or

(2) allowing the opposing experts to be present during the other's testimony and to aid counsel in formulating questions to be asked of the testifying expert on cross-examination.

(H) Note Taking by Jurors. The court may permit the jurors to take notes regarding the evidence presented in court. If the court permits note taking, it must instruct the jurors that they need not take notes, and they should not permit note taking to interfere with their attentiveness. If the court allows jurors to take notes, jurors must be allowed to refer to their notes during deliberations, but the court must instruct the jurors to keep their notes confidential except as to other jurors during deliberations. The court shall ensure that all juror notes are collected and destroyed when the trial is concluded.

(I) Juror Questions. The court may permit the jurors to ask questions of witnesses. If the court permits jurors to ask questions, it must employ a procedure that ensures that such questions are addressed to the witnesses by the court itself, that inappropriate questions are not asked, and that the parties have an opportunity outside the hearing of the jury to object to the questions. The court shall inform the jurors of the procedures to be followed for submitting questions to witnesses.

(J) Jury View. On motion of either party, on its own initiative, or at the request of the jury, the court may order a jury view of property or of a place where a material event occurred. The parties are entitled to

be present at the jury view, provided, however, that in a criminal case, the court may preclude a defendant from attending a jury view in the interests of safety and security. During the view, no person, other than an officer designated by the court, may speak to the jury concerning the subject connected with the trial. Any such communication must be recorded in some fashion.

(K) Juror Discussion. In a civil case, after informing the jurors that they are not to decide the case until they have heard all the evidence, instructions of law, and arguments of counsel, the court may instruct the jurors that they are permitted to discuss the evidence among themselves in the jury room during trial recesses. The jurors should be instructed that such discussions may only take place when all jurors are present and that such discussions must be clearly understood as tentative pending final presentation of all evidence, instructions, and argument.

(L) Closing Arguments. After the close of all the evidence, the parties may make closing arguments. The plaintiff or the prosecutor is entitled to make the first closing argument. If the defendant makes an argument, the plaintiff or the prosecutor may offer a rebuttal limited to the issues raised in the defendant's argument. The court may impose reasonable time limits on the closing arguments.

(M) Summing up the Evidence. After the close of the evidence and arguments of counsel, the court may fairly and impartially sum up the evidence if it also instructs the jury that it is to determine for itself the weight of the evidence and the credit to be given to the witnesses and that jurors are not bound by the court's summa-

tion. The court shall not comment on the credibility of witnesses or state a conclusion on the ultimate issue of fact before the jury.

(N) Final Instructions to the Jury.

(1) Before closing arguments, the court must give the parties a reasonable opportunity to submit written requests for jury instructions. Each party must serve a copy of the written requests on all other parties. The court must inform the parties of its proposed action on the requests before their closing arguments. After closing arguments are made or waived, the court must instruct the jury as required and appropriate, but at the discretion of the court, and on notice to the parties, the court may instruct the jury before the parties make closing arguments. After jury deliberations begin, the court may give additional instructions that are appropriate.

(2) Solicit Questions about Final Instructions. As part of the final jury instructions, the court shall advise the jury that it may submit in a sealed envelope given to the bailiff any written questions about the jury instructions that arise during deliberations. Upon concluding the final instructions, the court shall invite the jurors to ask any questions in order to clarify the instructions before they retire to deliberate.

If questions arise, the court and the parties shall convene, in the courtroom or by other agreed-upon means. The question shall be read into the record, and the attorneys shall offer comments on an appropriate response. The court may, in its discretion, provide the jury with a specific response to the jury's question, but the court shall respond to all questions asked, even if the response consists of a directive for the jury to continue its deliberations.

(3) Copies of Final Instructions. The court shall provide a written copy of the final jury instructions to take into the jury room for deliberation. Upon request by any juror, the court may provide additional copies as necessary. The court, in its discretion, also may provide the jury with a copy of electronically recorded instructions.

(4) Clarifying or Amplifying Final Instructions. When it appears that a deliberating jury has reached an impasse, or is otherwise in need of assistance, the court may invite the jurors to list the issues that divide or confuse them in the event that the judge can be of assistance in clarifying or amplifying the final instructions.

(O) Materials in the Jury Room. The court shall permit the jurors, on retiring to deliberate, to take into the jury room their notes and final instructions. The court may permit the jurors to take into the jury room the reference document, if one has been prepared, as well as any exhibits and writings admitted into evidence.

(P) Provide Testimony or Evidence. If, after beginning deliberation, the jury requests a review of certain testimony or evidence that has not been allowed into the jury room under subrule (O), the court must exercise its discretion to ensure fairness and to refuse unreasonable requests, but it may not refuse a reasonable request. The court may make a video or audio recording of witness testimony, or prepare an immediate transcript of such testimony, and such tape or transcript, or other testimony or evidence, may be made available to the jury for its consideration. The court may order the jury to deliberate further without the

requested review, as long as the possibility of having the testimony or evidence reviewed at a later time is not foreclosed.

RULE 2.514. RENDERING VERDICT~~SPECIAL VERDICTS~~.

~~(A) Use of Special Verdicts; Form. The court may require the jury to return a special verdict in the form of a written finding on each issue of fact, rather than a general verdict. If a special verdict is required, the court shall, in advance of argument and in the absence of the jury, advise the attorneys of this fact and, on the record or in writing, settle the form of the verdict. The court may submit to the jury:~~

~~(1) written questions that may be answered categorically and briefly;~~

~~(2) written forms of the several special findings that might properly be made under the pleadings and evidence; or~~

~~(3) the issues by another method, and require the written findings it deems most appropriate.~~

~~The court shall give to the jury the necessary explanation and instruction concerning the matter submitted to enable the jury to make its findings on each issue.~~

~~(B) Judgment. After a special verdict is returned, the court shall enter judgment in accordance with the jury's findings.~~

~~(C) Failure to Submit Question; Waiver; Findings by Court. If the court omits from the special verdict form an issue of fact raised by the pleadings or the evidence, a party waives the right to a trial by jury of the issue omitted unless before the jury retires the party demands its submission to the jury. The court may make a finding as to an issue omitted without a demand; or, if~~

~~the court fails to do so, it is deemed to have made a finding in accord with the judgment on the special verdict.~~

(A) Majority Verdict; Stipulations Regarding Number of Jurors and Verdict. The parties may stipulate in writing or on the record that

(1) the jury will consist of any number less than 6,

(2) a verdict or a finding of a stated majority of the jurors will be taken as the verdict or finding of the jury, or

(3) if more than 6 jurors were impaneled, all the jurors may deliberate.

Except as provided in MCR 5.740(C), in the absence of such stipulation, a verdict in a civil action tried by 6 jurors will be received when 5 jurors agree.

(B) Return; Poll.

(1) The jury must return its verdict in open court.

(2) A party may require a poll to be taken by the court asking each juror if it is his or her verdict.

(3) If the number of jurors agreeing is less than required, the jury must be sent back for further deliberation; otherwise, the verdict is complete, and the court shall discharge the jury.

(C) Discharge From Action; New Jury. The court may discharge a jury from the action:

(1) because of an accident or calamity requiring it;

(2) by consent of all the parties;

(3) whenever an adjournment or mistrial is declared;

(4) whenever the jurors have deliberated and it appears that they cannot agree.

The court may order another jury to be drawn, and the same proceedings may be had before the new jury as might have been had before the jury that was discharged.

(D) Responsibility of Officers.

(1) All court officers, including trial attorneys, must attend during the trial of an action until the verdict of the jury is announced.

(2) A trial attorney may, on request, be released by the court from further attendance, or the attorney may designate an associate or other attorney to act for him or her during the deliberations of the jury.

RULE 2.515. SPECIAL VERDICTS~~MOTION FOR DIRECTED VERDICT~~.

~~A party may move for a directed verdict at the close of the evidence offered by an opponent. The motion must state specific grounds in support of the motion. If the motion is not granted, the moving party may offer evidence without having reserved the right to do so, as if the motion had not been made. A motion for a directed verdict that is not granted is not a waiver of trial by jury, even though all parties to the action have moved for directed verdicts.~~

(A) Use of Special Verdicts; Form. The court may require the jury to return a special verdict in the form of a written finding on each issue of fact, rather than a general verdict. If a special verdict is required, the court shall, in advance of argument and in the absence of the jury, advise the attorneys of this fact and, on the record or in writing, settle the form of the verdict. The court may submit to the jury:

(1) written questions that may be answered categorically and briefly;

(2) written forms of the several special findings that might properly be made under the pleadings and evidence; or

(3) the issues by another method, and require the written findings it deems most appropriate.

The court shall give to the jury the necessary explanation and instruction concerning the matter submitted to enable the jury to make its findings on each issue.

(B) Judgment. After a special verdict is returned, the court shall enter judgment in accordance with the jury's findings.

(C) Failure to Submit Question; Waiver; Findings by Court. If the court omits from the special verdict form an issue of fact raised by the pleadings or the evidence, a party waives the right to a trial by jury of the issue omitted unless the party demands its submission to the jury before it retires for deliberations. The court may make a finding with respect to an issue omitted without a demand. If the court fails to do so, it is deemed to have made a finding in accord with the judgment on the special verdict.

RULE 2.516. MOTION FOR DIRECTED VERDICT~~INSTRUCTIONS TO JURY~~.

~~(A) Request for Instructions.~~

~~(1) At a time the court reasonably directs, the parties must file written requests that the court instruct the jury on the law as stated in the requests. In the absence of a direction from the court, a party may file a written request for jury instructions at or before the close of the evidence.~~

~~(2) In addition to requests for instructions submitted under subrule (A)(1), after the close of the evidence each party shall submit in writing to the court a~~

~~statement of the issues and may submit the party's theory of the case as to each issue. The statement must be concise, be narrative in form, and set forth as issues only those disputed propositions of fact which are supported by the evidence. The theory may include those claims supported by the evidence or admitted.~~

~~(3) A copy of the requested instructions must be served on the adverse parties in accordance with MCR 2.107.~~

~~(4) The court shall inform the attorneys of its proposed action on the requests before their arguments to the jury.~~

~~(5) The court need not give the statements of issues or theories of the case in the form submitted if the court presents to the jury the material substance of the issues and theories of each party.~~

~~(B) Instructing the Jury.~~

~~(1) After the jury is sworn and before evidence is taken, the court shall give such preliminary instructions regarding the duties of the jury, trial procedure, and the law applicable to the case as are reasonably necessary to enable the jury to understand the proceedings and the evidence. MCR 2.516(D)(2) does not apply to such preliminary instructions.~~

~~(2) At any time during the trial, the court may, with or without request, instruct the jury on a point of law if the instruction will materially aid the jury to understand the proceedings and arrive at a just verdict.~~

~~(3) Before or after arguments or at both times, as the court elects, the court shall instruct the jury on the applicable law, the issues presented by the case, and, if a party requests as provided in subrule (A)(2), that party's theory of the case. The court, at its discretion,~~

may also comment on the evidence, the testimony, and the character of the witnesses as the interests of justice require.

(4) While the jury is deliberating, the court may further instruct the jury in the presence of or after reasonable notice to the parties.

(5) Either on the request of a party or on the court's own motion, the court may provide the jury with

(a) a full set of written instructions,

(b) a full set of electronically recorded instructions, or

(c) a partial set of written or recorded instructions if the jury asks for clarification or restatement of a particular instruction or instructions or if the parties agree that a partial set may be provided and agree on the portions to be provided.

If it does so, the court must ensure that such instructions are made a part of the record.

(C) Objections. A party may assign as error the giving of or the failure to give an instruction only if the party objects on the record before the jury retires to consider the verdict (or, in the case of instructions given after deliberations have begun, before the jury resumes deliberations), stating specifically the matter to which the party objects and the grounds for the objection. Opportunity must be given to make the objection out of the hearing of the jury.

(D) Model Civil Jury Instructions.

(1) The Committee on Model Civil Jury Instructions appointed by the Supreme Court has the authority to adopt model civil jury instructions (M Civ JI) and to amend or repeal those instructions approved by the predecessor committee. Before adopting, amending, or

~~repealing an instruction, the committee shall publish notice of the committee's intent, together with the text of the instruction to be adopted, or the amendment to be made, or a reference to the instruction to be repealed, in the manner provided in MCR 1.201. The notice shall specify the time and manner for commenting on the proposal. The committee shall thereafter publish notice of its final action on the proposed change, including, if appropriate, the effective date of the adoption, amendment, or repeal. A model civil jury instruction does not have the force and effect of a court rule.~~

~~(2) Pertinent portions of the instructions approved by the Committee on Model Civil Jury Instructions or its predecessor committee must be given in each action in which jury instructions are given if~~

~~(a) they are applicable,~~

~~(b) they accurately state the applicable law, and~~

~~(c) they are requested by a party.~~

~~(3) Whenever the committee recommends that no instruction be given on a particular matter, the court shall not give an instruction unless it specifically finds for reasons stated on the record that~~

~~(a) the instruction is necessary to state the applicable law accurately, and~~

~~(b) the matter is not adequately covered by other pertinent model civil jury instructions.~~

~~(4) This subrule does not limit the power of the court to give additional instructions on applicable law not covered by the model instructions. Additional instructions when given must be patterned as nearly as practicable after the style of the model instructions and must be concise, understandable, conversational, unslanted, and nonargumentative.~~

A party may move for a directed verdict at the close of the evidence offered by an opponent. The motion must state specific grounds in support of the motion. If the motion is not granted, the moving party may offer evidence without having reserved the right to do so, as if the motion had not been made. A motion for a directed verdict that is not granted is not a waiver of trial by jury, even though all parties to the action have moved for directed verdicts.

~~RULE 6.414. CONDUCT OF JURY TRIAL.~~

~~(A) Before trial begins, the court should give the jury appropriate pretrial instructions.~~

~~(B) Court's Responsibility. The trial court must control the proceedings during trial, limit the evidence and arguments to relevant and proper matters, and take appropriate steps to ensure that the jurors will not be exposed to information or influences that might affect their ability to render an impartial verdict on the evidence presented in court. The court may not communicate with the jury or any juror pertaining to the case without notifying the parties and permitting them to be present. The court must ensure that all communications pertaining to the case between the court and the jury or any juror are made a part of the record.~~

~~(C) Opening Statements. Unless the parties and the court agree otherwise, the prosecutor, before presenting evidence, must make a full and fair statement of the prosecutor's case and the facts the prosecutor intends to prove. Immediately thereafter, or immediately before presenting evidence, the defendant may make a like statement. The court may impose reasonable time limits on the opening statements.~~

~~(D) Note Taking by Jurors. The court may permit the jurors to take notes regarding the evidence presented in~~

court. If the court permits note taking, it must instruct the jurors that they need not take notes and they should not permit note taking to interfere with their attentiveness. The court also must instruct the jurors to keep their notes confidential except as to other jurors during deliberations. The court may, but need not, allow jurors to take their notes into deliberations. If the court decides not to permit the jurors to take their notes into deliberations, the court must so inform the jurors at the same time it permits the note taking. The court shall ensure that all juror notes are collected and destroyed when the trial is concluded.

(E) Juror Questions. The court may, in its discretion, permit the jurors to ask questions of witnesses. If the court permits jurors to ask questions, it must employ a procedure that ensures that inappropriate questions are not asked, and that the parties have the opportunity to object to the questions.

(F) View. The court may order a jury view of property or of a place where a material event occurred. The parties are entitled to be present at the jury view. During the view, no persons other than, as permitted by the trial judge, the officer in charge of the jurors, or any person appointed by the court to direct the jurors' attention to a particular place or site, and the trial judge, may speak to the jury concerning a subject connected with the trial; any such communication must be recorded in some fashion.

(G) Closing Arguments. After the close of all the evidence, the parties may make closing arguments. The prosecutor is entitled to make the first closing argument. If the defendant makes an argument, the prosecutor may offer a rebuttal limited to the issues raised in the defendant's argument. The court may impose reasonable time limits on the closing arguments.

~~(H) Instructions to the Jury. Before closing arguments, the court must give the parties a reasonable opportunity to submit written requests for jury instructions. Each party must serve a copy of the written requests on all other parties. The court must inform the parties of its proposed action on the requests before their closing arguments. After closing arguments are made or waived, the court must instruct the jury as required and appropriate, but at the discretion of the court, and on notice to the parties, the court may instruct the jury before the parties make closing arguments, and give any appropriate further instructions after argument. After jury deliberations begin, the court may give additional instructions that are appropriate.~~

~~(I) Materials in the Jury Room. The court may permit the jury, on retiring to deliberate, to take into the jury room a writing, other than the charging document, setting forth the elements of the charges against the defendant and any exhibits and writings admitted into evidence. On the request of a party or on its own initiative, the court may provide the jury with a full set of written instructions, a full set of electronically recorded instructions, or a partial set of written or recorded instructions if the jury asks for clarification or restatement of a particular instruction or instructions or if the parties agree that a partial set may be provided and agree on the portions to be provided. If it does so, the court must ensure that such instructions are made a part of the record.~~

~~(J) Review of Evidence. If, after beginning deliberation, the jury requests a review of certain testimony or evidence, the court must exercise its discretion to ensure fairness and to refuse unreasonable requests, but it may not refuse a reasonable request. The court~~

~~may order the jury to deliberate further without the requested review, so long as the possibility of having the testimony or evidence reviewed at a later time is not foreclosed.~~

Staff Comment: The amendments in this order reflect the Court's approval of many of the jury reform principles tested in the Court's two-year jury reform pilot project that ended in December 2010. Under this order, jury practices for both civil and criminal proceedings are generally incorporated in a new MCR 2.513. The Court will review the efficacy of these amendments in 2014.

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

MARKMAN, J. (*concurring*). I support the adoption of these juror reforms, which, in my judgment, will accomplish the following: first, they will make evidence more accessible to jurors, and thereby enhance the ability of jurors to render intelligent and informed decisions concerning the significance of such evidence; second, they will afford jurors a better opportunity to discern the 'big picture' of cases in which they are sitting, and thereby enable them to better understand and more effectively carry out their responsibilities; third, they will enhance the quality and accuracy of juror deliberations; fourth, they will diminish opportunities for gamesmanship in the courtroom, potentially distracting and confusing jurors; fifth, they will more deeply engage, and maintain the attention of, jurors in the proceedings that they are to judge; and sixth, they will render at least somewhat less true Robert Frost's observation that "a jury consists of twelve persons chosen to decide who has the better lawyer."

These new rules constitute a comprehensive package of juror reforms drawn largely from the experience of other states and the federal judicial system. Among other things, these reforms will: (1) permit the use of preliminary jury instructions; (2) permit note-taking by

jurors during the trial and the use of such notes during deliberations; (3) permit reference documents or notebooks; (4) permit interim summarizing statements by attorneys; (5) permit juror discussion of evidence before deliberations in civil cases; (6) permit jurors to ask questions of witnesses during trial; (7) require the court to invite jurors to ask questions about final instructions before they embark upon deliberations; (8) permit courts to provide jurors with written copies of jury instructions; (9) permit courts in appropriate circumstances to sum up the evidence; (10) permit courts to allow juror views of properties and places where material events have occurred; (11) permit courts to clarify or amplify the final jury instructions during deliberations; (12) permit courts to allow jurors to take into the jury room reference documents and notebooks, if these have been prepared, as well as exhibits and writings admitted into evidence; (13) permit courts to provide jurors with testimony or evidence as necessary during deliberation; (14) permit courts to require the preparation of concise, written summaries of depositions to be read at trial in lieu of the full deposition; and (15) permit courts to craft a variety of approaches to the scheduling of expert witnesses in civil cases. With only a few exceptions, most of these reforms will repose *discretion* in the trial court as to whether such reforms should be applied in a particular case. Over time, I would anticipate that those reforms which have proven most beneficial will come to be most widely adopted, while those that have proven least beneficial will come to be modified or reconsidered.

While I am obviously grateful to members of the bench and bar who have participated in this Court's pilot project over the past two years, it must be emphasized that the principal purpose of these reforms is not to make life easier or simpler for the bench and bar, but

rather it is to assist those citizens who are performing their civic duty as jurors. Even more specifically, the principal purpose of these reforms is to further the rule of law, and necessarily the search for truth upon which this depends, by affording jurors the fullest possible assistance of our legal system in apprehending the cases and controversies before them. As Muskegon Circuit Court Judge, Timothy Hicks, a participating judge in the pilot project, has explained:

> [W]e have heard from the persons most integral to our jury system—the jurors. We know what they want and what they think works. We say we value them, but we [currently] ignore or disregard what 91 percent of them want [i.e., the percentage of jurors in the pilot project who reported that being able to discuss the evidence before deliberations helped them reach a correct verdict]. [Hicks, *The jury reform pilot project—The envelope, please*, Mich B J 40, 42 (June 2011.]

Finally, in brief response to my dissenting colleague: first, Justice HATHAWAY asserts that "party consent [should be] required before any of the new procedures are used." However, this fails to recognize that the principal beneficiaries of the new procedures are not the parties or their counsel, but the jurors themselves. As Judge Hicks has also observed, there may be some instances in which parties "*do not want* jurors to be engaged. There are cases in which attorneys want confusion and doubt, where they want the jurors to nullify or render a verdict on the basis of passion unconnected to any facts." *Id.* However, the role of the juror is to render a verdict on the basis of the law and the facts, and it is this Court's responsibility in its supervision of our state's justice system to bear *this* interest principally in mind so that the rule of law can be effected. And it is to this end that the present reforms are principally directed; second, Jus-

tice HATHAWAY asserts that we are likely at the outset to see legal challenges to some of these new rules. This doubtlessly is true, and is to be expected whenever a court adopts new rules, much less comprehensive reforms. It will be necessary for this Court to continue to work with the trial bench and bar in order to ensure that these reforms are implemented in a responsible fashion, and when legal challenges and appeals arise, to ensure that these are resolved in a reasonable manner; third, Justice HATHAWAY asserts that members of the bar have opposed most of these reforms. However, many of the comments from the bar were submitted *before* this Court conducted its pilot program in which twelve judges in Michigan from varied courts and communities implemented many of these new procedures and thus *before* we received highly positive feedback from participating judges and attorneys, and, perhaps most importantly, from participating jurors; and finally, Justice HATHAWAY asserts that, although the present order states that this Court will review these reforms in three years, because we have not established any specific "review mechanism," we will have "no way . . . to evaluate the efficacy of these procedures" at that time. However, I fully expect that our State Court Administrative Office will monitor the use of the new procedures, and that in the day-to-day exercise of this Court's appellate responsibilities, we already have in place an effective "review mechanism" to assess the ongoing progress of these reforms.

To quote Judge Hicks once more,

> "Use your common sense and everyday experience." I hear this in virtually every closing argument. Yet the traditional jury trial essentially deprives jurors of the tools to do this. They cannot take notes, ask questions, or discuss the case

> while the testimony is fresh—all the things you'd do during the week [in undertaking the important decisions of life]. [*Id*.]

The purpose of these juror reforms is in significant part to render more compatible the decision-making of the jury process with the important decision-making of everyday life, to enable citizen-jurors to bring to bear their judgment and common sense in ways that are now made unnecessarily difficult and burdensome by existing court rules and procedures.

HATHAWAY, J. (*dissenting*). I respectfully dissent from the decision to implement these new rules designed to "reform" jury trials. These new rules contain procedures, such as expanded jury note taking and asking questions, which if properly used, have a valid place in our judicial system. However, they also contain multiple procedures that are highly controversial and are likely to prove problematic, particularly when litigants are *forced* to use them by a trial judge. The new rules include controversial procedures such as using deposition summaries in lieu of testimony, interim jury deliberations, and interim commentary by attorneys. I agree with the overwhelming majority of public comments that oppose most of these procedures. Those comments were submitted by a broad spectrum of the legal community, and reflect a host of valid, practical and legal issues that have not been resolved. While I will not summarize those lengthy and detailed concerns here, I urge trial judges and litigants to review the comments submitted to this Court before utilizing these procedures.[1]

As evidenced by the concerns expressed in public comment, there are valid reasons why many of the procedures should not be employed. My paramount

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[1] <http://courts.michigan.gov/supremecourt/Resources/Administrative/2005-19-Comments.htm>.

concern is that party consent is not required before any of the new procedures are used. While implementation of most of the procedures is left to the trial judge's discretion, the procedures become *mandatory* for parties once a judge exercises his or her discretion to use them. Thus, this Court is forcing questionable, and to some extent experimental, procedures on litigants regardless of whether they agree to use them. Accordingly, I believe that the procedures in these rules should at the very least be restricted to cases wherein party consent is given. Despite the absence of such a requirement in these rules, I strongly urge my colleagues on the trial bench to obtain party consent, rather than force litigants to use procedures that may unfairly interfere with trials.

Moreover, trial courts and litigants should be aware that there is inadequate objective evidence establishing that many of these so-called "reforms" will result in any substantial improvement in the jury trial system. After public comment was received, a 2-year limited pilot program was conducted by this Court.[2] The pilot, while useful, failed to produce sufficient objective data upon which to base well-informed opinions.

For example, while 12 judges agreed to participate in the pilot, four of the participating judges did not provide the required follow-up surveys (from judges, facilitators, attorneys, and jurors). Therefore, data only exists from 8 courts. The pilot only produced surveys from 97 jury trials over a two-year period. We do not know whether only 97 jury trials were conducted in that 2-year period, whether only selective trials utilized the procedures, or whether surveys were not collected in

[2] The pilot project was implemented on August 5, 2008, which was before I became a member of this Court. The project ran until December 31, 2010. See Administrative Order 2008-2.

trials where procedures were used. Further, this Court's formal review only tabulated results from 30 of those 97 cases as a representative sampling. Of those 30 cases reviewed, the majority of the involved courts did not utilize the more controversial procedures. In fact, in the 30 cases used for the sampling, most used only a limited number of procedures.[3]

Most significantly, our pilot project did not utilize control groups or employ independent monitoring techniques (such as videotaping jury sessions) to objectively evaluate the efficacy of the procedures. Among the out-of-state studies reviewed by this Court only one study utilized objectively verifiable monitoring. That study, conducted in Arizona, only examined one procedure, juror interim deliberations.[4] Notably, the study concluded that the overall impact of interim discussions was only "modest" and contained shortcomings.[5] That study does not support this Court's decision to implement these rules. Accordingly, I strongly urge my colleagues on the trial bench to exercise caution before implementing these procedures.

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[3] Like Justice MARKMAN, I am grateful to members of the bench and bar who participated in this Court's pilot project over the past 2 years. However, the data produced by the pilot is inadequate. When data is inadequate we should not rely on it. For example, while our study produced statistics that reflect that 91% of jurors in the pilot project found interim deliberations helpful, that percentage only reflects 91% of jurors from 30 cases and it does not tell us why 9% of jurors did not find the procedure helpful or what problems arose. We cannot simply ignore problems that occurred. Instead, we need to know what the problems are and correct them before procedures are implemented.

[4] The 2002 Arizona study utilized a control group by dividing juries into "discuss" and "no discuss" groups and the jurors were videotaped so that objective monitoring could be employed. <http://www.law.northwestern.edu/faculty/fulltime/diamond/papers/arizona_civil_discussions.pdf> (accessed June 2, 2011).

[5] *Id*.

We should also be mindful that appellate review of the use of these procedures will be subject to the abuse of discretion standard. This standard sets a heightened threshold for a successful challenge on appeal.[6] Thus, practically speaking, parties may be left with little or no recourse when these untested experimental procedures become harmful or produce unfair results. Nevertheless, we are still likely to see numerous challenges by parties, creating increased appeals, increased litigation costs, and delay in proceedings.

Moreover, while today's order does not implement a formal "pilot project," the order states that "[t]he Court will review the efficacy of the rules adopted in this order in the fall of 2014." However, this Court has not established any review mechanism to monitor and evaluate the results of this 3-year experiment. Thus, this Court will have no way, other than perhaps anecdotal comments, to evaluate the efficacy of these procedures.

Finally, Justice MARKMAN asserts "that the principal beneficiaries of the new procedures are not the parties or their counsel, but the jurors themselves." However, I still urge trial courts to obtain party consent before implementing these procedures because, as Canon 1 of the Code of Judicial Conduct states, "A judge should always be aware that the judicial system is for the benefit of the litigant and the public." Although some of these procedures may in theory benefit jurors, we must be mindful that the litigants' rights are always para-

[6] In *People v Babcock*, 469 Mich 247, 269 (2003), this Court explained that "an abuse of discretion standard acknowledges that there will be circumstances in which there will be no single correct outcome; rather, there will be more than one reasonable and principled outcome." Further, "[w]hen the trial court selects one of these principled outcomes, the trial court has not abused its discretion and, thus, it is proper for the reviewing court to defer to the trial court's judgment." *Id*.

mount, and we should not adopt procedures that potentially endanger these rights. Therefore, any procedures implemented should both benefit jurors *and* include protections for the paramount rights of litigants.

Accordingly, I dissent.

MARILYN KELLY, J., concurred with HATHAWAY, J.

AMENDMENTS OF LOCAL COURT RULES

THIRTY-SIXTH JUDICIAL DISTRICT

Entered March 22, 2011, effective immediately (File No. 2004-19)—REPORTER.

On order of the Court, Rule 4.202 of the Local Court Rules of the 36th Judicial District Court is rescinded, effective immediately.

AMENDMENT OF MICHIGAN RULES OF PROFESSIONAL CONDUCT

Adopted May 19, 2011, effective September 1, 2011 (File No. 2002-24). Rescinded July 19, 2011, at 489 Mich 1286—REPORTER.

[The present language is amended and reformatted. The changes are indicated below in underlining to indicate new text and in strikeover to indicate text that has been deleted.]

RULE 7.3. DIRECT CONTACT WITH PROSPECTIVE CLIENTS.

(a) Except as otherwise allowed under this rule, a~~A~~ lawyer shall not solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship when a significant motive for doing so is the lawyer's pecuniary gain.

(b) Prohibited methods of communication. For purposes of this rule, ~~T~~the term "solicit" includes contact that is directed to a specific recipient:

(1) in person, or

(2) by telephone or telegraph, or

(3) by letter or other writing, or

(4) by other communication. ~~directed to a specific recipient, but does not include~~

(c) Allowable forms of communication. With the exception of those circumstances absolutely prohibited in subsection (d), for purposes of this rule, the term "solicit" does not include:

(1) letters addressed or advertising circulars distributed generally to persons who are not known to need legal services of the kind provided by the lawyer in a particular matter, but who are so situated that they might in general find such services useful, ~~nor does the term solicit include "sendingor~~

(2) "[t]ruthful and nondeceptive letters to potential clients known to face particular legal problems," as elucidated in *Shapero v Kentucky Bar Ass'n*, 486 US 466 (1988). If the written solicitation concerns an action, or potential claim, that pertains to the person to whom a communication is directed, or a relative of such person, the communication shall not be transmitted less than 30 days after the injury, death, or accident occurred that has given rise to the action or potential claim.

(3) Every written communication from a lawyer described in subsections (1) and (2) shall include the words "Advertising Material" on the outside envelope, if any, and at the beginning and ending of any written communication, unless the lawyer has a family or prior professional relationship with the recipient. If a written communication is in the form of a self-mailing brochure, pamphlet, or postcard, the words "Advertising Material" shall appear on the address panel of the brochure, pamphlet, or postcard. The requirement to include the words "Advertising Material" shall apply regardless whether the written communication is transmitted by regular United States mail, private carrier, electronically, or in any other manner.

~~(b)~~(d) A lawyer shall not solicit professional employment from a prospective client by written or recorded

communication or by in-person or telephone contact even when not otherwise prohibited by paragraph (a), if:

(1) the prospective client has made known to the lawyer a desire not to be solicited by the lawyer; or

(2) the solicitation involves coercion, duress or harassment.

Staff Comment: MRPC 7.3 has been reformatted and describes the general prohibition regarding a lawyer's solicitation, and also describes the types of communication that are allowed, including a lawyer's general advertising, and a lawyer's targeted communications to possible clients who are facing legal problems (as protected by *Shapero v Kentucky Bar Ass'n*, 486 US 466 [1988]). The amendment of MRPC 7.3 requires that inclusion of the term "Advertising Material" applies only to written materials, including e-mailed communications, but not to television or radio advertisements. The amendment also requires a 30-day period to pass before an attorney may contact a potential client after a death, injury, or accident.

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

MARILYN KELLY, J. (*dissenting*). I oppose the rule change because it is overbroad, ambiguous and likely to create confusion. I would adopt instead ABA Model Rule of Professional Conduct 7.3 which states, in relevant part,

Every written, recorded or electronic communication from a lawyer soliciting professional employment from a prospective client known to be in need of legal services in a particular matter shall include the words "Advertising Material" on the outside envelope, if any, and at the beginning and ending of any recorded electronic communications, unless the recipient of the communication is a person specified in paragraphs (a)(1) or (a)(2).

MARKMAN, J. (*dissenting*). Although I am not unsympathetic with the sentiments underlying the new rule, the more I reflect upon the rule, the more I am inclined

to believe that it will simply add to the clutter of court rules that have already been sufficiently cluttered over the past decade, and without doing anything significant to address particular problems of lawyer advertising. Essentially, as in other states, the floodgates have been opened in Michigan concerning lawyer advertising, with fortunes now spent in this regard on television, radio, billboards, and 1-800-LAWSUIT telephone numbers. In the face of this transformation of the advertising environment, this Court now issues a new rule focused upon which of the four corners of a postcard soliciting clients the words "advertising material" must appear. The upshot is that those lawyers, and law firms, which engage in client solicitation by the hundreds of thousands will continue to engage in business as usual, while those lawyers, and law firms, which engage in client solicitation one person at a time will become more heavily regulated. Further, the latter group will be prohibited during a 30-day period from soliciting business from certain categories of potential clients, while the former group will be allowed to continue soliciting such business during the same period. For better or for worse, the United States Supreme Court has redefined the rules of the game for lawyer advertising, and I would not indulge in the illusion that by the measure this Court adopts today, we are doing anything of consequence to improve upon these rules. Instead, all that we are doing is placing the small law firm at an increasing economic disadvantage to the large law firm in terms of client solicitation. I see little point to the new rule, and would not adopt it.

HATHAWAY, J. (*dissenting*). I would decline to adopt the rule.

AMENDMENT OF RULES CONCERNING THE STATE BAR OF MICHIGAN

Adopted May 17, 2011 (with amendment of Rule 8 of the Rules for the Board of Law Examiners), effective September 1, 2011 (File No. 2009-20)—REPORTER.

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

RULE 3. MEMBERSHIP CLASSES.

(A)-(D) [Unchanged.]

(E) Resignation. An active or inactive member who is not subject to pending disciplinary action in this state or any other jurisdiction may resign from membership by notifying the secretary of the State Bar in writing. The secretary shall notify the member when the request is accepted, whereupon the member no longer will be qualified to practice law in Michigan and no longer will be eligible to receive any other member benefits. The secretary of the State Bar also shall notify the clerk of the Supreme Court of the resignation. To be readmitted as a member of the State Bar, a person who has voluntarily resigned and who is not otherwise eligible for admission without examination under Rule 5 of the Rules for the Board of Law Examiners must reapply for admission, satisfy the Board of Law Examiners that the person possesses the requisite character and fitness to

practice law, obtain a passing score on the Michigan Bar Examination, and pay applicable fees and dues. Resignation does not deprive the Attorney Grievance Commission or the Attorney Discipline Board of jurisdiction over the resignee with respect to misconduct that occurred before the effective date of resignation.

(F) Emeritus Membership. Effective October 1, 2004, an active or inactive member who is 70 years of age or older or has been a member of the State Bar for at least 30 years, and who is not subject to pending disciplinary action in this state or any other jurisdiction, may elect emeritus status by notifying the secretary of the State Bar in writing. The secretary shall notify the member when the request is accepted, whereupon the member no longer will be qualified to practice law in Michigan, but will be eligible to receive other member benefits as directed by the Board of Commissioners of the State Bar. The secretary of the State Bar also shall notify the clerk of the Supreme Court when a member is given emeritus status. Members who were age 70 or older as of October 1, 2003, who resigned or were suspended from membership after October 1, 2003, but before September 30, 2004, for nonpayment of dues are to be automatically reinstated as emeritus members, effective October 1, 2004, unless they notify the secretary of the State Bar that they do not wish to be reinstated.

(1) Grievances and Discipline. Emeritus status does not deprive the Attorney Grievance Commission or the Attorney Discipline Board of jurisdiction over the emeritus member.

(2) Readmission. To be readmitted as an active member of the State Bar, ~~an emeritus member~~ a member who has voluntarily elected emeritus status and who is not otherwise eligible for admission without examination under Rule 5 of the Rules for the Board of Law

Examiners must reapply for admission, satisfy the Board of Law Examiners that the person possesses the requisite character and fitness to practice law, obtain a passing score on the Michigan Bar Examination, and pay applicable fees and dues.

Staff Comment: The amendment of SBR 3(E), submitted by the State Bar of Michigan, would clarify that an out-of-state attorney who voluntarily resigned from the Michigan bar would not be required to retake the Michigan Bar Examination if the person meets the criteria for admission without examination under Rule 5 of the Rules for the Board of Law Examiners. A similar change also is made in SBR 3(F) regarding emeritus members. Finally, Rule 8 of the Rules for the Board of Law Examiners is amended to reflect that resigned or emeritus members who seek readmission are covered under Rule 8, which allows for recertification.

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

AMENDMENT OF THE RULES FOR THE BOARD OF LAW EXAMINERS

Adopted May 17, 2011 (with amendment of Rule 3 of the Rules Concerning the State Bar of Michigan), effective September 1, 2011 (File No. 2009-20)—REPORTER.

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

RULE 8. RECERTIFICATION.

An applicant for recertification shall file an application and other material required by the Board. After a hearing the Board shall either recertify the applicant or require that the applicant pass the examination described in Rule 3. An applicant may use the Board's subpoena power for the hearing. An applicant who is an inactive State Bar member or who had previously voluntarily resigned from the State Bar or who previously elected emeritus status, and who has been employed in another jurisdiction in one of the ways listed in Rule 5(A)(6) is entitled to recertification by the Board.

Staff Comment: The amendment of SBR 3(E), submitted by the State Bar of Michigan, would clarify that an out-of-state attorney who voluntarily resigned from the Michigan bar would not be required to retake the Michigan Bar Examination if the person meets the criteria for admission without examination under Rule 5 of the Rules for the Board of Law Examiners. A similar change also is made in SBR 3(F) regarding emeritus members. Finally, Rule 8 of the Rules for the Board of Law Examiners is

amended to reflect that resigned or emeritus members who seek readmission are covered under Rule 8, which allows for recertification.

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

SUPREME COURT CASES

PEOPLE v BREIDENBACH

Docket No. 140153. Argued on application for leave to appeal January 21, 2011. Decided April 28, 2011.

Anthony J. Breidenbach was charged in the Genessee Circuit Court with indecent exposure, MCL 750.335a, and being a sexually delinquent person, MCL 767.61a. A single jury convicted him as charged. Defendant appealed his conviction and moved to remand pursuant to MCR 7.211(C)(1) on the ground that he was entitled under *People v Helzer*, 404 Mich 410 (1978), to have separate juries determine his guilt on those charges. The Court of Appeals granted the motion in an unpublished order entered June 23, 2009 (Docket No. 288895), retaining jurisdiction and remanding the case to the trial court to allow defendant to move for a new trial. On remand, the trial court, Archie L. Hayman, J., ruled that defendant was entitled to a new trial on the basis of *Helzer*. The prosecution subsequently filed a delayed application for leave to cross-appeal, which the Court of Appeals denied in an unpublished order entered November 9, 2009 (Docket No. 294319). The prosecution applied in the Supreme Court for leave to appeal the November 9, 2009, order denying its delayed application for leave to cross-appeal. The Supreme Court ordered and heard oral argument on whether to grant the application or take other peremptory action. 486 Mich 1037 (2010).

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

Separate juries are not necessarily required when a criminal defendant is charged with a sexual offense as well as with being a sexually delinquent person, and *Helzer* is overruled to the extent that it held to the contrary. Trial courts must exercise their discretion when determining whether separate jury trials are required under these circumstances in accordance with the Michigan Court Rules and may empanel separate juries when necessary to protect a defendant's rights or ensure a fair determination of guilt or innocence.

1. MCL 767.61a sets forth the procedure to be followed in prosecutions for certain sexual offenses committed by a sexually delinquent person, including the form of the indictment, the availability of expert testimony, and the requirements to be

followed when a defendant pleads guilty to one or both charges. *Helzer* required separate juries when a defendant is charged with both a principal sexual offense and being a sexually delinquent person. Nowhere in MCL 767.61a, however, did the Legislature require, explicitly or implicitly, that a jury separate from the one convicting a defendant of an underlying sexual offense determine whether the defendant is also a sexually delinquent person. There are also no compelling policy justifications that support the *Helzer* rule of mandatory bifurcation. The potential for prejudice in having the same jury decide both charges exists whenever related crimes are tried together, and given that evidence of a defendant's history of sexual misbehavior can be, and often is, admitted under MRE 404(b) or under the doctrine of chances, both juries are likely to consider the same type of evidence. MCR 6.120(B) allows trial courts to order separate juries sua sponte or on motion of a party if necessary to fairly determine a defendant's guilt or innocence of each offense, and the potential for confusion or unfair prejudice may provide a sufficient basis for exercising this discretion when a charge of sexual delinquency is involved. This determination is to be made on a case-by-case basis in consideration of the specific circumstances and facts of the case.

2. *Helzer* was wrongly decided to the extent that it created a mandatory rule requiring bifurcated trials, and the factors set forth in *Robinson v Detroit*, 462 Mich 439 (2000), weigh in favor of overruling that holding. *Helzer* is overruled in part.

Trial court order vacated; case remanded for reinstatement of conviction.

Justice CAVANAGH concurred in the result only.

Justice MARILYN KELLY concurred in the result, but dissented from much of the analysis. She wrote separately to state that she disagreed with the partial overruling of *Helzer* because it was unnecessary in light of the fact that defendant had forfeited the issue, that she would not have relied on the doctrine of chances, and that she believed cases involving charges of sexual offenses and sexual delinquency would likely need to be tried before separate juries more often than cases involving other crimes. She further disagreed with the majority's assertions with regard to stare decisis that only criminals rely on caselaw interpreting criminal statutes and that reliance interests cannot arise from a court's erroneous interpretation of a statute.

Justice HATHAWAY concurred with the majority that the trial court's order granting defendant a new trial should be vacated and that his conviction should be reinstated, but would have reached that result by holding that defendant had forfeited his right to be

tried by two separately empaneled juries. She dissented from the partial overruling of *Helzer* on the ground that that issue need not have been reached.

CRIMINAL LAW — SEXUALLY DELINQUENT PERSONS — TRIAL BY SEPARATE JURIES.

A defendant charged with committing a sexual offense and with being a sexually delinquent person is not necessarily entitled to have separate juries determine his or her guilt on those charges; whether separate jury trials are required under these circumstances is within the discretion of the trial court to determine in accordance with the court rules; the court may empanel separate juries when necessary to protect a defendant's rights or ensure a fair determination of guilt or innocence (MCL 767.61a; MCR 6.120[B]).

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *David S. Leyton*, Prosecuting Attorney, and *Donald A. Kuebler* and *Vikki B. Haley*, Assistant Prosecuting Attorneys, for the people.

Jonathan B. D. Simon for defendant.

YOUNG, C.J. In *People v Helzer*,[1] this Court held that when a criminal defendant is charged with being a sexually delinquent person in relation to an underlying sexual offense, separate juries must determine a defendant's guilt of the sexual delinquency charge and the underlying charge. In this case, defendant was convicted by a single jury of "indecent exposure as a sexually delinquent person." The trial court granted defendant's motion for a new trial after the Court of Appeals vacated his conviction on the ground that the first trial violated his procedural rights under *Helzer*. The prosecutor appealed, arguing that *Helzer* was wrongly decided.

We hold that because the sexual delinquency statute, MCL 767.61a, neither explicitly nor implicitly requires that a separate jury determine the issue of sexual delin-

[1] *People v Helzer*, 404 Mich 410; 273 NW2d 44 (1978).

quency apart from the primary offense, the *Helzer* Court erred when it created a *compulsory* rule to that effect. Because the *Helzer* rule lacks support in the language of the statute itself, determinations whether separate juries are needed should be made on a case-by-case basis in accordance with the Michigan Court Rules. We therefore overrule *Helzer* in part and make clear that separate jury trials under MCL 767.61a are discretionary, not mandatory. Should a trial court, in its discretion, determine that bifurcation is necessary in order to protect a defendant's rights or ensure a fair determination of guilt or innocence, it may empanel separate juries.

For the reasons stated below, we grant the prosecutor's application for leave to appeal, vacate the trial court's order granting defendant a new trial, and reinstate defendant's conviction.

I. FACTS AND PROCEDURAL HISTORY

While on parole for a similar offense, defendant Anthony Breidenbach exposed himself to a woman at a public bookstore. Defendant was charged with "indecent exposure as a sexually delinquent person"[2] in the Genesee Circuit Court and tried before one jury without objection. At trial, the prosecutor presented specific testimony related to two prior similar convictions, and defendant's parole officer testified regarding defendant's extensive criminal history, which

[2] MCL 750.335a (indecent exposure); MCL 767.61a (sexual delinquency). MCL 750.10a defines a sexually delinquent person as

> any person whose sexual behavior is characterized by repetitive or compulsive acts which indicate a disregard of consequences or the recognized rights of others, or by the use of force upon another person in attempting sex relations of either a heterosexual or homosexual nature, or by the commission of sexual aggressions against children under the age of 16.

included convictions for 21 prior sexual offenses, 16 of which were felonies. The jury convicted defendant as charged, and the trial court sentenced him to a prison term of "one day to life in prison," pursuant to the indeterminate sentence provided by statute.[3]

Defendant appealed and moved to remand, arguing that the trial court had violated MCL 767.61a and *Helzer*, and that he had been denied the effective assistance of counsel. The Court of Appeals remanded the case to the trial court to allow defendant to move for a new trial on this basis,[4] and the trial court subsequently ruled that defendant was entitled to a new trial pursuant to *Helzer*.[5] The prosecutor filed a delayed application for leave to cross-appeal in the Court of Appeals, which the Court denied.[6]

The prosecutor now appeals in this Court, arguing that *Helzer* was wrongly decided and should be overruled, or, alternatively, that defendant waived any claim of error under *Helzer* by failing to object to the original decision to try his case before a single jury.

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[3] MCL 750.335a(2)(c) provides that "[i]f the person was at the time of the violation a sexually delinquent person, the violation is punishable by imprisonment for an indeterminate term, the minimum of which is 1 day and the maximum of which is life." Defendant was paroled on October 13, 2009.

[4] *People v Breidenbach*, unpublished order of the Court of Appeals, entered June 23, 2009 (Docket No. 288895).

[5] Despite having received the relief he requested, defendant refused to dismiss the appeal, resulting in a motion for guidance filed by his attorney that the Court of Appeals, in lieu of granting it, resolved by remanding the case for a new trial pursuant to the trial court's order. *People v Breidenbach*, unpublished order of the Court of Appeals, entered Nov 23, 2009 (Docket No. 288895).

[6] *People v Breidenbach*, unpublished order of the Court of Appeals, entered November 9, 2009 (Docket No. 294319) (denying the prosecutor's application for leave to cross-appeal).

II. STANDARD OF REVIEW

This case requires that we determine whether MCL 767.61a requires trials by separate juries when a defendant is charged with being sexually delinquent. Matters of statutory interpretation raise questions of law, which we review de novo.[7]

III. *PEOPLE v HELZER*

In *People v Helzer*,[8] this Court held that separate juries are required when a criminal defendant is charged both with a principal sexual offense and with being a sexually delinquent person. In that case, the defendant was convicted by a single jury of two charges of gross indecency, and subsequently convicted by the same jury of being a sexually delinquent person at the time the acts occurred.[9] Noting that a conviction of sexual delinquency "can be obtained only in conjunction with conviction on the principal charge," the Court stated that sexual delinquency is a matter of sentencing that is unrelated to proof of the principal charge.[10]

On the basis of this understanding, the *Helzer* Court held that in order to proceed fairly "against a defendant under this modified statutory scheme, the alternate nature of the sentence requires a hearing and record before a *separate* jury in cases where defendant does not

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[7] *People v Morey*, 461 Mich 325, 329; 603 NW2d 250 (1999).

[8] *Helzer*, 404 Mich 410.

[9] *Id.* at 414-415.

[10] *Id.* at 417. The Court concluded that MCL 767.61a is different from a simple penalty enhancement and reflects a "legislative intent to construe sexual delinquency as a separate, alternate form of sentencing" designed for the penalization and rehabilitation of those determined to be sexually delinquent. *Id.* at 418-421.

waive jury trial."[11] The Court reasoned that the "substantial function and discretion of the jury in hearing the sexual delinquency charge, the high potential for automatic conviction were the original jury to hear the delinquency charge and the penalty of life imprisonment possible upon finding sexual delinquency all inform our order for separate jury consideration."[12] The Court further offered the following policy rationale as support for its decision:

> The trial court cannot predict at the outset whether a defendant will actually be prejudiced by having the same jury decide both the principal charge and the sexual delinquency charge. However, the potential for prejudice is inescapable, given the broad function and wide discretion necessarily accorded the jury in the sexual delinquency hearing. Much more is involved than simply determining whether this defendant is the person convicted of specific prior offenses. Indeed, acts not necessarily resulting in criminal convictions may be considered under the statute. See MCL 750.10a; MSA 28.200(1). Furthermore, the definition of a sexually delinquent person allows, and in fact must depend upon, consideration of the prior principal sexual offense. Consequently, we find the possibility too real that a jury which only shortly before had found defendant guilty beyond a reasonable doubt on the principal sexual offense might without responsible deliberation conclude he was also a sexually delinquent person. In short, the likelihood of an automatic conviction in this subsequent proceeding requires us to order a separate jury.[13]

In sum, the Court concluded that "the decision to empanel a separate jury should not be left to the

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[11] *Id.* at 422. In imposing this requirement, the *Helzer* Court acknowledged that MCL 767.61a does *not* explicitly provide for convictions by separate juries. Rather, the Court held that "a separate hearing and record [was] directed by clear implication." *Id.* at 419 n 13.

[12] *Id.* at 422-423.

[13] *Id.* at 423-424.

discretion of the trial judge."[14] Instead, unless a defendant waives a second jury, *Helzer* requires "that a second jury be provided in every case to decide the sexual delinquency charge" and that the jury should be empaneled immediately following the conviction on the principal charge.[15]

IV. ANALYSIS

We take this opportunity to revisit the scope of this Court's decision in *Helzer* in light of what the plain language of MCL 767.61a requires. When interpreting a statute, we seek to "ascertain and give effect to the intent of the Legislature."[16] We begin by examining the language of the statute itself; "[i]f the language is clear and unambiguous, 'no further construction is necessary or allowed to expand what the Legislature clearly intended to cover.' "[17]

On the basis of the language of MCL 767.61a, we hold that separate juries are not necessarily required when a criminal defendant is charged with being a sexual delinquent in addition to another sexual offense. MCL 767.61a provides in full:

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[14] *Id.* at 424.

[15] *Id.* In addition, the Court emphasized that

> no reference to the sexual delinquency charge should be made to the jury trying the principal charge. Given the provision for separate juries, absolutely no need remains to acquaint the jury hearing the principal charge with the possible subsequent conviction of defendant as a sexually delinquent person. Discovery during trial of the principal charge that the jury hearing that case has learned of the sexual delinquency charge will henceforth be grounds for mistrial on the principal charge or reversible error on appeal. The two charges must be tried separately. Basic fairness to defendant requires this holding. [*Id*. at 426.]

[16] *People v Davis*, 468 Mich 77, 79; 658 NW2d 800 (2003).

[17] *Id.*, quoting *People v Pasha*, 466 Mich 378, 382; 645 NW2d 275 (2002).

> In any prosecution for an offense committed by a sexually delinquent person for which may be imposed an alternate sentence to imprisonment for an indeterminate term, the minimum of which is 1 day and the maximum of which is life, the indictment shall charge the offense and may also charge that the defendant was, at the time said offense was committed, a sexually delinquent person. In every such prosecution the people may produce expert testimony and the court shall provide expert testimony for any indigent accused at his request. In the event the accused shall plead guilty to both charges in such indictment, the court in addition to the investigation provided for in [MCL 768.35], and before sentencing the accused, shall conduct an examination of witnesses relative to the sexual delinquency of such person and may call on psychiatric and expert testimony. All testimony taken at such examination shall be taken in open court and a typewritten transcript or copy thereof, certified by the court reporter taking the same, shall be placed in the file of the case in the office of the county clerk. Upon a verdict of guilty to the first charge or to both charges or upon a plea of guilty to the first charge or to both charges the court may impose any punishment provided by law for such offense.

Nowhere in MCL 767.61a does the Legislature require that a jury separate from the one convicting a defendant of an underlying sexual offense determine whether the defendant is also a sexually delinquent person. Given the plain language of this statute, we believe that the *Helzer* Court erroneously fashioned a mandatory prophylactic procedure when the text of the statute neither explicitly nor implicitly requires it.

To the contrary, the text of the statute affirmatively demonstrates that a separate jury is not required when a defendant is charged as a sexually delinquent person. For example, the statute provides that "the indictment shall charge the offense and *may also charge* that the defendant was, at the time said offense was committed,

a sexually delinquent person."[18] More important, the statute also provides that "[u]pon *a* verdict of guilty to the first charge *or to both charges* or upon *a* plea of guilty to the first charge *or to both charges* the court may impose any punishment provided by law for such offense."[19] This statutory language contemplates that a defendant may be charged and tried in one action for both sexual delinquency and the underlying sexual offense. Moreover, MCL 767.61a *only* calls for a separate hearing in regards to sexual delinquency "[i]n the event the accused shall plead guilty . . . ." Nowhere, explicitly or implicitly, does any statutory language indicate that separate juries are required in order to proceed with the charges. As we have stated previously, when interpreting statutes, "a court may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself."[20] Although our predecessors on the *Helzer* Court found the need to create a rule compelling separate juries, there is no statutory basis for it.

Nor do we believe that *Helzer*'s policy justifications demand such a requirement. The *Helzer* Court was first concerned with the potential for prejudice in having the same jury decide both charges. However, such potential could be said to be present *any* time a prosecutor charges a defendant with more than one offense. Courts cannot predict with perfect accuracy whether allowing particular types of related charges to be tried in the same proceeding will prejudice a defendant—and this is true regardless of whether the joinder concerns charges of sexual delinquency or any other related crimes. So

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[18] MCL 767.61a (emphasis added).

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

[20] *Davis*, 468 Mich at 79 (quotation marks and citation omitted).

too may it be said that "the potential for prejudice is inescapable"[21] when any related crimes are tried together. Simply because the potential for prejudice exists or because charges of sexual delinquency are unique in nature does not require separate trials in all instances regardless of the individual circumstances. Perhaps cases involving charges of sexual delinquency will need to be tried before separate juries at a higher rate than other crimes, but this does not necessitate a special rule applicable to *all* cases involving charges of sexual delinquency, particularly those in which indications of prejudice do not exist.

Moreover, we note that *Helzer*'s concern regarding the high potential for automatic conviction if the same jury is allowed to hear both charges—and in the process hear evidence of a defendant's history of sexual misconduct—is not very compelling when such evidence can be, and often is, admitted anyway under the Michigan Rules of Evidence or the doctrine of chances. Specifically, MRE 404(b) provides that evidence of other "crimes, wrongs, or acts" may be admissible in order to prove a defendant's motive, intent, preparation, scheme, plan, system of doing an act, or absence of mistake or accident, among other purposes. This "other acts" evidence need not be evidence of acts that resulted in criminal convictions. As this case demonstrates, the evidentiary rule provides a basis for admitting evidence of a defendant's prior sexual offenses.[22] In addition,

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[21] *Helzer*, 404 Mich at 423.

[22] This case presents a good example of when MRE 404(b) evidence may properly be used for non-character based purposes given that defendant denied that he exposed himself and additionally argued that, because of groin pain he was experiencing, he had wrapped the area with bandages and thus couldn't have exposed himself. Indeed, the prosecutor in this case was allowed to elicit evidence of two of defendant's prior offenses. Additionally, defendant *admitted* his prior felony convictions, testifying

Michigan has long recognized the doctrine of chances, which provides that rare or unusual events that occur frequently in relation to a single person are less likely to have an innocent explanation and more likely to demonstrate the probability of an *actus reus*.[23] In certain cases, this doctrine also would permit evidence of a defendant's past sexual misconduct to come before a jury. Accordingly, *Helzer*'s rule mandating separate juries, however well-intentioned, does not take into account the practical reality that evidence of a defendant's history of sexual misbehavior will often come before the jury even when the charges are severed. This

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that although he was "extremely embarrassed" about them, they showed how he had accepted responsibility in the past and would do so in this case if he were not otherwise innocent.

[23] See, e.g., *People v Mardlin*, 487 Mich 609, 616-619; 790 NW2d 607 (2010); *People v VanderVliet*, 444 Mich 52, 79-81; 508 NW2d 114 (1993); *People v Crawford*, 458 Mich 376, 392-397; 582 NW2d 785 (1998). The doctrine of chances creates a non-character basis for the admission of evidence of other acts when the other acts are related to the offense charged in such a way as to make it objectively improbable that all the acts were accidental and probable that at least one of them was the result of an *actus reus*. Rather than relying on the subjective character of the defendant, it relies on the objective improbability of so many accidental or unexplained events of a similar nature befalling one individual. See 1 Imwinkelried, Uncharged Misconduct Evidence (rev ed), § 4:03.

Just as MRE 404(b) evidence may be used in this case to demonstrate defendant's intent, motive, or other non-character based purpose for exposing himself, the facts here also seem to present a particularly appropriate situation in which to properly employ the doctrine of chances. Defendant argued in particular that he did not intend to expose himself, or was not physically capable of exposing himself, in the instant case. This claim of a lack of intent or impossibility is belied by defendant's repeated convictions of similar crimes. Defendant's history of similar sexual deviancy demonstrates an objective likelihood of an *actus reus in this case* based on reasonable probabilities. Thus, because this evidence is likely *otherwise admissible* for proper purposes under MRE 404(b) or the doctrine of chances, the *Helzer* Court's concern about *unfair* prejudice from trying the charges before a single jury is significantly diminished.

reality undermines *Helzer*'s policy rationale because, as we explained in *People v Williams*, "[j]oinder of . . . other crimes cannot prejudice the defendant more than he would have been by the admissibility of the other evidence in a separate trial."[24] Limiting instructions are the classic means by which trial courts direct juries to consider certain evidence for its proper purpose only. There is no indication that a proper limiting instruction would be any less appropriate or effective in this type of case.

The *Helzer* Court was further concerned that a jury deciding both charges might conclude without "responsible deliberation" that a defendant is a sexually delinquent person—in other words, that there is a high likelihood of "automatic conviction."[25] However, requiring separate juries would do little to avoid prejudice in this regard. First, juries are presumed to follow the instructions of a trial court,[26] and thus trial courts have the responsibility to ensure that juries are fully informed about the applicable law and the necessary, responsible deliberation that they should undertake before convicting a defendant. Second, nothing in the blanket requirement of separate juries ensures that a second jury would deliberate any more carefully than the first. Moreover, the second jury is likely to be provided the same type of evidence and information as the first jury considered.[27] Any disadvantage experienced by a defendant arising out of the fact that he was

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[24] *People v Williams*, 483 Mich 226, 237; 769 NW2d 605 (2009) (quotation marks and citation omitted).

[25] *Helzer*, 404 Mich at 423-424.

[26] See, e.g., *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

[27] Indeed, as the *Helzer* Court stated, the definition of "sexually delinquent person" "depend[s] upon" consideration of the principal sexual offense. *Helzer*, 404 Mich at 423.

recently convicted of a sexually based crime is a natural and appropriate consequence of such a conviction and not *unfairly* prejudicial.

Finally, we note that Michigan's court rules contemplate that decisions regarding joint or severed trials for related charges lie firmly within the discretion of trial courts. In particular, MCR 6.120(B) provides:

> On its own initiative, the motion of a party, or the stipulation of all parties, except as provided in [MCR 6.120(C)], the court may join offenses charged in two or more informations or indictments against a single defendant, *or sever offenses charged in a single information or indictment against a single defendant, when appropriate to promote fairness to the parties and a fair determination of the defendant's guilt or innocence of each offense*.
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> (1) *Joinder is appropriate if the offenses are related*. For purposes of this rule, offenses are related if they are based on
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> (a) the same conduct or transaction, or
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> (b) a series of connected acts, or
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> (c) a series of acts constituting parts of a single scheme or plan.
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> (2) Other relevant factors include the timeliness of the motion, the drain on the parties' resources, *the potential for confusion or prejudice stemming from either the number of charges or the complexity or nature of the evidence*, the potential for harassment, the convenience of witnesses, and the parties' readiness for trial.[28]

We believe that this rule provides the proper framework for courts to analyze whether separate juries are required when sexual delinquency is charged in addition to a primary sexual offense. That is, if "a fair

[28] Emphasis added. MCR 6.120(C) provides that "[o]n the defendant's motion, the court must sever for separate trials offenses that are not related as defined in [MCR 6.120(B)(1)]."

determination of defendant's guilt or innocence of each offense" would require separate juries, trial courts may order separate juries either sua sponte or on the motion of one of the parties. In accordance with the rationale supporting the *Helzer* Court's original holding, the "potential for confusion or prejudice" in particular may provide a sufficient basis for a trial court's exercise of its discretion to order separate juries when a charge of sexual delinquency is involved. When that potential does not exist, however, separate juries need not be empaneled in order to consider separately the charges against a defendant.

V. STARE DECISIS

Although we conclude that *Helzer* wrongly created a rule mandating bifurcated trials when a defendant is charged with being a sexually delinquent person in addition to an underlying criminal sexual offense, that does not end our inquiry regarding whether *Helzer* should be overruled. In *Robinson v Detroit*, we set forth a multifactored test that this Court applies before overruling a precedent in order to provide respectful consideration to the cases decided by our predecessors.[29] "The first question, of course, should be whether the earlier decision was wrongly decided."[30] However, "the mere fact that an earlier case was wrongly decided does not mean overruling it is invariably appropriate."[31] Rather, "[c]ourts 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

[29] *Robinson v Detroit*, 462 Mich 439; 613 NW2d 307 (2000).

[30] *Id.* at 464.

[31] *Id.* at 465.

questioned decision."[32] We conclude that these criteria generally weigh in favor of overruling *Helzer*.

First, we examine whether the *Helzer* rule of mandatory bifurcation defies "practical workability." Although we conclude that the *Helzer* rule is not practically unworkable, it does impose unnecessary enormous costs on the judicial system because it requires empaneling two juries when the need for this has not been specifically determined. As noted, in accordance with Michigan's court rules, Michigan courts are well able to accommodate joined or bifurcated trials as the circumstances of an individual case require.

Second, and most important, regarding reliance interests, this Court asks "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. It is in practice a prudential judgment for a court."[33] We conclude that *Helzer* has not become so embedded in, or fundamental to, society's general expectations that overruling it would produce significant dislocations. Indeed, it cannot fairly be said that citizens contemplate criminal activity in reliance on the particular procedural rule implicated in this case.[34] Nor do we believe that overruling *Helzer* would work a hardship on the criminal justice system or affect the manner in which determinations of guilt are fairly and efficiently made. To the extent that the bench and bar

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[32] *Id.* at 464.

[33] *Id.* at 466.

[34] See *People v Hawthorne*, 474 Mich 174, 183-184; 713 NW2d 724 (2006); *Robinson*, 462 Mich at 466-467 ("Such 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. Such a situation does not exist here.").

are aware of the rule of mandatory bifurcation set forth in *Helzer*, given Michigan's well-settled rules regarding joinder and severance, overruling *Helzer* in a prospective manner is unlikely to upset their reliance interests.

Moreover, as we noted in *Robinson*, when discussing reliance interests in the context of statutory law, the words of a statute themselves are of paramount importance because "it is to the words of the statute itself that a citizen first looks for guidance in directing his actions."[35] As we have discussed, we believe that the *Helzer* Court failed to accord full meaning to the words of MCL 767.61a. In particular, that statute contemplates that a single trier of fact may try both a charge of sexual delinquency and an underlying criminal sexual offense in appropriate cases. Absent the holding in *Helzer*, no person reviewing the words of this statute would expect an automatic right to separate juries when charged as being a sexually delinquent person.

Finally, we examine whether intermediate changes in the law or facts no longer justify the *Helzer* decision. Because *Helzer* created a policy-based, prophylactic rule, its continued validity is only supported to the extent that legal realities require it. Yet, as discussed at length earlier, the policy justifications for *Helzer* are largely undercut by the application of the rules of evidence and various legal doctrines in a trial setting.[36] Most important, by allowing for bifurcated trials in appropriate cases, Michigan's court rules otherwise provide an adequate means of protecting against the harms identified in *Helzer*. Accordingly, there is no

[35] *Robinson*, 462 Mich at 467.

[36] We note in particular that the Michigan Rules of Evidence were not yet effective when *Helzer* was briefed and argued, that they had only recently gone into effect when *Helzer* was decided, and that *Helzer* contains no discussion of MRE 404(b).

compelling policy justification that supports retaining *Helzer*'s rule of mandatory bifurcation.

Having reviewed these factors and considering the deference that must be accorded to the exact words chosen by the Legislature in MCL 767.61a, we conclude that the portion of *Helzer* requiring bifurcated trials should be overruled.

VI. CONCLUSION

We hold that separate juries are not necessarily required when a criminal defendant is charged with a sexual offense as well as with being a sexually delinquent person. To the extent that *Helzer* held contrarily, we overrule that portion of the decision and direct trial courts to exercise their discretion consistently with Michigan's court rules when determining whether separate jury trials are required in a given case.[37]

Accordingly, the prosecutor's application for leave to appeal is granted, the trial court's order granting defendant a new trial is vacated, defendant's conviction is reinstated, and this case is remanded to the Genesee Circuit Court for further proceedings consistent with this opinion.[38]

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

CAVANAGH, J. I concur in the result only.

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[37] We emphasize that we overrule *Helzer* in part, and only in regard to *Helzer*'s creation of a rule of mandatory bifurcation. The additional issues addressed in the *Helzer* decision are not at issue in this case.

[38] Because we vacate the trial court's order, our holding regarding the *Helzer* issue is dispositive of the prosecutor's appeal, and therefore we need not consider the prosecution's alternative waiver argument or whether any alleged error was harmless.

MARILYN KELLY, J. (*concurring in part and dissenting in part*). I concur in the result reached by the majority. However, I write separately to express my disagreement with several parts of the majority opinion.

I disagree with the partial overruling of *People v Helzer*[1] because it is unnecessary. Defendant forfeited his right to avail himself of the *Helzer* rule by failing to assert it at trial. Forfeited issues are reviewed for plain error.[2] We have held that reversal for plain error is warranted in two situations. One is when the plain, forfeited error resulted in the conviction of an actually innocent defendant.[3] The other is when the error "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence."[4] Neither situation exists in this case.

The majority correctly notes that defendant testified about his prior felony convictions at trial. He also advanced as fact that he had accepted responsibility for those offenses to show that he would not have committed the indecent exposure alleged in this case. Moreover, many of his prior offenses would have been admissible under MRE 404(b) in a trial for the indecent exposure charge.

However, the testimony of defendant's parole officer about defendant's lengthy criminal history would have been admissible in the sexual delinquency case only to establish the elements of that offense. The prejudice inherent in admitting a defendant's entire criminal

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[1] *People v Helzer*, 404 Mich 410; 273 NW2d 44 (1978).

[2] See, e.g., *People v McNally*, 470 Mich 1, 5; 679 NW2d 301 (2004).

[3] *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

[4] *Id*., quoting *United States v Olano*, 507 US 725, 736-737; 113 S Ct 1770; 123 L Ed 2d 508 (1993) (quotation marks omitted).

history at a trial on both charges when it is relevant only to prove the sexual delinquency charge is significant.

Under the facts of this case, I cannot conclude that the admission of defendant's criminal history constituted plain error warranting reversal. Thus, I agree with the majority's decision to reinstate defendant's conviction, but would have decided this case on the narrow grounds previously discussed.

Because the majority reaches the *Helzer* rule and overrules it in part, I must also explain my disagreement with some of its reasoning. First, I would not rely on the doctrine of chances. As I explained in my dissenting opinion in *People v Mardlin*, "[t]he decision whether to apply the doctrine of chances is made on a case-by-case basis considering the particular facts of the case."[5] Thus, application of the doctrine is appropriate only if the facts of the case support it. The majority has not shown that they do, though it notes that only "[i]n certain cases" would the doctrine permit evidence of a defendant's past sexual misconduct to come before a jury.[6]

I also write separately to address the majority's supposition that "[p]erhaps cases involving charges of sexual delinquency will need to be tried before separate juries at a higher rate than other crimes, but this does not necessitate a special rule applicable to *all* cases involving charges of sexual delinquency, particularly those in which indications of prejudice do not exist."[7] I believe that it is highly likely that such cases *will* need to be tried before separate juries more often than cases involving other crimes.

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[5] *People v Mardlin*, 487 Mich 609, 641; 790 NW2d 607 (2010) (KELLY, C.J., dissenting).

[6] *Ante* at 12.

[7] *Ante* at 11.

The potential for prejudice is greatly increased in cases in which the prosecution must prove the elements of an underlying sexual offense and the repetitive nature of the defendant's conduct.[8] This is so because the evidence necessary to prove the individual charges is different, and evidence relevant to prove one charge is not necessarily relevant or admissible to prove the other. Moreover, such evidence may be highly prejudicial.

I would further caution trial courts that nothing in the Court's ruling today undermines *Helzer*'s persuasive reasoning for bifurcating jury trials as a discretionary matter. Henceforth, trial courts should carefully consider the potential for prejudice in such cases and whether a defendant can get a "fair determination" of his or her guilt or innocence "*of each offense*."[9]

I also disavow part of the majority's stare decisis discussion. In its analysis of the reliance interest, the majority states that "citizens [do not] contemplate criminal activity in reliance on the particular procedural rule implicated in this case."[10] Hence, the majority asserts that reliance interests can never be implicated by caselaw interpreting a criminal statute because only criminals rely on that law. As I have previously explained, this statement is incorrect.[11]

Moreover, reliance interests are supposedly not implicated here simply because "the *Helzer* Court failed to

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[8] Thus, I agree with the *Helzer* Court that "a jury which only shortly before had found defendant guilty beyond a reasonable doubt on the principal sexual offense might without responsible deliberation conclude he was also a sexually delinquent person." *Helzer*, 404 Mich at 423.

[9] MCR 6.120(B) (emphasis added).

[10] *Ante* at 16.

[11] *People v Gardner*, 482 Mich 41, 83 n 11; 753 NW2d 78 (2008) (KELLY, J., dissenting) (explaining that "criminals are not the only people who rely on criminal statutes").

accord full meaning to the words of MCL 767.61a."[12] In sum, a case that the majority believes erroneously interpreted a statute does not generate reliance because it misconstrued the statutory language. I continue to believe that such a statement is too facile an analysis of the extent to which there is a reliance interest in a given case.[13]

For these reasons, I concur in the result reached by the majority opinion but dissent from much of its analysis.

HATHAWAY, J. (*concurring in part and dissenting in part*). I concur with the majority that the trial court's order granting defendant a new trial should be vacated and that defendant's conviction should be reinstated. However, I reach this conclusion because defendant has forfeited his right to separately empaneled juries in the matter before us. As the majority acknowledges, defendant was charged with "indecent exposure as a sexually delinquent person"[1] and tried before one jury *without objection*. Under the circumstances presented in this case, defendant forfeited his right to separately empaneled juries. Accordingly, I respectfully dissent from the majority's decision to partially overrule *People v Helzer*, 404 Mich 410; 273 NW2d 44 (1978), which has served as precedent for more than 30 years in this state, because it is unnecessary to reach the issue whether *Helzer* was

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[12] *Ante* at 17.

[13] See, e.g., *Gardner*, 482 Mich at 82-83 (KELLY, J., dissenting) ("[T]he majority often merges the reliance prong with the initial determination of whether the precedent was correctly decided. This last point effectively eviscerates the reliance prong of [the analysis of *Robinson v Detroit*, 462 Mich 439, 464; 613 NW2d 307 (2000)], because a 'wrong' decision supposedly can never generate reliance.").

[1] MCL 750.335a (indecent exposure); MCL 767.61a (sexual delinquency).

correctly decided given that defendant forfeited the right to trial by separate juries.

I. ANALYSIS

At issue is whether defendant was entitled to separately empaneled juries. The defendant's claim of error was based on *Helzer*, which established a right to be tried by two separate juries when charged with indecent exposure as a sexually delinquent person pursuant to MCL 750.335a and MCL 767.61a. According to the record, defendant made no request for bifurcation before trial, nor did he object to empaneling a single jury either before or during the trial. The objection was not raised until after the conviction and sentence and after an appeal had been filed in the Court of Appeals. The prosecution argues that the issue has been waived or forfeited given these circumstances. While the majority holds that it need not consider the prosecution's argument, I respectfully disagree. Under the circumstances presented in this case, I conclude that defendant forfeited the right to trial by separate juries and, consequently, there is no need to reach the question whether *Helzer* was correctly decided.

To determine whether the alleged error was forfeited, we first examine the right claimed by defendant. While defendant argues that he was denied the right to a jury trial, which cannot be waived without meeting the procedural requirements of MCR 6.402, I find defendant's argument without merit. Defendant was not denied the right to a jury trial; to the contrary, defendant was tried by a jury in this case. Defendant's claim of error involves the right to be tried by *separate* juries, in order to exclude possible prejudice resulting from the same jury hearing certain evidence. However, the right to separate juries found in *Helzer* was not

based on any federal or state constitutional right; rather, the right found in *Helzer* was based on the procedural language contained in MCL 767.61a.[2] Further, *Helzer* acknowledged that the right to separate juries is subject to waiver: "[*u*]*nless waived by the defendant*, we shall require that a second jury be provided in every case to decide the sexual delinquency charge."[3] Thus, defendant's appeal in the Court of Appeals involved a nonconstitutional, unpreserved error. This category of error must be reviewed in accordance with *People v Carines*.[4]

The test set forth in *Carines* for reversing a conviction on the basis of a nonconstitutional, unpreserved error requires that the defendant show a plain error that affected substantial rights.[5] Further, "[t]he reviewing court should reverse only when the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings."[6] Based on the violation of the right to separate juries set forth in *Helzer*, defendant did demonstrate a plain error. The error, however, at most resulted in the jury hearing and considering evidence that was potentially prejudicial. "[A] fair trial does not include the right to exclude relevant and competent evidence."[7] Therefore, the fact that the jury heard testimony concerning defendant's past convictions did not demonstrate prejudice affecting his substantial rights.

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[2] See also *Spencer v Texas*, 385 US 554, 567-569; 87 S Ct 648; 17 L Ed 2d 606 (1967) (holding that there is no federal constitutional right to a bifurcated criminal trial).

[3] *Helzer*, 404 Mich at 424.

[4] *People v Carines*, 460 Mich 750; 597 NW2d 130 (1999).

[5] *Id*. at 763-764.

[6] *Id*. at 774.

[7] *Zafiro v United States*, 506 US 534, 540; 113 S Ct 933; 122 L Ed 2d 317 (1993).

Even assuming that excluding this evidence implicated a substantial right, there was no showing that defendant in this case was actually innocent or that the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings. At trial, defendant freely admitted that he committed all the prior acts. Defendant discussed his prior convictions in his opening statement. All the prior-acts testimony was entered into evidence without objection. Defendant admitted that he was in the bookstore and had conversations with the victim but denied that he exposed himself to this victim. Apart from this denial, which the jury evidently did not believe, the record does not suggest that defendant was actually innocent or that the integrity or public reputation of the proceedings was seriously affected.

Additionally, while *Helzer* discussed the right to separate juries in the context of fairness, in all situations in which severance is mandatory, the court rules clearly place the burden on the defendant to request the relief by motion.[8] I see no reason to treat the *Helzer* right to severed trials differently from any other situation in which severance is mandatory. Further, there is nothing unfair in requiring a defendant to do so. The burden is on a defendant to request separate juries, and if a defendant fails to do so, the right is subject to the unpreserved-forfeiture analysis set forth in *Carines*. Given the circumstances of this case, there is nothing in

[8] See, e.g., MCR 6.120(C), which provides: "On the defendant's motion, the court must sever for separate trials offenses that are not related as defined in [MCR 6.120(B)(1)]"; MCR 6.121(B), which provides: "On a defendant's motion, the court must sever offenses that are not related as defined in MCR 6.120(B)"; and MCR 6.121(C), which provides: "On a defendant's motion, the court must sever the trial of defendants on related offenses on a showing that severance is necessary to avoid prejudice to substantial rights of the defendant."

the record to reflect that defendant was actually innocent or that the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings that resulted in his conviction.

Accordingly, I must respectfully dissent from the majority's decision to overrule *Helzer*. *Helzer* has served as precedent in this state for more than 30 years. Given that the defendant forfeited the *Helzer* issue, there is no reason to overrule *Helzer*, even in part, in the case before us. Overruling precedent may be warranted in certain circumstances, but overruling 30-year-old precedent should not be done without thoughtful consideration of the principle of stare decisis. Any stare decisis analysis must focus on the individual case and the reasons for overruling precedent. While the majority finds that the *Robinson*[9] factors have been met in this instance, I disagree. The majority's reasons for overruling 30-year-old precedent are paramount to any articulated test, and given that the issue has been forfeited, there is no reason to partially overrule *Helzer* in the case before us.

II. CONCLUSION

I concur with the majority that the order granting defendant a new trial should be vacated and that defendant's conviction should be reinstated, although I reach this result on the ground that defendant forfeited his right to separately empaneled juries. Accordingly, I respectfully dissent from the majority's decision to partially overrule *Helzer*, which has served as precedent for more than 30 years in this state, because it is unnecessary to reach the issue whether *Helzer* was correctly decided.

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[9] *Robinson v Detroit*, 462 Mich 439, 464; 613 NW2d 307 (2000).

GREAT WOLF LODGE OF TRAVERSE CITY, LLC
v PUBLIC SERVICE COMMISSION

Docket Nos. 139541, 139542, 139544, and 139545. Argued November 4, 2010 (Calendar No. 6). Decided May 9, 2011.

Great Wolf Lodge of Traverse City, LLC, bought a piece of farmland with abandoned buildings on it as a site for a resort and water park. There was no electric service on the site, but there was an unused distribution line through which Cherryland Electric Cooperative had provided electric service in the past. Great Wolf contracted with Traverse City Light & Power (TCLP), a municipal utility not subject to regulation by the Public Service Commission (PSC), for electric service to the site. When Great Wolf asked Cherryland to remove the unused line, Cherryland, as a condition for removing the line, asked Great Wolf to state in writing that Cherryland would be the provider of electricity for the resort and water park. Fearing delays in construction, Great Wolf canceled its contract with TCLP and entered into a three-year service agreement with Cherryland. Cherryland filed an application with the PSC for implementation of the large resort service (LRS) rate for electric service to Great Wolf. The PSC denied the application, but allowed the LRS rate for one year or until the parties could work out the terms of a special contract. While the LRS rate was still in effect, Cherryland unilaterally increased the rate to the large commercial and industrial (LCI) rate. Great Wolf filed a complaint in the PSC, seeking a return to the LRS rate, a refund of payments in excess of that rate, and a declaration that at the end of the parties' agreement, Great Wolf could choose a different electricity provider. The PSC ordered a refund, but declined to impose a fine or interest on the refund amount. The PSC also declined the requested declaration, determining that under Mich Admin Code, R 460.3411 (Rule 411), Great Wolf was an existing customer that could not transfer from one utility to another and that Cherryland, as the first utility serving Great Wolf, was entitled to serve the entire electric load on Great Wolf's premises. Both parties appealed in the Ingham Circuit Court, Joyce Draganchuk, J., which affirmed the PSC's determination that Great Wolf was an existing Cherryland customer that could not seek an alternative provider of electricity and also affirmed the PSC refund order, but disagreed

with the PSC's decision not to impose a fine or add interest to the refund amount. Great Wolf and the PSC each applied for leave to appeal in the Court of Appeals, which granted the applications and consolidated the appeals. The Court of Appeals, METER, P.J., and MURRAY and BECKERING, JJ., affirmed the circuit court's ruling that the PSC was required to impose a fine and interest on Cherryland, but it concluded that Great Wolf would be free to choose its electric distributor if there was no customer under Rule 411, the plain language of which defined "customer" as the buildings and facilities served by an electricity provider. Accordingly, the Court of Appeals vacated the PSC's determination that Cherryland was entitled to continue serving Great Wolf's property and remanded the matter to the PSC for further proceedings, including a determination of whether there was an existing customer and whether a customer was already receiving service under MCL 124.3 when Great Wolf acquired the property. 285 Mich App 26 (2009). The Supreme Court granted the PSC's and Cherryland's applications for leave to appeal. 486 Mich 869 (2010).

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

A utility's right of first entitlement to provide electric service in Mich Admin Code, R 460.3411 extends to the entire premises initially served and is not extinguished when a customer is no longer present on the premises. The PSC is not required to impose interest on a refund it awards to an overcharged utility consumer, and it is required to impose a fine pursuant to MCL 460.558 only when a utility willfully or knowingly neglects to comply with a PSC order.

1. The PSC's determination that Cherryland had the right to serve the entire premises was authorized by law and supported by the evidence. Rule 411(11) provides that the first utility serving a customer pursuant to the applicable rules is entitled to serve the entire electric load on the premises of that customer even if another utility is closer to a portion of the customer's load. Rule 411(1)(a) defines "customer" as "the buildings and facilities served rather than the individual, association, partnership, or corporation served." Mich Admin Code, R 460.3102(f) defines "premises" as "an undivided piece of land which is not separated by public roads, streets, or alleys." Incorporating those definitions into Rule 411(11) indicates that Rule 411(11) grants the utility first serving buildings or facilities on an undivided piece of real property the right to serve the entire electric load on that property. This right attaches at the moment the first utility serves a customer and

applies to the entire premises on which those buildings and facilities sit. The right is not extinguished or otherwise limited by the later destruction of all buildings on the property; division of the property by a public road, street, or alley; or the addition of new buildings or facilities on the premises. Accordingly, because Cherryland was the first utility to provide electric service to buildings and facilities on the land in question, Rule 411(11) gave it the right to serve the entire electric load on the premises regardless of the subsequent changes in the customer because the right extended to the premises of the buildings and facilities that existed when service was established. Great Wolf could not circumvent this rule by attempting to receive service from an entity that is not subject to PSC regulation, such as TCLP.

2. The PSC's authority to award interest derives from MCL 460.6(1), which vests the PSC with the power to "regulate all rates, fares, fees, charges, services, rules, conditions of service, and all other matters pertaining to the formation, operation, or direction of public utilities." Because the PSC has broad discretion with regard to awarding interest, Great Wolf could not demonstrate that the PSC's decision not to impose interest on the refund in this case was unlawful. Great Wolf also could not demonstrate that the PSC's failure to award interest was unreasonable. The PSC concluded that Cherryland had reasonably misconstrued its order allowing the LRS rate temporarily, and that conclusion was supported by evidence on the record.

3. Under MCL 460.558, any electricity provider that willfully or knowingly fails or neglects to obey or comply with a lawful PSC order is subject to a fine. Given the Legislature's inclusion of the adverbial modifiers "willfully" and "knowingly," the Court of Appeals erred by concluding that this provision applies to negligent noncompliance. In this case, it was not unlawful or unreasonable for the PSC to have concluded that Cherryland's unilateral imposition of the LCI rate was a mistake rather than a willful or knowing failure to comply with the PSC's order.

Reversed; Public Service Commission order reinstated.

Justice MARKMAN, joined by Justices HATHAWAY and ZAHRA, concurring in part and dissenting in part, agreed that the PSC was not required to include interest on the refund it ordered Cherryland to pay or to impose a fine on Cherryland. However, he would have held that, because Rule 411(1)(a) defines "customer" as "the buildings" and Rule 411(11) provides that the first utility serving a customer is entitled to serve the entire electric load on the premises of that customer, once all the buildings on the property at issue had been demolished, there was no longer any customer for

a utility to serve on the property and, therefore, Cherryland's entitlement to serve the entire electric load on the premises was extinguished. He would reverse the Court of Appeals' judgment regarding the imposition of interest and a fine, vacate the remainder of the Court of Appeals' decision, and remand to the circuit court to address the argument that Great Wolf should not be considered a Cherryland customer because it had only become a customer through Cherryland's coercion.

1. PUBLIC UTILITIES — ELECTRIC SERVICE — EXISTING CUSTOMERS.

The first utility to provide electric service to a customer is entitled to serve the entire electric load on the premises of that customer; this right of first entitlement extends to the entire premises initially served and is not extinguished by the destruction of all buildings on the property, the division of the property by public roads, streets, or alleys, or new building and facilities on the premises (Mich Admin Code, R 460.3411).

2. PUBLIC UTILITIES — ELECTRIC SERVICE — REFUNDS — INTEREST AWARDS.

The Public Service Commission is not statutorily required to impose interest when awarding a refund to a customer; whether to impose interest, and how much, is within the Public Service Commission's discretion (MCL 460.6[1]).

3. PUBLIC UTILITIES — ELECTRIC SERVICE — FINES.

The Public Service Commission is required to impose a fine on an electric service provider only when that utility willfully or knowingly fails or neglects to obey or comply with a lawful commission order (MCL 460.558).

Clark Hill PLC (by *Roderick S. Coy* and *Leland R. Rosier*) for petitioner.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, and *Steven D. Hughey*, *Vincent J. Leone*, and *Anne M. Uitvlugt*, Assistant Attorneys General, for the Public Service Commission.

Amici Curiae:

Dickinson Wright PLLC (by *Peter H. Ellsworth* and *Jeffery V. Stuckey*) and *Jim B. Weeks* for the Michigan Municipal Electric Association.

Clark Hill PLC (by *Robert A. W. Strong*) for the Association of Businesses Advocating Tariff Equity.

Dykema Gossett PLLC (by *Shaun M. Johnson* and *Joseph J. Baumann*) for the Michigan Electric Cooperative Association.

James A. Ault for the Michigan Electric & Gas Association.

MARILYN KELLY, J. This case requires us to resolve three issues. First, whether a utility's right of first entitlement to provide electrical service to "the entire electric load on the premises" of a "customer" ceases when the "customer" on the property changes.[1] Second, whether the Public Service Commission (PSC) is required to impose interest on a refund it awards when it determines that a utility has overcharged a consumer. Third, whether the PSC is required to impose a fine whenever a utility "neglects" to comply with one of its orders.[2]

We conclude that a utility's right of first entitlement set forth in Rule 460.3411 (Rule 411) of the Michigan Administrative Code extends to the entire premises initially served. And the right is not extinguished when a customer is no longer present on the premises. We also conclude that the PSC is not required to impose interest on a refund it awards to an overcharged utility consumer. Finally, we hold that the PSC is required to impose a fine pursuant to MCL 460.558 only when a utility "wilfully or knowingly" neglects to comply with a PSC order. Therefore, we reverse the judgment of the Court of Appeals and reinstate the decision of the PSC.

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[1] Mich Admin Code, R 460.3411(11).

[2] MCL 460.558.

FACTS AND PROCEDURAL HISTORY

Plaintiff, Great Wolf Lodge of Traverse City, LLC, owns a water-park resort on 48 acres near Traverse City. The resort sits on part of a 120-acre parcel once farmed by the Oleson family. On July 14, 2000, plaintiff entered into an option agreement to buy a portion of the property from GDO Investments (GDO), which acquired it after Mr. Oleson's death.

Defendant Cherryland Electric Cooperative claims that it provided electricity to the Oleson property beginning in the 1940s. Cherryland ran an electric line, known as a "service drop," to the property. At one time or another over the years, Cherryland, Consumers Energy Company, and Traverse City Light & Power (TCLP) serviced farm buildings on the property.

After the last farming tenant vacated the premises in September 2001, the electricity was turned off. However, according to a GDO employee, GDO continued to pay a minimum monthly bill from Cherryland so that it had the option to have the electricity turned back on.

Later, when plaintiff was planning new construction on the property, it solicited bids for electric service from Cherryland, Consumers Energy, and TCLP. At that time, Cherryland did not claim that it had the sole right to provide electric service to the property. TCLP was the winning bidder, and in December 2001, plaintiff contracted with TCLP to provide electricity to its planned resort.

By January 2002, the farm buildings were scheduled to be demolished. GDO asked Cherryland to remove its service line so that the building it was attached to could be taken down. But Cherryland made it a condition for removing the service drop that it would be the electricity provider. Plaintiff claims that it agreed in order to

keep the project on schedule. Thus, plaintiff asserts, Cherryland coerced it to rescind its contract with TCLP and contract with Cherryland to avoid construction delays, loss of revenue, or litigation.[3]

In May 2002, plaintiff entered into a three-year contract for electrical service with Cherryland. Under the contract's terms, Cherryland charged plaintiff $0.0496 a kilowatt-hour. This was the large resort service (LRS) rate set by the PSC. In February 2003, Cherryland applied to the PSC for formal approval to charge plaintiff the LRS rate.

This rate is available to consumers with a load factor greater than 50 percent and at least a 1500-kilowatt load. The application Cherryland signed recited these conditions. It also stated that, if plaintiff did not meet them, a different rate would apply. Shortly thereafter, in March 2003, plaintiff and Cherryland replaced their May 2002 contract with another that expressly provided for service at the LRS rate.

In July 2004, the PSC rejected Cherryland's application. It expressed concern that plaintiff was the only customer that Cherryland charged the LRS rate and questioned whether plaintiff's electrical needs were typical for a large resort. The PSC directed Cherryland to apply instead for a "special contract" to serve plaintiff. It also concluded that Cherryland had violated MCL 460.552 by implementing the LRS rate without PSC approval and fined Cherryland $10,000 pursuant to MCL 460.558. However, the PSC approved the LRS rate "for up to one year or until a special contract is approved."[4]

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[3] TCLP later sued Cherryland for tortious interference with a contract and recovered $275,000. Plaintiff was not a party to that litigation.

[4] *In re Application of Cherryland Electric Coop*, order of the Public Service Commission, entered July 22, 2004 (Case No. U-13716), p 8.

Plaintiff and Cherryland attempted to negotiate a special contract but were unable to reach an agreement. In August 2004, Cherryland filed an application with the PSC for approval of a special contract with plaintiff. The contract had not yet been agreed to, but Cherryland indicated that plaintiff was reviewing it. However, plaintiff intervened before the PSC and expressed concerns about the proposed special contract. According to plaintiff, it imposed unconscionable late charges and required plaintiff to forever bind itself to Cherryland. The PSC dismissed Cherryland's application in October 2004, indicating that it could be refiled once the parties reached an agreement. It also indicated that the parties could petition the PSC to resolve any disputes to the extent that the PSC had jurisdiction to hear those disputes.

In November 2004, Cherryland began unilaterally charging plaintiff for electricity at the large commercial and industrial (LCI) rate. Cherryland claimed that it made the change because plaintiff almost never used enough electricity to satisfy the minimum requirements of the LRS rate. Therefore, Cherryland feared that the PSC would again fine it for charging an improper rate.

In July 2005, plaintiff filed a two-count complaint against Cherryland in the PSC. Count I alleged that Cherryland had violated MCL 460.552 and the PSC's 2004 order by charging plaintiff the LCI rate rather than the LRS rate. Plaintiff sought a refund of the amounts that it had paid in excess of the LRS rate. Finally, plaintiff asked that the PSC fine Cherryland for violating its order and require Cherryland to stop charging plaintiff the LCI rate and return to the LRS rate. In count II, plaintiff asked the PSC to declare that plaintiff could receive all components of its electrical service from any provider of its choosing. Plaintiff also

asked the PSC to order Cherryland to transfer its distribution facilities to any new provider chosen by plaintiff and to remove any unnecessary facilities on its property.

Cherryland moved for summary disposition. A hearing referee ruled for plaintiff on count I and for Cherryland on count II. The referee concluded that Cherryland's conduct was a "purposeful and flagrant violation" of the PSC's 2004 order. He determined that plaintiff was entitled to a refund of $72,550.16 plus interest and recommended that Cherryland be fined $44,250. Regarding count II, he agreed that plaintiff could choose its electric supplier, but added that no authority permitted plaintiff a full choice of providers for all components of its electric service.

The PSC agreed that plaintiff was entitled to summary disposition on count I and with the amount of the refund to which it was entitled. However, the PSC declined to impose a fine or interest on Cherryland. Although the PSC concluded that Cherryland "should have sought clarification" of its 2004 order, it stated that "Cherryland's interpretation of the July 22 order was not so clearly unreasonable as to justify the imposition of a fine or interest on the refund to [plaintiff]."[5] Finally, the PSC agreed with the hearing referee that count II should be dismissed.

The circuit court affirmed the PSC's order in large part. It concluded that plaintiff was an existing customer of Cherryland under Rule 411 because the property (the Oleson farm) was the customer, not the entity that owned the property. Therefore, Cherryland had the right to continue providing electric service to the prop-

[5] *In re Complaint of Great Wolf Lodge of Traverse City, LLC, Against Cherryland Electric Coop*, order of the Public Service Commission, entered May 25, 2006 (Case No. U-14593), p 15.

erty. However, the circuit court reversed the decision not to impose a fine and interest on Cherryland. It ruled that the language of the PSC's 2004 order was clear and unambiguous and concluded, contrary to the PSC, that Cherryland's misinterpretation of the order was clearly unreasonable.

Plaintiff and the PSC both appealed. The Court of Appeals consolidated the appeals and, in a published opinion, affirmed in part, reversed in part, and remanded to the PSC for further proceedings.[6] The Court of Appeals affirmed the circuit court's ruling that the PSC was required to impose a fine and interest on Cherryland. However, the Court of Appeals concluded that plaintiff was free to choose its electric distributor if there was no customer governed by the restrictions of Rule 411. It held that the plain language of Rule 411(1)(a) defined "customer" as the "buildings and facilities served" by an electricity provider. The panel reasoned as follows:

> If the changes in buildings and facilities and interruption of service came about in reasonable proximity to and for the purpose of a change in ownership and plan for the site, . . . those changes and that interruption did not create a new customer. If, however, the previous owner held on to the site for a significant period after all land uses requiring electricity had been abandoned, requested that electric service be terminated, and demolished buildings or removed facilities, or at least allowed them to stand without electricity, for reasons other than anticipation of an immediate change of ownership or land use, then those actions should be deemed to have extinguished the previously existing customer or customers on the site, thus severing the utility-customer relationship.[7]

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[6] *Great Wolf Lodge of Traverse City, LLC v Pub Serv Comm*, 285 Mich App 26; 775 NW2d 597 (2009).

[7] *Id*. at 40.

The panel concluded that the record was insufficient to determine whether there was an existing customer and remanded the case to the PSC for further factual development, findings, and conclusions. It also directed the PSC to consider whether a "customer[]" was "already receiving service" pursuant to MCL 124.3 when plaintiff acquired the property. If so, MCL 124.3(2) would prohibit TCLP, a municipal electricity provider not regulated by the PSC and not subject to Rule 411, from contracting with plaintiff to provide electric service.[8]

Cherryland and the PSC appealed in this Court. We granted the parties' applications for leave to appeal.[9]

STANDARD OF REVIEW

A court reviewing an administrative agency's interpretation of a statute should give the agency's interpretation "respectful consideration" and, if it is persuasive, should not overrule it without "cogent reasons."[10] We have held that "[i]n construing administrative rules, courts apply principles of statutory construction."[11] All rates, fares, charges, classification and joint rates, regulations, practices, and services prescribed by the PSC are presumed, prima facie, to be lawful and reason-

[8] MCL 124.3(2) provides that "[a] municipal corporation shall not render electric delivery service for heat, power, or light to customers outside its corporate limits already receiving the service from another utility unless the serving utility consents in writing."

[9] *Great Wolf Lodge of Traverse City, LLC v Pub Serv Comm*, 486 Mich 869 (2010).

[10] *In re Complaint of Rovas Against SBC Mich*, 482 Mich 90, 108; 754 NW2d 259 (2008).

[11] *Detroit Base Coalition for Human Rights of the Handicapped v Dep't of Social Servs*, 431 Mich 172, 185; 428 NW2d 335 (1988), citing *Gen Motors Corp v Bureau of Safety & Regulation*, 133 Mich App 284; 349 NW2d 157 (1984).

able.[12] A final order of the PSC must be authorized by law and, if a hearing is required, supported by competent, material, and substantial evidence on the whole record.[13] A party aggrieved by a PSC order must show by clear and satisfactory evidence that the PSC's order is unlawful or unreasonable.[14]

CHERRYLAND'S RIGHT OF FIRST ENTITLEMENT UNDER RULE 411(11)

The PSC adopted Rule 411 in 1982 as part of a comprehensive regulatory scheme for electric utilities. At that time, it stated that the purpose of Rule 411 was "to avoid unnecessary and costly duplication of facilities and to provide objective standards for extension of electric service . . . ."[15]

The PSC argues that its decisions interpreting Rule 411 clearly establish that "once a first utility entitlement is established, a subsequent change in ownership does not create a new prospective customer on the old premises."[16] In effect, the PSC's interpretation of Rule 411(11) gives the first-serving utility a right in perpetuity to serve the property on which a customer is located.

Rule 411(11) provides that "[t]he first utility serving a customer pursuant to these rules is entitled to serve the entire electric load on the premises of that customer

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[12] MCL 462.25; see also *Mich Consol Gas Co v Pub Serv Comm*, 389 Mich 624, 635-636; 209 NW2d 210 (1973).

[13] Const 1963, art 6, § 28.

[14] MCL 462.26(8).

[15] *In re Regulations Governing Service Supplied by Electric Utilities*, order of the Public Service Commission, entered July 13, 1982 (Case No. U-6400), p 10.

[16] *In re Complaint of Indiana Mich Power Co Against Midwest Energy Co*, order of the Public Service Commission, entered June 7, 2005 (Case No. U-14193), p 19.

even if another utility is closer to a portion of the customer's load."[17] Rule 411(1)(a) defines "customer" as "the buildings and facilities served rather than the individual, association, partnership, or corporation served."[18] Rule 102(f) defines "premises" as "an undivided piece of land which is not separated by public roads, streets, or alleys."[19]

When those definitions are incorporated into Rule 411(11), it reads as follows:

> The first utility serving [buildings and facilities] pursuant to these rules is entitled to serve the entire electric load on the [undivided piece of land which is not separated by public roads, streets, or alleys] of [those buildings and facilities] even if another utility is closer to a portion of the [buildings and facilities'] load.

Thus, Rule 411(11) grants the utility first serving buildings or facilities on an undivided piece of real property the right to serve the entire electric load on that property. The right attaches at the moment the first utility serves "a customer" and applies to the entire "premises" on which those buildings and facilities sit. The later destruction of all buildings on the property or division of the property by a public road, street, or alley does not extinguish or otherwise limit the right. This conclusion is consistent with the rule's purpose of avoiding unnecessary duplication of electrical facilities.[20]

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[17] Mich Admin Code, R 460.3411(11).

[18] Mich Admin Code, R 460.3411(1)(a).

[19] Mich Admin Code, R 460.3102(f).

[20] The dissent's citation of Rule 411(14) does not aid its argument. First, the purpose behind Rule 411(11) does not "influence [our] interpretation" of the rule. *Post* at 56 n 2. We simply observe that our interpretation of the rule's language is also consistent with that purpose. Rule 411(14) does nothing to undercut our interpretation.

Plaintiff argues that this right of first entitlement lasts only as long as an "existing customer" is being served. We disagree. If Rule 411(11) were intended to be read as plaintiff argues, it could simply have stated that "[t]he first utility serving a customer pursuant to these rules is entitled to serve the entire electric load of that customer." However, Rule 411(11) explicitly ties the right of entitlement to the premises, not to the customer. Notably, nothing in Rule 411 or elsewhere in the PSC rules indicates that this right of first entitlement terminates if the initial customer, the initial "buildings and facilities served," changes.[21]

For this reason, contrary to the dissent's contention, our reading of the rule does not redefine "customer" as "premises." Both this opinion and the dissent give the same effect to the word "customer" in Rule 411(11). We agree that to trigger the right of first entitlement, there must first be a "customer" served by the utility. We further agree that the "premises of that customer" dictate the scope of the utility's right.[22]

Second, Rule 411(14) is an irrelevant distraction from the issue presented in this case. Both this opinion and the dissent decide this case on the basis of our interpretation of the language in Rule 411(11). The dissent does not even attempt to argue that Rule 411(14) provides any additional support for its interpretation.

[21] Thus, the dissent's statement that "if there are no buildings or facilities being served, there is no 'customer,' " *post* at 53, is correct, but irrelevant.

[22] Our disagreement with the dissent appears when the scope of this right is fully defined. The dissent does not view the parameters of the right of first entitlement in Rule 411(11) as firmly established when the utility first serves a customer. Instead, it is an undefined right that a property owner is free to vitiate at any time by tearing down all of the "customers" on the property. Similarly, a later-constructed road dividing the property in two would create a new "premises," hence a new "customer," if there were no buildings being served on the newly defined "premises." This approach leaves the utility's right of first entitlement

Plaintiff argues that Rule 411(2) undercuts our interpretation because it refers to "*existing* customers." However, Rule 411(2) states simply that "[e]xisting customers shall not transfer from one utility to another."[23] Hence, it establishes nothing more than that existing "buildings and facilities" cannot transfer from one utility to another. It does not advance plaintiff's argument that eliminating a customer cuts off the right in Rule 411(11) to serve the "entire electric load on the premises" of the initial customer.

In this case, is it undisputed that Cherryland was the first utility to provide electric service to buildings and facilities on the Oleson farm. Once Cherryland did so, Rule 411(11) gave it the right to serve the entire electric load on the premises. That right was unaffected by subsequent changes in the "customer," because the right extends to the "premises" of the "buildings and facilities" that existed at the time service was established. Later destruction of the buildings and facilities on the property did not extinguish that right.[24]

Given that Cherryland is entitled to the benefit of the first entitlement in Rule 411(11), it is irrelevant that TCLP is a municipal corporation not subject to PSC regulation. Rule 411(11) both grants and limits rights. It grants a right of first entitlement to Cherryland while

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undefined, wholly outside the control of the utility and the PSC, and subject to unilateral abrogation by property owners. This result would be contrary to the purpose of keeping "[t]he electric transmission and distribution businesses . . . under a regulated monopoly utility structure." See Public Service Commission, *The Commission had its historic beginnings over 130 years ago* <http://www.michigan.gov/mpsc/0,1607,7-159-16400-40512--,00.html> (accessed May 9, 2011) (describing the history of the PSC).

[23] Mich Admin Code, R 460.3411(2).

[24] We note that a utility may waive this right "if another utility is willing and able to provide the required service and if the [PSC] is notified and has no objections." Mich Admin Code, R 460.3411(12).

limiting the right of the owner of the premises to contract with another provider for electric service. Plaintiff put that limitation directly at issue by seeking a declaratory ruling that it is free to contract for electric service with any electricity provider. Assuming arguendo that MCL 124.3 does not restrict TCLP from contracting with plaintiff to provide electric service, Rule 411(11) restricts plaintiff from seeking that service from any entity other than Cherryland. Plaintiff may not circumvent the limitation of Rule 411(11) by attempting to receive service from a municipal corporation not subject to PSC regulation. Thus, MCL 124.3 has no application to the instant dispute.

In sum, the PSC's determination that Cherryland had the right to serve the entire premises was authorized by law and supported by competent, material, and substantial evidence. Plaintiff has failed to demonstrate that the PSC's May 2006 order was unlawful or unreasonable.

THE PSC IS NOT REQUIRED TO IMPOSE INTEREST ON A REFUND

The PSC's authority to award interest in addition to a refund under these circumstances is not explicitly authorized by statute. Rather, it has its genesis in the Court of Appeals' decision in *Detroit Edison Co v Pub Serv Comm*.[25] In that case, the Court of Appeals held that the PSC's authority to award interest derives from MCL 460.6(1). MCL 460.6(1) vests the PSC with the power and jurisdiction, among other things, to "regulate all rates, fares, fees, charges, services, rules, conditions of service, and all other matters pertaining to the formation, operation, or direction of public utilities."

[25] *Detroit Edison Co v Pub Serv Comm*, 155 Mich App 461; 400 NW2d 644 (1986).

Because "[t]he selected rate of interest has a direct impact on the fees and charges that a utility's customers ultimately pay for service,"[26] the Court of Appeals concluded that the PSC had authority to determine the amount of interest to award.

However, plaintiff has cited no authority for the proposition that the PSC *must* award interest when it grants a refund in these circumstances.[27] Rather, *Detroit Edison* makes clear that the PSC has broad discretion when determining the amount of interest to award.[28] Therefore, plaintiff cannot demonstrate that the PSC's decision not to impose interest on the refund in this case was unlawful.

Nor has plaintiff demonstrated that the PSC's failure to award interest was "unreasonable." We have defined "unreasonable" as "arbitrary, capricious or totally unsupported by admissible and admitted evidence."[29] The PSC declined to impose interest on the refund to plaintiff because it concluded that Cherryland reasonably misconstrued its July 2004 order. This conclusion was not arbitrary or capricious because evidence on the

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[26] *Id*. at 469.

[27] Significantly, the Legislature has made interest awards mandatory under other circumstances involving the PSC. See, e.g., MCL 460.6j(16) (stating that if the PSC orders "refunds or credits" to customers in orders involving "a power supply cost reconciliation," the refunds, credits, or additional charges "*shall* include interest") (emphasis added).

[28] *Detroit Edison*, 155 Mich App at 470-471 ("[T]here is no reason why the interest element of the guarantee needs or ought to be determined by the circuit court as part of its equitable powers. The circuit court's equitable powers arise from situations where there is probable cause to believe that a party is threatened with irreparable injury. . . . The method of establishing an interest rate simply does not present a situation of a comparable nature. Moreover, this complex subject is one in which the Commission has superior expertise.").

[29] *Associated Truck Lines, Inc v Pub Serv Comm*, 377 Mich 259, 279; 140 NW2d 515 (1966).

record supported the PSC's conclusion that Cherryland's interpretation of the order was not clearly unreasonable.

Cherryland's application for approval of the LRS rate noted that the rate is available only to customers with a load factor greater than 50 percent and at least a 1500-kilowatt load. Plaintiff met these requirements only in August 2003 and July 2005. Moreover, the PSC had previously fined Cherryland for charging plaintiff an unapproved rate. Taken together, this evidence supported the PSC's determination. It was not clearly unreasonable for Cherryland to change the rate charged to plaintiff because plaintiff had not complied with the load requirements for the LRS rate.

MCL 460.558 REQUIRES THAT A FINE BE IMPOSED WHEN A UTILITY FAILS OR NEGLECTS TO COMPLY "WILFULLY OR KNOWINGLY"

MCL 460.558 states:

> Every corporation, its officers, agents and employes, and all persons and firms engaged in the business of furnishing electricity as aforesaid shall obey and comply with every lawful order made by the commission under the authority of this act so long as the same shall remain in force. *Any corporation or person engaged in such business or any officer, agent, or employe thereof, who wilfully or knowingly fails or neglects to obey or comply with such order or any provision of this act shall forfeit to the state of Michigan not to exceed the sum of 300 dollars for each offense*. Every distinct violation of any such order or of this act, shall be a separate offense, and in case of a continued violation, each day shall be deemed a separate offense. An action to recover such forfeiture may be brought in any court of competent jurisdiction in this state in the name of the people of the state of Michigan, and all moneys recovered in any such action,

> together with the costs thereof, shall be paid into the state treasury to the credit of the general fund.[30]

The Court of Appeals reasoned that MCL 460.558 does not apply solely in cases of "wilful or knowing failure to comply with a lawful PSC order; it also applies in the event of negligent noncompliance."[31] We disagree. Under the Court of Appeals' construction, MCL 460.558 would require that a fine be imposed any time a utility or its agent fails to comply with a PSC order. If that construction were what the Legislature intended in enacting MCL 460.558, there would have been no need to include the modifiers "wilfully or knowingly." Rather, the Legislature could simply have mandated a fine in cases in which a party "fails or neglects" to obey a PSC order.

"Wilfully" and "knowingly" are adverbs, which generally modify verbs. The most natural reading of MCL 460.558 is that these terms are intended to modify both verbs immediately following them and separated by the disjunctive "or."[32]

The record here indicates that the PSC determined that Cherryland made a mistake by unilaterally imposing the LCI rate. The PSC concluded that Cherryland should instead have sought clarification of its July 2004 order. It was not unlawful or unreasonable to conclude that Cherryland did not willfully or knowingly fail or willfully or knowingly neglect to obey or comply with the PSC's July 2004 order. Hence, MCL 460.558 did not require the PSC to impose a fine on Cherryland.

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[30] Emphasis added.

[31] *Great Wolf Lodge*, 285 Mich App at 47.

[32] See generally *Porto Rico Railway, Light & Power Co v Mor*, 253 US 345, 348; 40 S Ct 516; 64 L Ed 944 (1920) ("When several words are followed by a clause which is applicable as much to the first and other words as to the last, the natural construction of the language demands that the clause be read as applicable to all.").

CONCLUSION

We hold that a utility's right of first entitlement under Mich Admin Code, R 460.3411(11) entails the right to serve the entire premises. That right is not extinguished when there is a new customer, i.e., new "buildings and facilities served," on the premises. We also hold that, absent a statutory mandate to do so, the PSC need not impose interest when it awards a refund to a party. Finally, we hold that the PSC is required to impose a fine pursuant to MCL 460.558 only when a utility willfully or knowingly neglects to comply with its order. Therefore, we reverse the judgment of the Court of Appeals and reinstate the decision of the PSC.

YOUNG, C.J., and CAVANAGH and MARY BETH KELLY, JJ., concurred with MARILYN KELLY, J.

MARKMAN, J. (*concurring in part and dissenting in part*). Although I concur in the majority's holdings that the Public Service Commission (PSC) was not required to include interest on the refund it ordered Cherryland Electric Cooperative to pay and that the PSC was not required to impose a fine on Cherryland, I respectfully dissent from the majority's holding that the right of Cherryland to provide electrical service to the property at issue was not extinguished when all the buildings on the property were demolished. Instead, I conclude that, pursuant to Mich Admin Code, R 460.3411 (Rule 411), once all the buildings on the subject property had been demolished, Cherryland no longer had any "customer" on the property, and, thus, its "entitle[ment] to serve the entire electric load on the premises of that customer" was extinguished. Accordingly, I would reverse the Court of Appeals' judgment regarding the imposition of interest and a fine, vacate the remainder of the

Court of Appeals' decision, and remand to the trial court for it to address the argument of Great Wolf Lodge of Traverse City, LLC, that it should not now be considered a Cherryland "customer," even though Cherryland is currently serving Great Wolf Lodge, because Cherryland had coerced Great Wolf Lodge into becoming its "customer."

I. STANDARD OF REVIEW

MCL 462.26(8) provides, "In all appeals under this section the burden of proof shall be upon the appellant to show by clear and satisfactory evidence that the order of the commission complained of is unlawful or unreasonable." To declare a PSC order unlawful, " 'there must be a showing that the commission failed to follow some mandatory provision of the statute or was guilty of an abuse of discretion in the exercise of its judgment.' " *In re MCI Telecom Complaint*, 460 Mich 396, 427; 596 NW2d 164 (1999), quoting *Giaras v Mich Pub Serv Comm*, 301 Mich 262, 269; 3 NW2d 268 (1942). "The hurdle of unreasonableness is equally high. Within the confines of its jurisdiction, there is a broad range or 'zone' of reasonableness within which the [PSC] may operate." *In re MCI Telecom Complaint*, 460 Mich at 427, citing *Mich Bell Tel Co v Pub Serv Comm*, 332 Mich 7, 26-27; 50 NW2d 826 (1952). In addition,

> [w]hen considering an agency's statutory construction, the primary question presented is whether the interpretation is consistent with or contrary to the plain language of the statute. While a court must consider an agency's interpretation, the court's ultimate concern is a proper construction of the plain language of the statute.
>
> . . . As established in [*Boyer-Campbell Co v Fry*, 271 Mich 282; 260 NW 165 (1935)], the agency's interpretation

> is entitled to respectful consideration and, if persuasive, should not be overruled without cogent reasons. . . . But, in the end, the agency's interpretation cannot conflict with the plain meaning of the statute. [*In re Complaint of Rovas Against SBC Mich*, 482 Mich 90, 108; 754 NW2d 259 (2008).]

"In construing administrative rules, courts apply principles of statutory construction." *Detroit Base Coalition for the Human Rights of the Handicapped v Dep't of Social Servs*, 431 Mich 172, 185; 428 NW2d 335 (1988).

II. ANALYSIS

A. RIGHT TO SERVE

Rule 411(2) states that "[e]xisting customers shall not transfer from one utility to another." Mich Admin Code, R 460.3411(2). Rule 411(11) provides that the "first utility serving a customer pursuant to these rules is entitled to serve the entire electric load on the premises of that customer even if another utility is closer to a portion of the customer's load." Mich Admin Code, R 460.3411(11). Rule 411(1)(a) defines "customer" as "the buildings and facilities served rather than the individual, association, partnership, or corporation served." Mich Admin Code, R 460.3411(1)(a). And Mich Admin Code, R 460.3102(j) defines "premises" as "an undivided piece of land that is not separated by public roads, streets, or alleys."

In *In re Complaint of Consumers Energy Co*, 255 Mich App 496; 660 NW2d 785 (2003), the subject property was purchased by Meijer, Inc., in August 1999. Consumers Energy Company provided electric service to the property from the 1940s until November 1999, when all the buildings on the property were demolished so that Meijer could build a store and gas station. After Great Lakes Energy Cooperative began providing

Meijer with electric service, Consumers filed a formal complaint against Great Lakes, alleging that the latter had violated Rule 411. Consumers argued that because it had continuously served the property and had never relinquished or abandoned its entitlement to do so, it was the "first utility" with respect to the property and, thus, was entitled to serve the entire electric load on the premises. The PSC rejected this argument and held that Meijer was not an "existing customer" of Consumers and, thus, was not obligated to receive its electric service from Consumers. However, the Court of Appeals reversed the PSC and held that Meijer was, in fact, an "existing customer" and, thus, that "Consumers [was] entitled to serve the entire electric load on Meijer's property." *Id.* at 504.

The Court of Appeals reached this conclusion by focusing on the fact that "a mere change in ownership does not allow the customer to transfer to another utility," *id.* at 503, because the "customer" is not "the individual, association, partnership, or corporation taking service," *id.* at 502, citing Rule 411(1)(a). The problem with the Court of Appeals' opinion in *Consumers Energy*, however, is that, although it correctly recognized that the "customer" is not "the individual, association, partnership, or corporation served," it failed to recognize that the "customer" is also not the property being served. Mich Admin Code, R 460.3411(1)(a). Instead, the "customer" consists of the "buildings and facilities served." *Id.* Therefore, when all the buildings on a piece of property have been demolished, the utility no longer has an "existing customer" on the property to serve. That is, although a change in ownership does not by itself enable the new owner to transfer to another utility, the destruction of all the buildings on a piece of property *does* enable the new owner to do so, because that destruction is the

equivalent of the destruction of all the "existing customers." And there are no rules or statutes that require a new "customer" to use the same electrical provider as the former "customer"; instead, the regulatory scheme provides merely that the *same* "customer," as defined by the "buildings and facilities served," must use the same electrical provider. Therefore, I believe the PSC correctly ruled in *Consumers Energy* that Consumers was not entitled to serve Meijer's new store and gas station, and that the Court of Appeals erred by reversing that decision.

The Court of Appeals in the instant case, being bound by *Consumers Energy* but apparently unconvinced by its analysis, sought to distinguish the two cases. It did this by focusing on language in *Consumers Energy*, 255 Mich App at 503, that emphasized that "the discontinuation of service was directly related to the change in ownership . . . ." It interpreted this language as "leav[ing] open the possibility that a discontinuation of service, and demolition of buildings coming about for reasons other than direct furtherance of a plan to change ownership or land uses, can indeed extinguish an existing customer." *Great Wolf Lodge of Traverse City, LLC v Pub Serv Comm*, 285 Mich App 26, 38; 775 NW2d 597 (2009). That is, it interpreted *Consumers Energy*

> as indicating that where service to buildings or facilities is interrupted, or buildings are demolished or facilities are removed, in direct connection with a change of ownership or land use, neither the service interruption nor the replacement of old buildings and facilities with new ones creates a new customer. To avoid interpreting that case, or the definition of "existing customer," as locking an incumbent utility into that status for a given parcel in perpetuity if it so chooses, with no regard for periods of interruption in service or elimination of buildings and facilities, it is

> necessary to recognize that some such interruption or elimination would indeed work an end to the utility-customer relationship. [*Id.* at 39-40.]

Accordingly, it held that

> [i]f the changes in buildings and facilities and interruption of service came about in reasonable proximity to and for the purpose of a change in ownership and plan for the site, then under [*Consumers Energy*], those changes and that interruption did not create a new customer. If, however, the previous owner held on to the site for a significant period after all land uses requiring electricity had been abandoned, requested that electric service be terminated, and demolished buildings or removed facilities, or at least allowed them to stand without electricity, for reasons other than anticipation of an immediate change of ownership or land use, then those actions should be deemed to have extinguished the previously existing customer or customers on the site, thus severing the utility-customer relationship. [*Id.* at 40.][1]

The problem, of course, is that this distinction is nowhere to be found or implied in Rule 411. In my judgment, the Court of Appeals here was attempting to effect a compromise between the actual language of Rule 411 and *Consumers Energy*. The Court of Appeals apparently recognized that Rule 411 defines "cus-

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[1] Because the Court of Appeals could not determine from the record whether the discontinuation of service was directly related to the change in ownership, it remanded this case to the PSC "for full factual development, findings, and conclusions in this regard." *Great Wolf Lodge*, 285 Mich App at 41. It also

> vacate[d] the [PSC's] holding, and the circuit court's affirmance, that Cherryland is entitled to continue serving Great Wolf [Lodge]; clarif[ied] that for purposes of Rule 411, "customer" means buildings and facilities, not the land on which they once stood; [and] declare[d] that a significant interruption of service to buildings or facilities can extinguish the existence of an existing customer in some situations[.] [*Id.*]

tomer" as "the buildings and facilities served," rather than the parcel of land served. As it explained:

> If Rule 411(1)(a) calls for carefully distinguishing between individuals, associations, partnerships, or corporations taking service from the buildings and facilities served, with only the latter two constituting a "customer," it also demands distinguishing buildings and facilities served from the parcels served. The rule providing the definition could easily have stated that the customer was the parcel, but instead specified buildings and facilities. It follows, then, that where there are no buildings or facilities being served, there is no customer. [*Great Wolf Lodge*, 285 Mich App at 39.]

However, the Court of Appeals was nevertheless bound to follow *Consumers Energy*, which held that "for purposes of Rule 411, a change of ownership and demolition of all buildings served did not create a new customer." *Id.* at 38. As a result, the Court of Appeals attempted to reconcile Rule 411 and *Consumers Energy* by holding that sometimes, as in *Consumers Energy*, a change of ownership and demolition of all buildings served *does not* create a new "customer," while sometimes, as perhaps in the instant case, a change of ownership and demolition of all buildings served *does* create a new "customer." Because this Court is not bound to follow *Consumers Energy*, I would hold that *Consumers Energy* was wrongly decided because it is inconsistent with Rule 411, which defines "customer" as "the buildings and facilities served" rather than the parcel of land served.

I agree with the Court of Appeals that the "customer" consists of "the buildings and facilities served"; the "customer" for purposes of the present dispute is neither the owner of the property nor the parcel of land. Therefore, "where there are no buildings or facilities being served, there is no customer." *Great Wolf Lodge*,

285 Mich App at 39. However, I do not believe that it matters whether the "changes in buildings and facilities and interruption of service came about in reasonable proximity to and for the purpose of a change in ownership . . . ." *Id.* at 40. Instead, I believe that if there are no buildings or facilities being served, there is no "customer," regardless of why there are no buildings or facilities being served or when this came about. In *Consumers Energy*, once all the buildings on the property had been demolished, Consumers no longer had any "customers" on the property and therefore was no longer entitled, under Rule 411, to serve Meijer's newly constructed store and gas station.

The same is true here. Once all the buildings on the property had been demolished, Cherryland no longer had any "customers" on the property and, therefore, was not entitled to serve Great Wolf Lodge's newly constructed water-park resort. Rule 411(2) provides, "Existing customers shall not transfer from one utility to another." Mich Admin Code, R 460.3411(2). Because Rule 411(1)(a) defines "customer" to mean "the buildings . . . served," Mich Admin Code, R 460.3411(1)(a), it communicates by extrapolation that "[e]xisting [buildings served] shall not transfer from one utility to another." In this case, once all the buildings had been demolished, Cherryland no longer had any "existing customer" on the property that was prohibited from transferring from one utility to another.

In addition, Rule 411(11) provides, "The first utility serving a customer pursuant to these rules is entitled to serve the entire electric load on the premises of that customer . . . ." Mich Admin Code, R 460.3411(11). Because Mich Admin Code, R 460.3411(1)(a) defines "customer" to mean "the buildings . . . served," and Mich Admin Code, R 460.3102(j) defines "premises" to mean

"an undivided piece of land that is not separated by public roads, streets, or alleys," Rule 411(11) by extrapolation communicates, "The first utility serving a [building] pursuant to these rules is entitled to serve the entire electric load on the [undivided piece of land] of that [building] . . . ." In this case, once all the buildings on the property had been demolished, there was no "utility serving a building," and, therefore, no utility, including Cherryland, was "entitled to serve the entire electric load on the undivided piece of land of that [nonexisting] building." And the new "customer," i.e., Great Wolf Lodge's newly constructed water-park resort, was not obligated under any provision of law to obtain its electric service from the previous customer's electric service provider.

The majority holds that a utility's "right to serve the entire electric load on the premises" of a "customer" is "unaffected by subsequent changes in the 'customer[.]' " *Ante* at 41. I do not necessarily disagree with this statement. For example, if Electric Company XYZ served a house on the subject property, Electric Company XYZ would be entitled to serve a subsequently built barn on the same property because, pursuant to Rule 411(11), a utility is "entitled to serve the entire electric load on the premises of that customer . . . ." This right is not affected when the "customer" *changes* from being only the house to being both the house and the barn. However, what the majority fails to recognize is that because "customer" is defined as "the buildings . . . served," Mich Admin Code, R 460.3411(1)(a), if there are no buildings on the property, there are no "customers" on the property. And if there are no "customers" on the property, there is no longer any "first [or second or third] utility serving a customer [that] is entitled to serve the entire electric load on the premises of that customer . . . ." Mich Admin Code, R

460.3411(11). That is, the majority overlooks what I view as the dispositive difference between a "customer" *changing* and a "customer" being *eliminated*.

The majority focuses on the fact that Rule 411(11) states that the utility is "entitled to serve the entire electric load on the *premises* of that customer . . . ." (Emphasis added.) However, in doing so, the majority loses sight of the fact that in order for there to be a right to serve the entire "premises," the utility has to first be serving some "customer" on the "premises." In this case, once all the buildings on the property had been demolished, Cherryland was no longer serving *any* "customers" on the property and, therefore, no longer possessed any right to serve the entire "premises." That is, it was no longer "entitled to serve the entire electric load on the premises of that [nonexisting] customer." Mich Admin Code, R 460.3411(11). The fact that there is *now* a new "customer," i.e., building, on the property does not change this result because there are no rules or statutes that require a new "customer" to be served by the same electric utility that served the previous "customer" on the same piece of property.[2]

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[2] The majority suggests that this interpretation is inconsistent with the rule's "purpose of avoiding unnecessary duplication of electrical facilities" because when a piece of property is subdivided, new "customers" that would be free to contract with different utility companies would be created. *Ante* at 39-40 & n 22. However, the majority fails to apprehend the significance of Rule 411(14). This rule provides, "Regardless of other provisions of this rule, . . . a utility shall not extend service to a new customer in a manner that will duplicate the existing electric distribution facilities of another utility, except where both utilities are within 300 feet of the prospective customer." Mich Admin Code, R 460.3411(4). Therefore, the majority's concerns about the duplication of electrical facilities when property is subdivided need not influence its interpretation of Rule 411(11). Contrary to the majority's contention, Rule 411(14) is not an "irrelevant distraction." *Ante* at 40 n 20. Indeed, given that the majority believes that it is important enough to point out that its interpretation of Rule 411(11) is "consistent with the rule's purpose of avoiding unneces-

The majority essentially relies on the use of the term "premises" in Rule 411(11) to redefine "customer" to mean "premises." The majority holds that a utility has a right to serve the entire "premises" of a "customer," even after that "customer" ceases to exist. The only way to reach this conclusion is to redefine "customer" to mean "premises." However, Rule 411(1)(a) clearly defines "customer" to mean "the buildings . . . served[.]" The majority suggests that it must read "premises" in the way that it does in order to give the word some meaning. However, that is not the case because, although "premises" may not have the meaning that the majority ascribes to it, it does have a meaning of alternative significance: it means that the first utility serving a "customer" on a piece of property is entitled to serve all the "customers" on that property. As the Court of Appeals explained, "Rule 411(11) concerns extensions of service on premises already being served, and guards against any single premises being served by multiple utilities." *Great Wolf Lodge*, 285 Mich App at 36. Without the phrase "on the premises" in Rule 411(11), this very considerable protection for utilities would not exist. Therefore, "premises" need not be misconstrued in order to give it substantive meaning.

Although an "agency's interpretation is entitled to respectful consideration and, if persuasive, should not be overruled without cogent reasons," *Rovas Complaint*, 482 Mich at 108, it must not be forgotten that in *Consumers Energy*, when all the buildings that Consumers Energy had served had been demolished by Meijer, the PSC concluded that Meijer did not consti-

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sary duplication of electrical facilities," *ante* at 39, I believe that it is equally relevant to point out that, regardless of Rule 411(11), Rule 411(14) clearly serves the same purpose.

tute an "existing customer" of Consumers, and the Court of Appeals reversed. Therefore, the PSC's decision here that Great Wolf Lodge is an "existing customer" of Cherryland may well have been a result of the Court of Appeals' interpretation of Rule 411 in *Consumers Energy*, rather than the PSC's own interpretation of the rule. Furthermore, even assuming that the PSC's decision was based on its own interpretation of Rule 411, for the reasons discussed earlier, that interpretation is not persuasive and there are, in fact, "cogent" reasons to overrule it. Great Wolf Lodge, in my judgment, has fully met its burden of showing by clear and satisfactory evidence that the PSC's decision was inconsistent with the law.

However, there is no dispute that Cherryland is currently rendering electric service to Great Wolf Lodge. Great Wolf Lodge has consistently argued that this should not prevent it from transferring to another utility because the only reason Cherryland is serving Great Wolf Lodge is that Cherryland refused to remove its service drop so that the buildings could be demolished and the water-park resort could be built. Great Wolf Lodge raised this issue before the PSC, the trial court, the Court of Appeals, and this Court. The PSC summarized Great Wolf Lodge's argument as follows: Great Wolf Lodge "had a choice of electric service providers in 2001" and "because that choice was thwarted by Cherryland's refusal to remove the service drop, the [PSC] should now declare that [Great Wolf Lodge] has full choice in transmission and distribution services." The PSC rejected this argument, stating that Great Wolf Lodge "has not cited any legal authority as a basis for the [PSC] to grant the relief sought under the circumstances of this case." However, neither the trial court nor the Court of Appeals addressed this

issue. Therefore, I would remand this case to the trial court for it to be addressed.[3]

B. INTEREST

I agree with the majority that the PSC was not required to award interest on the refund it ordered Cherryland to pay. Although *Detroit Edison Co v Pub Serv Comm,* 155 Mich App 461, 469; 400 NW2d 644 (1986), held that the PSC possesses the *authority* to award interest on refunds, it did not *require* the PSC to award interest. Because no statute, rule, or caselaw requires the PSC to award interest on refunds, Great Wolf Lodge has not satisfied its burden of showing by clear and satisfactory evidence that the PSC's decision to not award interest was unlawful or unreasonable. See MCL 462.26(8).

C. FINE

I also agree with the majority that the PSC was not required to impose a fine on Cherryland. MCL 460.558 provides that "[a]ny corporation . . . [that] wilfully or knowingly fails or neglects to obey or comply with [a

[3] To the extent that Great Wolf Lodge argues that it should be allowed to obtain service from Traverse City Light & Power (TCLP), a municipal corporation not subject to PSC regulation, MCL 124.3(2) is applicable. MCL 124.3(2) provides, "A municipal corporation shall not render electric delivery service for heat, power, or light to customers outside its corporate limits already receiving the service from another utility unless the serving utility consents in writing." MCL 460.10y(2), like Rule 411(1)(a), defines "customer" as "the building or facilities served . . . ." In this case, once all the buildings on the property had been demolished, there were no "customers . . . already receiving [electric] service from another utility," and, thus, at that point, MCL 124.3(2) would not have prevented Great Wolf Lodge from obtaining service from TCLP. However, whether the fact that the water-park resort is now receiving electric service from Cherryland prevents the resort from obtaining service from TCLP instead is a question that the trial court should address on remand.

PSC] order or any provision of this act [1909 PA 106; MCL 460.551 *et seq*.] shall forfeit to the state of Michigan not to exceed the sum of 300 dollars for each offense." Contrary to the Court of Appeals' conclusion, this language does not encompass mere negligent noncompliance; otherwise, there would have been no need to include the language "wilfully or knowingly" within this statute. "Wilfully or knowingly" modifies both "fails" and "neglects," and, therefore, the PSC is required to impose a fine only where a utility "wilfully or knowingly" "fails," or "wilfully or knowingly" "neglects," to "obey or comply with [a PSC] order." MCL 460.558.

In the instant case, the PSC determined that Cherryland's understanding of the PSC's July 22, 2004, order was not unreasonable, and, therefore, Cherryland did not "wilfully or knowingly" fail or neglect to obey or comply with this order. In its July 22, 2004, order, the PSC ordered Cherryland to charge Great Wolf Lodge the large resort service (LRS) rate. Four months later, Cherryland began to charge Great Wolf Lodge the higher large commercial and industrial (LCI) rate. According to Cherryland, it did this because Great Wolf Lodge was not satisfying the 1,500-kilowatt minimum monthly load requirement that must be met for the LRS rate to be charged. The PSC explained that when it ordered Cherryland to charge the LRS rate, it assumed that Great Wolf Lodge was in compliance, and would remain in compliance, with the terms and conditions of the LRS rate, and therefore it did not address what Cherryland should do if Great Wolf Lodge failed to comply with the load requirement for the LRS rate. The PSC concluded that, although "Cherryland should have sought clarification of the July 22 order," "Cherryland's interpretation of the July 22 order was not so clearly unreasonable as to justify the imposition of a fine . . . ."

In other words, because Cherryland reasonably believed that the PSC's July 22, 2004, order did not preclude it from charging Great Wolf Lodge the LCI rate if Great Wolf Lodge was not complying with the load requirement for the LRS rate, it did not "wilfully or knowingly fail[] or neglect[] to obey or comply with such order." See MCL 460.558. Accordingly, Great Wolf Lodge has not satisfied its burden of showing by clear and satisfactory evidence that the PSC's decision to not impose a fine was unlawful or unreasonable. MCL 462.26(8).

III. CONCLUSION

Once all the buildings on the property had been demolished, Cherryland no longer had any "customer" on the property, and, therefore, its right to provide electric service to the property was extinguished. Because no rule, statute, or caselaw requires the PSC to impose interest on refunds, the PSC was not required to impose interest on the refund at issue. Finally, because Cherryland did not "willfully or knowingly fail[] or neglect[] to obey or comply with [the PSC's July 22, 2004] order," MCL 460.558, the PSC was not required to impose a fine on Cherryland. Accordingly, I would reverse the Court of Appeals' judgment regarding the imposition of interest and a fine, vacate the remainder of the Court of Appeals' decision, and remand to the trial court for it to address Great Wolf Lodge's argument that it should not now be considered a Cherryland "customer," even though Cherryland is currently serving Great Wolf Lodge, because Cherryland had coerced Great Wolf Lodge into becoming its "customer."

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

ATTORNEY GENERAL v CLARKE

Docket No. 142550. Argued May 3, 2011 (Calendar No. 1). Decided May 17, 2011.

The Attorney General brought a quo warranto action in the Court of Appeals against Judge Hugh Clarke, alleging that he was not entitled to hold office beyond January 1, 2011, under *Attorney General v Riley*, 417 Mich 119 (1983), and Const 1963, art 6, § 23. Defendant was appointed as a judge of the 54-A District Court by former Governor Jennifer Granholm effective December 22, 2010, to fill the vacancy created when Judge AMY RONAYNE KRAUSE resigned on December 13, 2010, to accept an appointment to the Court of Appeals. The Supreme Court assumed jurisdiction over the action and heard oral argument. 488 Mich 1052 (2011).

In an opinion per curiam joined by Chief Justice YOUNG and Justices MARKMAN, HATHAWAY, MARY BETH KELLY, and ZAHRA, the Supreme Court *held*:

Defendant is entitled under Const 1963, art 6, § 23 to hold the office of 54-A District Judge until January 1, 2013, and plaintiff's action for quo warranto is dismissed.

1. Const 1963, art 6, § 23 provides that a judicial vacancy shall be filled by appointment by the Governor and that the person the Governor appoints shall hold office until 12 noon of the first day of January next succeeding the first general election held after the vacancy occurs. The resignation of Judge RONAYNE KRAUSE created a vacancy on the 54-A District Court. Under MCL 168.2(h) and MCL 168.641(1)(d), the first general election to be held after the vacancy occurred in this case will fall on Tuesday, November 6, 2012. Therefore, defendant is entitled to hold office until 12 noon on January 1, 2013.

2. The plain language of Const 1963, art 6, § 23 allows a judicial appointee to hold office for two separate terms when the second term begins before 12 noon of the first day of January next

succeeding the first general election held after the vacancy occurs. Therefore, the plurality opinion in *Riley*, which reached a contrary conclusion, is repudiated.

Dismissed.

Justice CAVANAGH, joined by Justice MARILYN KELLY, concurring, agreed that the complaint should be dismissed, but only because MCL 168.467m(1) and 168.467i authorize holdovers for district judges and do not conflict with Const 1963, art 6, § 23.

CONSTITUTIONAL LAW — DISTRICT JUDGES — TERMS OF OFFICE — VACANCIES.

A person appointed by the Governor to fill a judicial vacancy is entitled to hold that office for two separate terms when the second term begins before 12 noon of the first day of January next succeeding the first general election held after the vacancy occurs (Const 1963, art 6, § 23).

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Richard A. Bandstra*, Chief Legal Counsel, and *Heather A. Meingast*, Assistant Attorney General, for the Attorney General.

Nolan, Thomsen & Villas, P.C. (by *Lawrence P. Nolan*) and *Thomas E. Brennan, Sr.*, for Hugh Clarke.

PER CURIAM. Defendant, Judge Hugh Clarke, was appointed to the 54-A District Court by former Governor Jennifer Granholm. The Attorney General claims that defendant is not entitled to hold office beyond January 1, 2011, and brought this quo warranto action to oust defendant. See MCL 600.4505(1); MCL 600.4515. Having assumed jurisdiction over this action and having heard oral argument, we hereby dismiss plaintiff's complaint.

In November 2004, Judge AMY RONAYNE KRAUSE of the 54-A District Court was elected to a six-year term of office beginning on January 1, 2005. In November 2010, Judge RONAYNE KRAUSE was reelected to another six-year term

that was to begin on January 1, 2011. However, on November 23, 2010, Governor Granholm appointed Judge RONAYNE KRAUSE to fill a vacancy on the Court of Appeals. Judge RONAYNE KRAUSE resigned from the 54-A District Court effective December 13, 2010, and Governor Granholm appointed defendant to the position on December 20, 2010, effective December 22, 2010. Governor Granholm's term of office as governor ended on January 1, 2011.

The Attorney General brought a quo warranto action in the Court of Appeals, claiming that defendant is not entitled to remain in office beyond the term of office to which he was appointed—that is, beyond January 1, 2011—and that the Governor is not entitled to fill a judicial vacancy for a term that does not begin until after the Governor leaves office. We granted defendant's application to bypass consideration of the matter by the Court of Appeals and assumed jurisdiction over the action. 488 Mich 1052 (2011); see MCR 7.302(C)(1).

We conclude the following:

(1) A judicial vacancy "shall be filled by appointment by the governor." Const 1963, art 6, § 23.

(2) The resignation of Judge KRAUSE created a vacancy on the 54-A District Court. *Id*. ("A vacancy shall occur . . . in the district court by . . . resignation . . . .").

(3) "The person appointed by the governor shall hold office until 12 noon of the first day of January next succeeding the first general election held after the vacancy occurs . . . ." *Id*.

(4) Michigan law defines "general election" as "the election held on the November regular election date in an even numbered year," MCL 168.2(h), and sets the November regular election date as "the first

Tuesday after the first Monday in November," MCL 168.641(1)(d). Accordingly, in this case, the "first general election held after the vacancy occurs" falls on Tuesday, November 6, 2012.

(5) Therefore, defendant "shall hold office until 12 noon" on January 1, 2013. Const 1963, art 6, § 23.

(6) The argument of plaintiff that an absurd result could conceivably arise under this Court's interpretation of Const 1963, art 6, § 23 in circumstances not presented in this case raises an abstract issue that is not properly before this Court.

(7) Although we rule in favor of defendant, his argument that it is inconsistent with Const 1963, art 6, § 4 for this Court to issue a writ of quo warranto to oust a judge from office does not represent the law of this state, see *In re Servaas*, 484 Mich 634; 774 NW2d 46 (2009), and this argument confuses judicial removal for reasons of misconduct with a determination that a person is not lawfully entitled to hold judicial office.

The plain language of article 6, § 23 operates to allow an appointee to hold office for two separate terms when the second term begins before "12 noon of the first day of January next succeeding the first general election held after the vacancy occurs." Thus, contrary to plaintiff's position and the conclusion of a plurality of justices in *Attorney General v Riley*, 417 Mich 119; 332 NW2d 353 (1983), article 6, § 23 is a "holdover" provision. While we understand why plaintiff relied on *Riley* in support of his position that Judge Clarke should be treated in the same manner as Justice RILEY and not be permitted to remain on the bench beyond the end of the term during which he was originally appointed, *Riley* does not control the outcome of today's case because it

is a plurality decision,[1] and the several rationales articulated in support of the plurality result are inconsistent with article 6, § 23. Accordingly, we hereby repudiate the *Riley* plurality opinion on the ground that it is inconsistent with the constitution of this state.

Because defendant is entitled under article 6, § 23 to hold the office of 54-A District Judge until January 1, 2013, we hereby dismiss plaintiff's action for quo warranto. Pursuant to MCR 7.317(C)(3), we direct the Clerk of the Court to issue the judgment order forthwith.

YOUNG, C.J., and MARKMAN, HATHAWAY, MARY BETH KELLY, and ZAHRA, JJ., concurred.

CAVANAGH, J. (*concurring*). I concur in the majority result dismissing the complaint for quo warranto, but only because I believe that there is no conflict between the statutes authorizing "holdovers" for district court judges and the Michigan Constitution. Specifically, MCL 168.467m(1) provides that "[i]f a vacancy occurs in the office of district judge, the governor shall appoint a successor to fill the vacancy" who "shall hold office until 12 noon of January 1 following the next general November election at which a successor is elected and qualified." Additionally, MCL 168.467i provides that the term of office for a district judge "shall be 6 years" and "shall continue until a successor is elected and qualified." These statutes clearly authorize holdovers for district judges and do not conflict with Const 1963, art

[1] "[D]ecisions in which no majority of the justices participating agree with regard to the reasoning are not an authoritative interpretation under the doctrine of stare decisis." *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 206 n 7; 731 NW2d 41 (2007), citing *Negri v Slotkin*, 397 Mich 105, 109; 244 NW2d 98 (1976).

6, § 23. Therefore, defendant is entitled to hold office until noon on January 1, 2013.

MARILYN KELLY, J., concurred with CAVANAGH, J.

PRIORITY HEALTH v COMMISSIONER OF THE OFFICE OF FINANCIAL AND INSURANCE SERVICES

Docket No. 139189. Argued October 6, 2010 (Calendar No. 6). Decided May 17, 2011.

Priority Health, a health maintenance organization (HMO), sought a declaratory ruling by the Commissioner of the Office of Financial and Insurance Services (OFIS) (which has since been renamed the Office of Financial and Insurance Regulation) on whether an HMO can require a reasonable and uniformly applied minimum premium-contribution level from an employer under the small employer group health coverage act, MCL 500.3701 *et seq*., which is chapter 37 of the Insurance Code. The commissioner ruled that an HMO cannot require such a contribution because it is unreasonable and inconsistent with the act. The Kent Circuit Court, George S. Buth, J., affirmed the commissioner's ruling when Priority Health petitioned for judicial review. The Court of Appeals denied Priority Health's application for leave to appeal in an unpublished order, entered October 12, 2007 (Docket No. 278373), but the Supreme Court, in lieu of granting leave to appeal, remanded the case to the Court of Appeals for consideration as on leave granted. 480 Mich 1073 (2008). The Court of Appeals, MARKEY, P.J., and MURPHY and BORRELLO, JJ., affirmed, holding that the act does not allow Priority Health to impose minimum-contribution requirements on employers as a condition for issuing a health-benefit plan. 284 Mich App 40 (2009). The Supreme Court granted Priority Health's application for leave to appeal. 485 Mich 1069 (2010).

In an opinion by Justice MARILYN KELLY, joined by Justices CAVANAGH, MARKMAN, HATHAWAY, MARY BETH KELLY, and ZAHRA, the Supreme Court *held*:

The fact that the Legislature did not include noncompliance with a minimum-employer-contribution provision among the reasons that a carrier may decline to renew a small-employer health-benefit plan does not render such a provision unreasonable or inconsistent with chapter 37 of the Insurance Code.

1. MCL 500.3707(1) requires a carrier of small-employer health-benefit plans to issue any health-benefit plan it markets to any small employer that applies for the plan, agrees to pay the

required premium, and agrees to satisfy other reasonable provisions of the plan that are not inconsistent with the act. MCL 500.3711 also provides that small-employer carriers must renew the policies they issue to small employers at the employer's option unless one of six exceptions applies.

2. Although the act does not expressly permit small-employer carriers to mandate a minimum employer contribution in their policies, it does permit them to include provisions that are reasonable and not inconsistent with the act. Minimum-employer-contribution requirements are not inconsistent with the guaranteed-renewal provisions of MCL 500.3711. The guaranteed-renewal provisions do not limit the initial coverage that can be included in a policy; rather, they mandate renewal of the initial policy once it is in effect. An employer that does not wish to comply with a minimum-employer-contribution requirement that was included in the initial policy is free to decline to renew the policy. Interpreting the act to prevent small-employer carriers from including any provision that the act does not expressly permit would effectively read out of the act the language that permits a carrier to include other reasonable provisions of the health-benefit plan that are not inconsistent with the act.

Reversed; OFIS ruling vacated and case remanded to OFIS for reconsideration of Priority Health's motion for declaratory judgment.

Chief Justice YOUNG, concurring, wrote separately to offer several observations for the commissioner to consider on remand: that the Legislature has indicated that the reasonableness of small-employer health insurance plan provisions may be considered and evaluated even if the contractual provision does not otherwise conflict with the provisions of the act; that the Legislature has assigned the responsibility of determining whether a particular insurance provision is reasonable to the commissioner, not the judicial branch; and that if the commissioner were to conclude on remand that compulsory minimum employer contributions are not reasonable, Priority Health would bear the burden of establishing that its substantial rights were prejudiced because the commissioner's reasonableness determination was arbitrary, capricious, or clearly an abuse or unwarranted exercise of discretion.

1. INSURANCE — GROUP HEALTH INSURANCE — SMALL-EMPLOYER GROUP HEALTH INSURANCE PLANS — MINIMUM PREMIUM-CONTRIBUTION LEVELS.

An insurance carrier may include a contractual provision requiring an employer to make minimum contributions to premiums in a

health-benefit plan offered to small employers as long as that provision is reasonable and is not otherwise inconsistent with chapter 37 of the Insurance Code (MCL 500.3707[1], 500.3711[1]).

2. INSURANCE — GROUP HEALTH INSURANCE — SMALL-EMPLOYER GROUP HEALTH INSURANCE PLANS.

The statutory provision that requires small-employer carriers to renew health-benefit plans at the option of the employer does not limit the initial coverage that can be included in a policy; rather, it mandates renewal of the initial policy that was offered to the employer once that policy is in effect, and any provisions included in the initial policy are part of the policy that must be renewed at the employer's option (MCL 500.3711[1]).

Warner Norcross & Judd LLP (by *Matthew T. Nelson* and *Julie Lam*) for Priority Health.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, and *David W. Silver* and *Christopher L. Kerr*, Assistant Attorneys General, for the Commissioner of the Office of Financial and Insurance Services.

Amicus Curiae:

Honigman Miller Schwartz and Cohn LLP (by *Timothy Sawyer Knowlton*) for the Michigan Association of Health Plans.

MARILYN KELLY, J. This appeal involves the small employer group health coverage act,[1] which establishes requirements for insurance carriers that offer health insurance benefit plans to small employers in Michigan. We address the narrow issue of whether § 3711(2) of the act, MCL 500.3711(2), prevents a carrier from requiring a small employer to pay a minimum percentage of its employees' health insurance premiums.[2]

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[1] MCL 500.3701 *et seq*.

[2] We decline to address the broader issue of whether such required contributions are unreasonable or inconsistent with the act for any other

Both the Court of Appeals and the Commissioner of the Office of Financial and Insurance Services (OFIS)[3] concluded that minimum employer contribution provisions are inconsistent with the act. They reasoned that an employer's failure to pay a minimum percentage of its employees' premiums is not among the reasons in MCL 500.3711(2) that a carrier may refuse to renew an insurance plan. We disagree with this rationale and reverse their decisions. We hold that merely because the Legislature did not include noncompliance with a minimum employer contribution provision among the reasons for nonrenewal does not render the provision unreasonable or inconsistent with § 3711(2).

BACKGROUND[4]

Priority Health is a nonprofit corporation that the state of Michigan has licensed as a health maintenance organization. It offers health benefit plans to many employers in Michigan, including small-employer groups covered by the act. Its policies require minimum employer contributions.[5] Employers contracting with it

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reason. The commissioner and the lower courts based their rulings on the determination that minimum employer contribution requirements conflict with MCL 500.3711(2). We reverse that determination and therefore need not address arguments on which no definitive ruling was issued below.

[3] OFIS has since been renamed the Office of Financial and Insurance Regulation.

[4] Because this dispute involves an OFIS declaratory ruling, no administrative agency hearing was conducted, and the record consists of those facts specifically identified by Priority Health in its request for a declaratory ruling. Mich Admin Code, R 500.1043(2).

[5] A minimum employer contribution provision requires an employer to contribute a portion of an employee's premium. Minimum contribution requirements set a ceiling on the health insurance expenses an employer may pass on to its employees. This ceiling is often expressed as a percentage of the premium.

must agree to contribute a certain portion of the insurance premium. Priority Health asserts that a minimum employer contribution requirement combats "adverse selection"—the tendency of healthy people to decline health insurance because of its cost—by encouraging a greater number of healthy employees to participate in the plan, thereby allowing carriers to charge lower premiums.[6]

In April 2006, Priority Health requested a declaratory ruling from OFIS.[7] It asked whether a health maintenance organization may require small employers to contribute a specific minimum in payment of the premiums if that minimum is reasonable and is applied uniformly. Priority Health asserted that a minimum employer contribution requirement is designed to address adverse selection. It argued that, by ensuring that a portion of the cost is borne by the employer, the financial burden on the employees is lessened. This makes it more likely that healthy employees will participate in the plan.

The commissioner[8] issued a declaratory ruling in which she concluded that the mandated employer contribution in Priority Health's policies is unreasonable and inconsistent with the act. She reasoned that an employer's failure to pay a portion of the premiums is not one of the conditions in MCL 500.3711(2) that permits a carrier to refuse to renew coverage.

Priority Health appealed the ruling in the circuit court, which affirmed it. Applying the standard of

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[6] See *In re Priority Health Declaratory Ruling Request*, entered June 7, 2006, Order No. 06-021-M (OFIS Ruling), p 5.

[7] See MCL 24.263, which permits an agency to issue a declaratory ruling on the application of a statute to particular facts.

[8] At the time, the commissioner was Linda Watters. The current commissioner is Kevin Clinton.

review in MCL 24.306(1), the circuit court concluded that the commissioner's interpretation of the act was not arbitrary or capricious. As a result, it concluded that the ruling should be affirmed.[9]

Priority Health sought leave to appeal in the Court of Appeals, arguing that the OFIS ruling and the circuit court's decision conflicted with the language of the act. It further argued that its minimum employer premium contribution requirement advances the act's purposes because it encourages employee participation and protects against adverse selection. The Court of Appeals denied Priority Health's application for leave to appeal, with Judge SMOLENSKI indicating that he would grant the application.[10] However, this Court remanded the case to the Court of Appeals as on leave granted.[11]

On remand, the Court of Appeals affirmed the decision of OFIS in a published opinion per curiam.[12] Most significant to our analysis, it agreed with the commissioner's legal conclusion. Consequently, it held that the act does not permit carriers to impose a minimum employer contribution requirement on small employers as a condition for issuing a health benefit plan.[13]

This Court granted leave to appeal to determine (1) whether, as part of a plan, an insurer or licensed health

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[9] The circuit court applied an improperly high standard when reviewing the OFIS ruling. The arbitrary-or-capricious standard does not apply to the interpretation of statutory provisions. *In re Complaint of Rovas Against SBC Mich*, 482 Mich 90, 103; 754 NW2d 259 (2008).

[10] *Priority Health v Comm'r of the Office of Fin & Ins Servs*, unpublished order of the Court of Appeals, entered October 12, 2007 (Docket No. 278373).

[11] *Priority Health v Comm'r of the Office of Fin & Ins Servs*, 480 Mich 1073 (2008).

[12] *Priority Health v Comm'r of the Office of Fin & Ins Servs*, 284 Mich App 40; 770 NW2d 457 (2009).

[13] *Id.* at 47.

maintenance organization can require an employer to pay a specific percentage of the premium charged for each employee and (2) whether MCL 500.3711(2) limits the provisions that can be included in such policies.[14]

STANDARD OF REVIEW

We review OFIS declaratory rulings in the same manner as any agency final decision or order issued in a contested case.[15] Here, OFIS was requested to interpret a statute. Statutory interpretation is a question of law, which we review de novo.[16] However, an agency's interpretation of a statute regarding matters it is charged with regulating is entitled to respectful consideration and should not be overruled without cogent reasons.[17]

KEY PROVISIONS OF THE ACT

The act regulates small employer group health coverage in Michigan. The Legislature adopted it in 2003 in an effort to resolve problems specific to the small-employer market. The act requires every insurance carrier wishing to provide health care benefits to small employers in Michigan to offer all of its small-employer health plans to all small employers.[18] At MCL

[14] *Priority Health v Comm'r of the Office of Fin & Ins Servs*, 485 Mich 1069 (2010).

[15] MCL 24.263.

[16] *Hunter v Hunter*, 484 Mich 247, 257; 771 NW2d 694 (2009).

[17] *In re Rovas Complaint*, 482 Mich at 103.

[18] MCL 500.3701(p) defines "small employer" as follows:

> [A]ny person, firm, corporation, partnership, limited liability company, or association actively engaged in business who, on at least 50% of its working days during the preceding and current calendar years, employed at least 2 but not more than 50 eligible employees. In determining the number of eligible employees, companies that are

500.3707(1), it also requires a small-employer carrier to issue any health benefit plan it markets to any small employer that: (1) applies for the plan, (2) agrees to pay the required premium, and (3) agrees to satisfy other reasonable provisions of the health benefit plan not inconsistent with the act.

The act provides that the carriers of small-employer benefit plans must renew the policies they issue to small employers, except under very limited circumstances. At MCL 500.3711, it states:

> (1) Except as provided in this section, a small employer carrier that offers health coverage in the small employer group market in connection with a health benefit plan shall renew or continue in force that plan at the option of the small employer or sole proprietor.
>
> (2) Guaranteed renewal under subsection (1) is not required in cases of: fraud or intentional misrepresentation of the small employer or, for coverage of an insured individual, fraud or misrepresentation by the insured individual or the individual's representative; lack of payment; noncompliance with minimum participation requirements; if the small employer carrier no longer offers that particular type of coverage in the market; or if the sole proprietor or small employer moves outside the geographic area.

Hence, MCL 500.3707 and MCL 500.3711 read together require every carrier of small-employer benefit plans to make all its plans available to all small employers. With six exceptions, the carrier must renew the coverage at the employer's option.

ANALYSIS

The act does not expressly permit carriers of small-employer benefit plans to mandate a minimum em-

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affiliated companies or that are eligible to file a combined tax return for state taxation purposes shall be considered 1 employer.

ployer contribution in their policies. However, it does permit them to include provisions that are "reasonable" and "not inconsistent" with the act.[19] As a consequence, minimum employer contribution requirements are permissible so long as they are "reasonable" and "not inconsistent" with the act.

In her ruling, the commissioner relied on her interpretation of the guaranteed-renewal provisions in MCL 500.3711. They require small-employer carriers to guarantee renewal of their health plans at the option of the employer, except in six expressly identified circumstances. Failure to comply with a minimum employer contribution requirement is not one of those circumstances. Hence, the commissioner concluded that a carrier must renew coverage without regard to the level of an employer's contribution to the total cost of the plan.

She reasoned that it would be inconsistent to "allow a minimum contribution requirement at the time coverage is issued, yet mandate renewal without regard to the employer's share."[20] And she concluded that Priority Health's minimum contribution requirement was unreasonable because it was inconsistent with the guaranteed-renewal provisions of MCL 500.3711.[21]

Likewise, the Court of Appeals based its decision on the guaranteed-renewal provisions in MCL 500.3711. Following a rationale similar to that of the commissioner, the Court found it "unreasonable and inconsistent to require [minimum employer] contributions as a prerequisite for initial coverage when renewal could not be denied on the basis of a failure to pay those contributions."[22]

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[19] MCL 500.3707(1).

[20] OFIS Ruling, p 16.

[21] *Id.* at 30.

[22] *Priority Health*, 284 Mich App at 47.

Both the commissioner and the Court of Appeals improperly relied on the guaranteed-renewal provisions of MCL 500.3711 to conclude that minimum employer contribution requirements are impermissible in small-employer policies. Our reading of chapter 37 of the Insurance Code, in which the act is found, persuades us that minimum employer contribution requirements are not inconsistent with MCL 500.3711. The guaranteed-renewal provisions do not limit the initial coverage that can be included in a policy. Rather, they mandate renewal of the initial policy that was offered to the employer once it is in effect. Any provisions included in the initial policy are part of the policy that must be renewed at the employer's option according to MCL 500.3711(1).

If a minimum employer contribution requirement is included as a provision of the initial policy, it is part of the policy being offered for renewal. If the employer determines that it cannot or does not wish to make such a contribution, it is free to decline to renew the policy. This differs from a situation where the carrier refuses to renew the policy for a reason not among the permissible reasons enumerated in MCL 500.3711(2). Nothing in chapter 37 prevents an employer from declining to renew the policy.

Moreover, under the Court of Appeals' rationale, any proposed health benefit plan provision which MCL 500.3711(2) does not expressly permit would be unreasonable and inconsistent with chapter 37. This means that a carrier could not require an employer to agree to an arbitration clause, merger or integration clause, or other common provision that it did not write into the initial policy. According to the Court of Appeals' reasoning, small-employer carriers would not be able to include *any* provisions in their plans that the act does not expressly permit.

Yet chapter 37 does not require a proposed policy provision to be expressly authorized by chapter 37 before a small-employer carrier can include it in a policy. Such an interpretation would effectively read out of the act the language of MCL 500.3707(1) that permits a carrier to include "other reasonable provisions of the health benefit plan not inconsistent with this chapter." If the only provisions a carrier could include in a policy were those expressly enumerated in the exceptions to guaranteed renewal, it could never include other reasonable provisions. A critical tenet of statutory construction is to give meaning to every portion of a statute, and interpretation of a provision that renders any part of the statute surplusage is to be avoided.[23]

Assuredly, the guaranteed-renewal provisions could be said to conflict with, and thus preclude, the inclusion of certain provisions in a health benefit plan for initial coverage. MCL 500.3711(2) lists only six reasons why a carrier can terminate or refuse to renew a health plan that has already been issued. A provision that attempted to broaden those exceptions would conflict with MCL 500.3711 and would be impermissible in a policy for initial coverage.

For example, a termination-at-will provision cannot be reconciled with the guaranteed-renewal provisions and therefore would be prohibited. But MCL 500.3711 does not preclude a carrier from including a reasonable provision in a policy for initial coverage that does not conflict with the enumerated reasons for nonrenewal.

CONCLUSION

We give respectful consideration to the commissioner's interpretation of chapter 37. But MCL 500.3711(2)

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[23] *In re MCI Telecom Complaint*, 460 Mich 396, 414; 596 NW2d 164 (1999).

does not support her conclusion that a minimum employer premium contribution provision is inconsistent with the act. An insurance carrier is not prohibited from including a provision in plans offered to small employers simply because it is not listed in MCL 500.3711(2) among the reasons for nonrenewal. Rather, unless a provision directly conflicts with the enumerated reasons, it may be included in a plan so long as it is reasonable and not inconsistent with chapter 37.[24] We do not reach the question of whether Priority Health's minimum employer premium contribution provision is unreasonable or inconsistent with the act for reasons not presented in this case. We reverse the judgment of the Court of Appeals, vacate the OFIS declaratory ruling, and remand this case to OFIS for reconsideration of plaintiff's motion for declaratory judgment in light of this opinion.

CAVANAGH, MARKMAN, HATHAWAY, MARY BETH KELLY, and ZAHRA, JJ., concurred with MARILYN KELLY, J.

YOUNG, C.J. (*concurring*). I concur with the majority opinion because I believe that the Commissioner of the Office of Financial and Insurance Services (OFIS)[1] erroneously concluded that minimum employer contribution requirements are inconsistent with the small employer group health coverage act (SEGHCA)[2] because noncompliance with a minimum employer contribution requirement is not listed among the exceptions to the guaranteed renewal provisions

[24] MCL 500.3707(1).

[1] Executive Order 2008-02 changed the name of the agency from the Office of Financial and Insurance Services (OFIS) to the Office of Financial and Insurance Regulation (OFIR).

[2] MCL 500.3701 *et seq*., which is chapter 37 of the Insurance Code.

contained in the act.[3] I offer several observations for the commissioner to consider on remand.

The petitioner in this matter, a Michigan health maintenance organization (HMO), requires that all small employers[4] pay either 75 percent of the single premium amount or 50 percent of the total premium amount, at the employer's option, as a condition of coverage. A small employer *cannot obtain* health insurance from petitioner unless the employer agrees to pay 50 or 75 percent of the premium,[5] even if the premiums are otherwise paid in full.

The SEGHCA establishes various requirements for carriers[6] that offer health insurance benefit

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[3] MCL 500.3711.

[4] A "small employer" is defined as a

> person, firm, corporation, partnership, limited liability company, or association actively engaged in business who, on at least 50% of its working days during the preceding and current calendar years, employed at least 2 but not more than 50 eligible employees. In determining the number of eligible employees, companies that are affiliated companies or that are eligible to file a combined tax return for state taxation purposes shall be considered 1 employer. [MCL 500.3701(p).]

[5] Petitioner requested a declaratory ruling after OFIS posted its informal opinion under the "Small Employer Group Health Coverage Act FAQ" section of its website:

> *Q*. Can a small employer carrier require a minimum contribution level (either dollar or percentage) by the employer *as a condition of coverage*?
>
> *A*. No, Chapter 37 does not allow small employer carriers to require a contribution level that must be paid by the employer sponsor.

<http://www.michigan.gov/dleg/0,1607,7-154-10555_13648-82698--,00.html#Q17> (accessed April 29, 2011) (emphasis added).

[6] A "carrier" is defined as including commercial insurance companies, HMOs, nonprofit health care corporations, and multiple employer welfare arrangements. MCL 500.3701(d).

plans[7] to small employers in Michigan. As a condition of transacting business with small employers in Michigan, a small employer provider is required to offer its entire menu of small employer health plans to any small employer. MCL 500.3707(1) provides:

> As a condition of transacting business in this state with small employers, every small employer carrier shall make available to small employers all health benefit plans it markets to small employers in this state. A small employer carrier shall be considered to be marketing a health benefit plan if it offers that plan to a small employer not currently receiving a health benefit plan from that small employer carrier. *A small employer carrier shall issue any health benefit plan to any small employer that applies for the plan and agrees to make the required premium payments and to satisfy the other reasonable provisions of the health benefit plan not inconsistent with this chapter* [chapter 37 of the Insurance Code, MCL 500.100 *et seq*.].[8]

Thus, under the SEGHCA, an insurer "shall issue" health insurance coverage to any small employer who does three things: (1) applies for the plan, (2) agrees to make the required premium payments, and (3) satisfies the other reasonable provisions of the health benefit plan not inconsistent with chapter 37, in which the SEGHCA is codified.

The issue in this case is whether requiring a minimum employer contribution as a condition of coverage is a "reasonable provision" that is not "inconsistent with" chapter 37 of the Insurance Code. By including the adjective "reasonable," the Legislature has indi-

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[7] A "health benefit plan" or "plan" means "an expense-incurred hospital, medical, or surgical policy or certificate, nonprofit health care corporation certificate, or health maintenance organization contract." MCL 500.3701(k).

[8] Emphasis added.

cated that the reasonableness of small employer health insurance plan provisions may be considered and evaluated, even if the contractual provision at issue does not otherwise conflict with the statutory provisions contained in the SEGHCA.[9]

However, it is not within the purview of the judicial branch to determine whether a particular insurance provision is "reasonable." Rather, "the explicit 'public policy' of Michigan is that the reasonableness of insurance contracts is a matter for the executive, not judicial, branch of government."[10] This is because "the Legislature has assigned the responsibility of evaluating the 'reasonableness' of an insurance contract to the person within the executive branch charged with reviewing and approving insurance policies: the Commissioner of Insurance."[11]

Moreover, the commissioner's determination regarding the reasonableness of a contractual provision is entitled to great deference under the limited standard of review that Michigan courts apply when reviewing the decisions of administrative agencies.[12] If the commissioner were to conclude on remand that compulsory minimum employer contributions are not "reasonable," the petitioner would bear the burden of establishing

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[9] In considering whether minimum employer contribution requirements are consistent with the SEGHCA, I note that the Legislature has identified only one circumstance under which a small employer carrier may impose "a condition of coverage" and "deny coverage to a small employer" if the condition is not met: when the small employer had failed to meet the minimum participation rules described in MCL 500.3709.

[10] *Rory v Continental Ins Co*, 473 Mich 457, 476; 703 NW2d 23 (2005).

[11] *Id.* at 475; see also MCL 500.2236; MCL 500.2242.

[12] MCL 500.244(1) provides that judicial review of the commissioner's actions is provided by the Administrative Procedures Act, MCL 24.201 *et seq*.

that its substantial rights have been prejudiced[13] because the commissioner's reasonableness determination was "[a]rbitrary, capricious or clearly an abuse or unwarranted exercise of discretion."[14] The commissioner's declaratory ruling identified several factors that *could* support a determination that the imposition of minimum employer contribution requirements is not reasonable.

Because it is the responsibility of the commissioner to make the determination in the first instance regarding whether a minimum employer contribution requirement is a "reasonable provision" that is not "inconsistent with" the SEGHCA, I concur with the majority opinion and concur in remanding this case for reconsideration of petitioner's motion for declaratory judgment.

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[13] It is unclear whether petitioner has a "substantial right" to require minimum employer contributions as a condition of coverage in its health insurance contracts. Black's Law Dictionary (8th ed), p 1349, defines "substantial right" as "[a]n *essential right* that potentially affects the outcome of a lawsuit and is capable of legal enforcement and protection, as distinguished from a mere technical or procedural right." (Emphasis added.)

[14] MCL 24.306(1)(e) provides that a court shall set aside a decision of an administrative agency "if substantial rights of the petitioner have been prejudiced because the decision or order" is "[a]rbitrary, capricious or clearly an abuse or unwarranted exercise of discretion." Any factual findings in support of the reasonableness determination are affirmed if "supported by competent, material and substantial evidence on the whole record." MCL 24.306(1)(d).

MIDLAND COGENERATION VENTURE LIMITED PARTNERSHIP
v NAFTALY
IRON MOUNTAIN INFORMATION MANAGEMENT, INC v NAFTALY
CVS PHARMACY, INC v NAFTALY
NES RENTAL HOLDINGS, INC v NAFTALY
IRON MOUNTAIN INFORMATION MANAGEMENT, INC v NAFTALY
IRON MOUNTAIN INFORMATION MANAGEMENT, INC v NAFTALY
IRON MOUNTAIN INFORMATION MANAGEMENT, INC v NAFTALY
IRON MOUNTAIN INFORMATION MANAGEMENT, INC v NAFTALY
IRON MOUNTAIN INFORMATION MANAGEMENT, INC v NAFTALY

Docket Nos. 140814 and 140817 through 140824. Argued January 19, 2011 (Calendar Nos. 5 and 6). Decided May 23, 2011.

Midland Cogeneration Venture Limited Partnership brought an action in the Midland Circuit Court against Robert Naftaly in his capacity as State Tax Commission (STC) chairperson, Douglas Roberts and Frederick Morgan in their capacities as STC members, and the STC itself (the STC defendants), seeking, in part, mandamus or superintending control to issue an order classifying Midland Cogeneration's property in a particular manner. Midland Cogeneration had disputed the classification and protested to the March board of review, which affirmed the classification. After Midland Cogeneration appealed this decision by filing a classification-complaint petition with the STC pursuant to MCL 211.34c(6), the STC agreed with the assessor's classification and issued a decision in favor of the assessor. The STC moved in the circuit court for summary disposition, alleging that the circuit court did not have jurisdiction to review the STC's decision and that the appeal was untimely. The court, Jonathan E. Lauderbach, J., denied the STC's motion and entered an order granting relief in favor of Midland Cogeneration. Naftaly, Roberts, Morgan, and the STC appealed.

In a similar separate action brought in the Wayne Circuit Court by Iron Mountain Information Management, Inc. against the STC defendants, James Rushton in his capacity as assessor for Pittsfield Charter Township, and Pittsfield Charter Township, the trial court, David S. Swartz, J., granted relief in favor of Iron Mountain. The STC defendants appealed.

In a similar separate action brought in the Oakland Circuit Court by CVS Pharmacy, Inc. against the STC defendants, Glenn Lemmon in his capacity as assessor for the city of Novi, and the city of Novi, the court, Shalina Kumar, J., granted relief in favor of CVS. The STC defendants appealed.

In similar separate actions brought in the Wayne Circuit Court by NES Rental Holdings, Inc. against the STC defendants, Linda Bade in her capacity as assessor for the city of Detroit, and the city of Detroit, by Iron Mountain against those same defendants, by Iron Mountain against the STC defendants, Sherron Schultz in her capacity as assessor for the city of Livonia, and the city of Livonia, and by Iron Mountain against the STC defendants, Tom Yack in his capacity as Canton Township Supervisor, and Canton Township, the court, Virgil C. Smith, J., granted summary disposition in favor of the respective plaintiffs. The STC defendants appealed. After consolidating the appeals, the Court of Appeals, GLEICHER, P.J., and FITZGERALD and WILDER, JJ., reversed the circuit courts' judgments and remanded for the entry of orders granting summary disposition in favor of the STC defendants, holding that MCL 211.34c(6) bars judicial appeals of STC classification decisions. 286 Mich App 616 (2009). The Supreme Court granted plaintiffs' applications for leave to appeal, limited to whether the circuit courts have subject-matter jurisdiction over appeals of an STC decision regarding property classification. 486 Mich 1038 (2010).

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

The final sentence of MCL 211.34c(6), which provides that no appeal may be taken from a property-classification decision of the STC, violates the guarantee of judicial review in Const 1963, art 6, § 28 and is therefore declared unconstitutional and severed. Because judicial review of property-classification decisions was not otherwise provided by law, circuit courts have subject-matter jurisdiction over appeals of these decisions under MCL 600.631.

1. Const 1963, art 6, § 28 provides that all final decisions, findings, rulings, and orders of any administrative officer or agency that are judicial or quasi-judicial and affect private rights or licenses are subject to direct review by the courts as provided by law. Accordingly, the guarantee of judicial review applies only if (1) the decision at issue is a final decision of an administrative agency, (2) the agency was acting in a judicial or quasi-judicial capacity, and (3) the decision affected private rights or licenses. STC classification decisions meet these criteria. First, they are final decisions of an administrative agency. Second, they are quasi-

judicial in nature because they resolve disputed factual claims on a case-by-case basis by evaluating evidence and, further, are statutorily categorized as arbitrations, which are considered quasi-judicial. Third, STC classification decisions affect private rights, which are personal rights as opposed to rights of the public or the state. A right includes the interest, claim, or ownership that one has in tangible or intangible property. Taxpayers have a private right to ensure that their property is taxed the same as similarly situated property, and the classification of plaintiffs' property will determine whether plaintiffs are entitled to the same tax treatment received by owners of similarly classified property. Because an erroneous interpretation of the statutory definitions could impermissibly increase plaintiffs' tax burdens, the classification decisions affect private rights.

2. The final sentence of MCL 211.34c(6) provides that no appeal may be taken from STC property-classification decisions. However, Const 1963, art 6, § 28 provides that these decisions are subject to direct review by the courts as provided by law. The phrase "as provided by law" allows the Legislature to exert substantial control over the mechanics of how administrative decisions are to be appealed, but it does not allow the Legislature to limit the jurisdiction of the circuit courts or prevent an appeal altogether. Because the last sentence of MCL 211.34c(6) eliminates any judicial appeal of STC classification decisions and there is no alternative mechanism for appeal, it violates article 6, § 28.

3. Under MCL 8.5, if a part of an act or its application is held invalid, the invalidity does not affect the remaining portions or applications of the act that can be given effect without the invalid portion or application as long as those portions are not judicially determined to be inoperable. The portion of MCL 211.34c(6) remaining after its last sentence has been severed provides for an internal administrative appellate process that is separate and distinct from any judicial review and therefore is capable of functioning alone. Accordingly, the final sentence of MCL 211.34c(6) must be declared unconstitutional and severed. The remainder of MCL 211.34c(6) remains in full force and effect.

4. MCL 600.631 specifically allows appeals of decisions by state agencies when judicial review has not otherwise been provided for by law. MCL 211.34c(6) precluded judicial review of STC property classification decisions in violation of Const 1963, art 6, § 28, and judicial review was not otherwise provided by law. Therefore, under MCL 600.631, circuit courts have subject-matter jurisdiction over appeals of STC classification decisions.

Reversed.

1. TAXATION — STATE TAX COMMISSION — PROPERTY-CLASSIFICATION DISPUTES — APPEAL.

The final sentence of MCL 211.34c(6), which provides that no appeal may be taken from a property-classification decision of the State Tax Commission, violates the guarantee of judicial review in Const 1963, art 6, § 28 and is therefore severed.

2. TAXATION — STATE TAX COMMISSION — PROPERTY-CLASSIFICATION DISPUTES — APPEAL — JURISDICTION.

Circuit courts have subject-matter jurisdiction over appeals of property-classification decisions of the State Tax Commission (MCL 600.631).

Honigman Miller Schwartz and Cohn LLP (by *John D. Pirich*, *Michael B. Shapiro*, and *Jason Conti*) and *Gary B. Pasek* for plaintiffs.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, and *Michael R. Bell*, Assistant Attorney General, for defendants.

Amici Curiae:

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

Robert S. LaBrant for the Michigan Chamber of Commerce.

James Hallan for the Michigan Retailers Association.

Dykema Gossett PLLC (by *Sherrill D. Wolford* and *Shaun M. Johnson*) for the Michigan Electric Cooperative Association.

Sachs Waldman, Professional Corporation (by *Marshall J. Widick*), and *Michael J. Steinberg* and *Kary L. Moss* for the American Civil Liberties Union Fund of Michigan.

MARILYN KELLY, J. In these consolidated cases, we must determine whether circuit courts have subject matter jurisdiction over appeals from the State Tax Commission (STC) regarding property classifications. We conclude that they do.

We hold that, because they constitute final decisions that are quasi-judicial and affect private rights, STC property-classification decisions fall within the ambit of article 6, § 28 of the Michigan Constitution, which guarantees judicial review. The Legislature lacks the authority to abolish the right to judicial review by enacting a statute. As a consequence, we declare the final sentence of MCL 211.34c(6) unconstitutional because it denies appeal in the courts of STC classification decisions. And because the Legislature has not provided other means for judicial review of STC classification decisions, we hold that the circuit courts have jurisdiction over such appeals pursuant to MCL 600.631.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

This appeal involves nine consolidated cases. All the plaintiffs own property that is subject to property taxes in Michigan. They describe the property as machinery and equipment. For 2008, the tax year in question, the local assessors classified the property for tax-assessment purposes as industrial real property[1] or commercial personal property.[2] Plaintiffs timely petitioned the relevant boards of review to reclassify the property as industrial personal property.[3] That reclas-

[1] MCL 211.34c(2)(d).

[2] MCL 211.34c(3)(b). In the *Midland Cogeneration* case (Docket No. 140814), the Midland assessor classified plaintiff's property as industrial real property. In all the other cases (Docket Nos. 140817 through 140824), the property in question was classified as commercial personal property.

[3] MCL 211.34c(3)(c).

sification would permit them to take advantage of recently enacted tax exemptions or credits.[4] In each instance, the board denied the request. Plaintiffs thereafter individually petitioned the STC to reclassify the property.

In each case, the STC denied the request to reclassify the property. Plaintiffs then individually sought and obtained relief in various circuit courts. Defendants appealed the judgments in the Court of Appeals, which granted leave to appeal and consolidated the individual cases. The Court reversed each of the circuit court judgments and remanded for the entry of orders granting summary disposition in defendants' favor.[5] It held that MCL 211.34c(6) bars an appeal in the courts of an STC classification decision.[6]

MCL 211.34c(6) provides in pertinent part: "An appeal may not be taken from the decision of the state tax commission regarding classification complaint petitions and the state tax commission's determination is final and binding for the year of the petition." The Court of Appeals rejected plaintiffs' claim that the statute violates the constitutional guarantee of a direct appeal of administrative final decisions. The Court held that, although it prevents an appeal of classification decisions in the courts, the statute does not prevent other review, such as seeking a refund in the Michigan Tax Tribunal.

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[4] Changes to the Michigan Business Tax Act (MBTA), MCL 208.1101 *et seq*., effective in tax year 2008 provide for credit against MBTA liability for property taxes paid on a tax parcel classified as industrial personal property. MCL 208.1413. In addition, recent amendments of the Revised School Code provide exemptions for industrial personal property and commercial property from taxes levied under the State Education Tax Act. See MCL 380.1211.

[5] *Iron Mountain Info Mgt, Inc v State Tax Comm*, 286 Mich App 616, 623; 780 NW2d 923 (2009).

[6] *Id.* at 621.

Plaintiffs sought leave to appeal in this Court and we granted it, limited to whether the circuit courts have subject matter jurisdiction over appeals of an STC decision regarding property classification.[7]

STANDARD OF REVIEW AND LEGAL BACKGROUND

The issue of subject matter jurisdiction presented in these cases involves questions of constitutional and statutory interpretation, which are reviewed de novo.[8]

The General Property Tax Act[9] requires local tax assessors to classify "every item of assessable [real and personal] property" in the local tax assessing unit according to categories established in MCL 211.34c.[10] It classifies real property into six broad categories: agricultural, commercial, developmental, industrial, residential, and timber-cutover.[11] Personal property is classified into five broad categories: agricultural, commercial, industrial, residential, and utility.[12]

A property owner who disputes the local tax assessor's classification "must notify the assessor and may protest the assigned classification to the March board of review."[13] A property owner or the assessor may appeal a decision of the board by filing a petition with the STC not later than June 30 of that tax year.[14] The STC is required to "arbitrate the petition based on the written

[7] *Iron Mountain Info Mgt, Inc v Naftaly*, 486 Mich 1038 (2010); *Midland Cogeneration Venture Ltd Partnership v Naftaly*, 486 Mich 1038 (2010).

[8] *Hunter v Hunter*, 484 Mich 247, 257; 771 NW2d 694 (2009).

[9] MCL 211.1 *et seq.*

[10] MCL 211.34c(1).

[11] MCL 211.34c(2)(a) through (f).

[12] MCL 211.34c(3)(a) through (e).

[13] MCL 211.34c(6).

[14] *Id.*

petition and written recommendations of the assessor and the state tax commission staff."[15]

Under MCL 211.34c(6), a decision of the STC regarding property classification is final, and no appeal is permitted. However, MCL 211.34c(7) provides that the Department of Treasury may appeal a classification decision to "the residential and small claims division of the Michigan tax tribunal not later than December 31 in the tax year for which the classification is appealed."

ANALYSIS

In reviewing a constitutional challenge, we presume that statutes are constitutional as written.[16] We exercise the power to declare a law unconstitutional "with extreme caution."[17] Plaintiffs claim that MCL 211.34c(6) violates article 6, § 28 of the Michigan Constitution, which provides in pertinent part:

> All final decisions, findings, rulings and orders of any administrative officer or agency existing under the constitution or by law, which are judicial or quasi-judicial and affect private rights or licenses, shall be subject to direct review by the courts as provided by law. This review shall include, as a minimum, the determination whether such final decisions, findings, rulings and orders are authorized by law . . . .[18]

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[15] *Id.*

[16] *Cruz v Chevrolet Grey Iron Div of Gen Motors Corp*, 398 Mich 117, 127; 247 NW2d 764 (1976) (opinion by COLEMAN, J., citing cases).

[17] *Thayer v Dep't of Agriculture*, 323 Mich 403, 410; 35 NW2d 360 (1949) (citations and quotation marks omitted).

[18] Const 1963, art 6, § 28. The final sentence of this section provides: "In the absence of fraud, error of law or the adoption of wrong principles, no appeal may be taken to any court from any final agency provided for the administration of property tax laws from any decision relating to valuation or allocation." The parties do not allege that property classifi-

Article 6, § 28 is not an absolute guarantee of judicial review of every administrative decision. In order for it to apply, (1) the administrative decision must be a "final decision" of an administrative agency, (2) the agency must have acted in a "judicial or quasi-judicial" capacity, and (3) the decision must affect private rights or licenses. Therefore, we must determine whether STC classification decisions are final decisions of a judicial or quasi-judicial nature that affect private rights or licenses.

First, it is uncontested that the challenged STC decisions are final decisions of an administrative agency. In each of these cases, the STC sent a letter to the plaintiff advising it that the STC's decision was final because MCL 211.34c(6) provides for no appeal of it.

Second, in order for article 6, § 28 to apply, the STC must have acted in a judicial or quasi-judicial capacity in rendering its classification decisions. Decisions of the STC are not judicial decisions. The dispositive question is whether they are quasi-judicial in nature.

This Court has employed the term "quasi-judicial" broadly: "When the power is conferred by statute upon a commission such as the public utilities, or a board such as the department of labor and industry, to ascertain facts and make orders founded thereon, they are at times referred to as *quasi*-judicial bodies . . . ."[19] The Court of Appeals has referred to Black's Law Dictionary to define "quasi-judicial":

> "A term applied to the action, discretion, etc., of public administrative officers, who are required to investigate facts, or ascertain the existence of facts, and draw conclu-

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cations are decisions relating to valuation or allocation. Hence, we do not consider this portion of the section in this opinion.

[19] *People ex rel Clardy v Balch*, 268 Mich 196, 200; 255 NW 762 (1934).

> sions from them, as a basis for their official action, and to exercise discretion of a judicial nature."[20]

An STC classification decision is not a general rule-making or advisory decision. The STC resolves disputed factual claims on a case-by-case basis. This entails an evaluation of evidence and dispute resolution, which are quasi-judicial functions. Furthermore, MCL 211.34c(6) styles the STC's actions as arbitrations in which the STC considers written petitions and "arbitrates" matters.[21] Thus, in rendering property classification decisions, the STC acts as an arbitrator adjudicating disputed claims. It is well settled that an arbitrator's function is quasi-judicial in nature.[22]

Third, in order for article 6, § 28 to apply to STC classification decisions, they must "affect private rights or licenses." This case does not involve a license. Therefore, we must determine whether STC classification decisions affect private rights.

Taxpayers do not have "a vested right in a tax statute or in the continuance of any tax law."[23] We defined a vested right as "an interest that the government is compelled to recognize and protect of which the holder could not be deprived without injustice."[24] In contrast, article 6, § 28 of the constitution recognizes and protects administrative decisions that "affect private

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[20] *Pletz v Secretary of State*, 125 Mich App 335, 351-352; 336 NW2d 789 (1983), quoting Black's Law Dictionary (4th ed), p 1411.

[21] "The state tax commission shall arbitrate the petition based on the written petition and the written recommendations of the assessor and the state tax commission staff." MCL 211.34c(6).

[22] See *Boraks v American Arbitration Ass'n*, 205 Mich App 149, 151; 517 NW2d 771 (1994); *Int'l Union, United Auto, Aerospace, & Agricultural Implement Workers v Greyhound Lines, Inc*, 701 F2d 1181, 1185 (CA 6, 1983).

[23] *Detroit v Walker*, 445 Mich 682, 703; 520 NW2d 135 (1994).

[24] *Id.* at 699.

rights." Black's Law Dictionary defines a "private right" as "a personal right, as opposed to a right of the public or the state."[25] Black's defines "right" as "[t]he interest, claim, or ownership that one has in tangible or intangible property."[26]

We conclude that taxpayers have a private right to ensure that their property is taxed the same as similarly situated property.[27] As applied to this case, the classification of plaintiffs' property will determine whether plaintiffs are entitled to the same tax treatment received by owners of similarly classified property. Plaintiffs have an interest in the proper interpretation of the statutory definitions of "industrial personal property," "commercial personal property," and "industrial real property." An erroneous interpretation of the statutory definitions could impermissibly increase their tax burden and thus affect their private right. Hence, the STC classification decisions in question affect private rights.

Aside from requiring a final quasi-judicial decision that affects private rights, article 6, § 28 provides that such decisions "shall be subject to direct review by the courts *as provided by law*."[28] Defendants argued that "as provided by law" means that the Legislature has the authority to limit the jurisdiction of the circuit courts. The Court of Appeals agreed and, in reliance on that language, held that MCL 211.34c(6) prevents an STC classification decision from being appealed in a court. It relied solely on this Court's 1977 decision in *McAvoy v H B Sherman Co*.[29]

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[25] Black's Law Dictionary (8th ed), p 1348.

[26] *Id*. at 1347, definition 5.

[27] See Const 1963, art 9, § 3 (requiring the Legislature to provide for uniform taxation of property).

[28] Const 1963, art 6, § 28 (emphasis added).

[29] *McAvoy v H B Sherman Co*, 401 Mich 419, 443; 258 NW2d 414 (1977).

McAvoy held that the Legislature may "exert substantial control over the mechanics of how administrative decisions are to be appealed."[30] It does not stand for the proposition that the Legislature can limit the jurisdiction of the circuit courts. Rather, *McAvoy* held that "as provided by law" contemplates that the Legislature will provide the manner in which judicial review shall occur. It recognized the Legislature's ability to dictate "how," "when," and "what" type of appeal of an agency decision is permitted. Acknowledging that the Michigan Constitution mandates review, *McAvoy* opined that "as provided by law" permits the Legislature only to prescribe the details of that review.[31] For example, the Legislature can prescribe time frames for filing an appeal, dictate whether a party may obtain a stay pending appeal, and set forth the controlling standard of review.

MCL 211.34c(6) is not an exercise of control over the "mechanics" of an appeal to the courts of an STC classification decision. Rather, it is a complete prohibition of court review of STC classification decisions. There is a significant difference between dictating the mechanics of an appeal and preventing an appeal altogether. Thus, the Court of Appeals erred by concluding that MCL 211.34c(6) is concerned merely with mechanics.

The Legislature may not eradicate a constitutional guarantee in reliance on the language "as provided by law." Because MCL 211.34c(6) eliminates any appeal of a final administrative decision that is quasi-judicial in nature and affects private rights, it runs afoul of the guarantee in article 6, § 28. This conclusion assumes that there is no other mechanism for direct review by the courts.

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[30] *Id.*

[31] See *id.*

The Court of Appeals and defendants have failed to make a persuasive case that an alternative mechanism exists with which to appeal an STC classification decision. The Court suggested that a plaintiff could pay the tax and then seek a refund in the Michigan Tax Tribunal.[32] However, nothing in the Tax Tribunal Act grants the Tax Tribunal jurisdiction over STC classification decisions. Indeed, in 2010, the Tax Tribunal ruled that it lacks jurisdiction over STC classification decisions.[33] Hence, as a result of that decision and the Court of Appeals' opinion, plaintiffs are left with no forum in which to challenge STC classification decisions, notwithstanding their constitutional right to judicial review.

Therefore, we hold that the phrase "as provided by law" in article 6, § 28 does not grant the Legislature the authority to circumvent the protections that the section guarantees. If it did, those protections would lose their strength because the Legislature could render the entire provision mere surplusage. And given that no other mechanism for review of STC classification decisions exists, the last sentence of MCL 211.34c(6) violates article 6, § 28.

To cure this defect, we must determine whether the entire statute is unconstitutional or whether its last sentence is severable. MCL 8.5 provides:

> If any portion of an act or the application thereof to any person or circumstances shall be found to be invalid by a

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[32] The Court of Appeals stated: "The Legislature did not preclude review by other mechanisms. For example, a party could pay the property taxes due for a subject parcel, and then file a claim in the Michigan Tax Tribunal for a refund of taxes paid because of an improper classification." *Iron Mountain Info Mgt*, 286 Mich App at 623 n 2.

[33] *Midland Cogeneration Venture Ltd Partnership v City of Midland*, order of the Michigan Tax Tribunal, entered April 21, 2010 (Docket No. 383162).

> court, such invalidity shall not affect the remaining portions or applications of the act which can be given effect without the invalid portion or application, provided such portions are not determined by the court to be inoperable, and to this end acts are declared to be severable.

To determine whether severance is appropriate, we must consider whether the portion of MCL 211.34c(6) remaining after its last sentence has been severed is capable of functioning alone.[34]

The subsection consists of four sentences. The first three dictate the process by which a property owner may protest an adverse property classification.[35] The initial review is made by the March board of review. The next level of review is by the STC. The fourth and final sentence of MCL 211.34c(6) restricts judicial review of STC classification decisions. This final sentence has no effect on the remainder of the subsection. In its absence, the subsection provides for an internal appellate process within the administrative agency. The internal process is separate and distinct from any judicial review. Thus, MCL 211.34c(6) is capable of functioning without its final sentence. Accordingly, the final sentence of MCL 211.34c(6), which shields STC classification decisions from judicial review, is severed and declared unconstitutional.[36] The remainder of MCL 211.34c(6) remains in full force and effect.

Without the final sentence of MCL 211.34c(6), the General Property Tax Act is silent as to plaintiffs' right to appeal an adverse STC classification decision. As we have held, however, article 6, § 28 of the Michigan Constitution mandates that plaintiffs be afforded this

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[34] See *Maki v East Tawas*, 385 Mich 151, 159; 188 NW2d 593 (1971).

[35] MCL 211.34c(6).

[36] See *C F Smith Co v Fitzgerald*, 270 Mich 659, 667-668; 259 NW 352 (1935).

right. Thus, we must consider what remedy is available to plaintiffs absent a specific legislative directive.

The Revised Judicature Act specifically allows appeals of decisions by state agencies when judicial review "has not otherwise been provided for by law."[37] Because MCL 211.34c(6) precluded judicial review in violation of article 6, § 28, judicial review "has not otherwise been provided for by law," and MCL 600.631 applies. Therefore, the circuit court has subject matter jurisdiction over appeals of a decision of the STC regarding property classifications.

CONCLUSION

STC property-classification decisions are final decisions of an administrative agency that are quasi-judicial in nature and affect private rights. Consequently, article 6, § 28 of the Michigan Constitution guarantees judicial review of them, and this guarantee may not be jettisoned by statute. Accordingly, because the final sentence of MCL 211.34c(6) precludes judicial review of STC classification decisions, it violates article 6, § 28 of the Michigan Constitution. We declare that sentence unconstitutional and sever it, leaving the remainder of MCL 211.34c(6) in full force and effect.

The circuit courts have subject matter jurisdiction over appeals of a decision of the STC regarding property

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[37] MCL 600.631 states:

> An appeal shall lie from any order, decision, or opinion of any state board, commission, or agency, authorized under the laws of this state to promulgate rules from which an appeal or other judicial review has not otherwise been provided for by law, to the circuit court of the county of which the appellant is a resident or to the circuit court of Ingham county, which court shall have and exercise jurisdiction with respect thereto as in nonjury cases. Such appeals shall be made in accordance with the rules of the supreme court.

classifications. Plaintiffs may appeal the decisions in the cases before us in the circuit court for the county of which plaintiffs are residents or the circuit court for Ingham County.

We reverse the judgment of the Court of Appeals.

YOUNG, C.J., and CAVANAGH, MARKMAN, HATHAWAY, MARY BETH KELLY, and ZAHRA, JJ., concurred with MARILYN KELLY, J.

BEACH v LIMA TOWNSHIP

Docket No. 139394. Argued October 5, 2010 (Calendar No. 1). Decided June 3, 2011.

Florence Beach brought an action in the Washtenaw Circuit Court against Lima Township and Jeffrey Munger, seeking to quiet title to three streets dedicated on a plat recorded in 1835. Other parties were subsequently added as plaintiffs. The township had acquired several of the lots shown on the plat and sought to use the streets for ingress to and egress from a fire department substation it proposed to build on the lots. Plaintiffs asserted that they had acquired title to the streets by adverse possession. The township brought a counterclaim to quiet title, and the parties filed cross-motions for summary disposition. In its motion, the township asserted that plaintiffs had to bring an action under the Land Division Act (LDA), MCL 560.101 *et seq*., specifically MCL 560.221 through 560.229, to vacate streets created by a plat. The court, Donald E. Shelton, J., denied the township summary disposition and, following an evidentiary hearing on the adverse-possession question, granted plaintiffs summary disposition. The township appealed. The Court of Appeals, WILDER, P.J., and MURPHY and METER, JJ., affirmed, holding in part that plaintiffs were not required to bring their adverse-possession action under the LDA because they did not expressly seek to vacate, correct, or revise a dedication in a plat. 283 Mich App 504 (2009). The Supreme Court granted the township's application for leave to appeal, limited to the issue whether a plaintiff who seeks to establish an adverse-possession claim that would affect property in a recorded plat must file a claim under the LDA if the plaintiff is not expressly requesting that the plat be vacated, corrected, or revised. 485 Mich 1036 (2010).

In an opinion by Chief Justice YOUNG, joined by Justices MARILYN KELLY, HATHAWAY, MARY BETH KELLY, and ZAHRA, the Supreme Court *held*:

A plaintiff seeking to quiet title by adverse possession is not required to file a claim under the Land Division Act if that plaintiff is not expressly requesting to alter a recorded plat.

1. A party seeking to acquire title to property by adverse possession must show clear and cogent proof of possession that is actual, visible, open, notorious, exclusive, continuous and uninterrupted for the statutory period of 15 years, hostile, and under cover of claim of right. After the statutory period ends, the record owner's title is extinguished and the adverse possessor acquires legal title to the property. However, this title is neither record title nor marketable title until the adverse possessor files a lawsuit and obtains a judicial decree.

2. A plat is a map or chart that describes the physical property interests on a particular area of land. The exclusive means by which to vacate, correct, or revise a dedication in a recorded plat is to file a lawsuit under the LDA. The LDA does not enable a court to recognize a property right the legitimacy of which has yet to be established; it only allows a court to alter a plat to reflect property rights that already exist.

3. Plaintiffs' action to quiet title would be a necessary prerequisite for a claim under the LDA because it sought to establish a substantive property right that was not reflected in the plat or traceable to the platting process. Without a judicial decree showing that plaintiffs had validly obtained record title to the property, there would be no basis on which to seek a vacation, correction, or revision of the plat, and no need to do so, because the plat accurately reflected the underlying substantive property rights until the change in ownership rights was established by plaintiffs' adverse-possession action. Therefore, plaintiffs could not have obtained the relief they sought merely by filing a claim under the LDA.

4. The circuit court did not have jurisdiction to order that the plat be altered because plaintiffs did not proceed under the LDA, which provides the exclusive means to vacate, correct, or revise a plat.

Affirmed and remanded for the trial court to strike the portion of its order instructing that the plat be corrected.

Justice MARKMAN, joined by Justice CAVANAGH, dissenting, would reverse the judgment of the Court of Appeals because plaintiffs' quiet-title action necessarily sought to vacate, correct, or revise a plat, and therefore plaintiffs should have been required to bring their cause of action under the LDA, which provides the exclusive way to achieve that relief. Justice MARKMAN noted that the majority's interpretation undermines the LDA's primary purposes of ensuring that plats on file remain accurate and providing other affected parties their statutory right to notice and a right to participate. Furthermore, the majority's interpretation will intro-

duce greater uncertainty and instability into Michigan property law, will incentivize artful pleadings and gamesmanship, and will result in Michigan plats becoming increasingly more inaccurate and increasingly less reflective of the actual underlying property interests.

1. PROPERTY — ACTIONS TO QUIET TITLE — ADVERSE POSSESSION — LAND DIVISION ACT — PLATS — REVISION OF PLATS.

A plaintiff seeking to quiet title by adverse possession is not required to file a claim under the Land Division Act if that plaintiff is not expressly requesting to alter a recorded plat (MCL 560.101 *et seq*.; MCL 600.5801[4]).

2. PROPERTY — LAND DIVISION ACT — PLATS — REVISION OF PLATS.

The exclusive means by which to vacate, correct, or revise a dedication in a recorded plat is to file a lawsuit under the Land Division Act (MCL 560.101 *et seq*.).

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Reading, Etter & Lillich (by *Victor L. Lillich*) for Lima Township.

Amici Curiae:

Cunningham Dalman, P.C. (by *Andrew J. Mulder* and *Vincent L. Duckworth*), for the Michigan Municipal League, the Michigan Township Association, and the Public Corporation Law Section of the State Bar of Michigan.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, and *James E. Riley*, Assistant Attorney General, for the Department of Energy, Labor, and Economic Growth.

McClelland & Anderson, L.L.P. (by *David E. Pierson*), for the Real Property Law Section of the State Bar of Michigan.

YOUNG, C.J. This case requires us to consider whether a plaintiff who seeks to establish an adverse possession claim that would affect property in a recorded plat must file a claim under the Land Division Act (LDA), MCL 560.101 *et seq.*, if the plaintiff is not expressly requesting that the plat be vacated, corrected, or revised. We hold that an action that seeks to establish a substantive property right arises independently of an LDA action to vacate, correct, or revise a recorded plat. It is only after such a property right has been recognized that the need arises under the LDA to revise a plat that does not reflect the newly recognized property right. Until that property right is legally recognized, the LDA is inapplicable. The language of the LDA and our cases analyzing the LDA demonstrate that an LDA action is appropriate when a party's interest arises from or is traceable to the plat or the platting process.

An action to quiet title by adverse possession confers judicial recognition that the possessor acquired marketable title of record to the property at issue. A successful quiet title action also establishes a substantive property right that was not previously shown within the plat. Without possessing record title to the property, no one, including plaintiffs, had a basis on which to request an alteration of the plat under the LDA. Therefore, plaintiffs were not required to proceed under MCL 560.221,[1] which allows a circuit court to vacate, correct, or revise a plat but does not "enable a court to establish an otherwise nonexistent property right."[2] Accordingly, we affirm the judgment of the Court of Appeals. However, we order the circuit court to strike the portion of its

[1] MCL 560.221 provides that "[t]he circuit court may, as provided in sections 222 to 229 vacate, correct, or revise all or a part of a recorded plat."

[2] *Tomecek v Bavas*, 482 Mich 484, 496; 759 NW2d 178 (2008).

order that corrected the plat to reflect plaintiffs' successful quiet title action because plaintiffs did not request that relief.

I. FACTS AND PROCEEDINGS

The dispute in this case arises from a disagreement between plaintiff Florence Beach[3] and defendant Lima Township (the township) over property rights to areas of land shown as platted streets on the Harford Village plat. The Harford Village plat, which was made and recorded in 1835, has remained unaltered since its execution. It consists of six blocks arranged in two rows of three. Blocks I, II, and III, which are the relevant blocks here, are bordered to the south by Jackson Road, a county road that runs east to west. Block I is bordered to the west by West Street, a county road that runs north and south. The other relevant streets shown on the plat, North Street, East Street, and Cross Street, have never been developed or used as roads.

Through several conveyances that occurred in 1854, 1881, and 1897, the Beach family acquired the area of land now known as the Beach Family Farm. In particular, the Beach Family Farm consists of all of the lots in Blocks II and III of the plat. In 1954, the township purchased lots in Block I, which is currently the site of a community hall. In 2004, the township purchased several more lots in Block I, intending to build a fire department substation. The township also intended to use and develop part of North Street and part of Cross Street as roads for ingress and egress to the substation.

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[3] After Ms. Beach filed this action, the circuit court ordered the remaining plaintiffs joined as necessary parties because they each had an interest in the Beach Family Farm, which plaintiffs assert includes the disputed platted streets. For ease of reference, we will generally refer to plaintiffs collectively.

Plaintiffs disputed the township's right to use the undeveloped property designated as streets on the plat and filed the instant action to quiet title to the areas platted as North, East, and Cross Streets based on adverse possession. The township filed a counterclaim to quiet title with regard to its right to the platted streets. The parties then filed cross-motions for summary disposition.

The township moved for summary disposition under MCR 2.116(C)(8) and (10), arguing that plaintiffs' action should be dismissed because they were required to file an action under the LDA to vacate portions of the plat. Plaintiffs contended in their motion for summary disposition, filed under MCR 2.116(C)(8), (9), and (10), that there was no genuine question of material fact that they had acquired title by adverse possession.

The circuit court denied the township's motion but ordered an evidentiary hearing on plaintiffs' motion. Following the hearing, the court granted plaintiffs' motion for summary disposition. The circuit court found that large trees, at least 100 years old, were growing in the middle of the areas platted as streets and that the Beach family had adversely possessed the disputed property by farming, as well as by maintaining private trails and fences on the disputed property. The circuit court held that plaintiffs had established the elements of adverse possession and that plaintiffs were not required to proceed under the LDA. Although plaintiffs had not requested such relief, the court ordered that "[t]o the extent that it is necessary the Harford Plat shall be corrected to remove Cross, North, and East Street[s] . . . ."

On appeal, the Court of Appeals affirmed.[4] In response to the township's argument that plaintiffs were

[4] *Beach v Lima Twp*, 283 Mich App 504; 770 NW2d 386 (2009).

required to file their claim under the LDA, the Court of Appeals held that "because plaintiffs did not expressly seek in this action 'to vacate, correct, or revise a dedication in a recorded plat,' " an action under the LDA was not required.[5] The Court of Appeals construed our decisions in *Martin v Beldean*[6] and *Tomecek v Bavas*[7] as supporting the proposition that "akin to quieting title, resolution of underlying disputes regarding the nature, character, and scope of existing property rights that could potentially lead to plat revisions may be undertaken in the context of an LDA action, but it is not mandatory."[8] The Court of Appeals also concluded that *Martin* and *Tomecek* permit "a bifurcated approach, involving, first, a determination regarding the nature, character, and scope of the existing property interests being disputed by the parties and, second, an alteration of the plat map, if necessary, so that it is consistent with the property interests as determined by the court."[9] The township subsequently sought leave to appeal, which we granted.[10]

II. STANDARD OF REVIEW

We review de novo a decision on a motion for summary disposition.[11] We also review de novo questions of

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[5] *Id*. at 509.

[6] *Martin v Beldean*, 469 Mich 541; 677 NW2d 312 (2004).

[7] *Tomecek*, 482 Mich 484.

[8] *Beach*, 283 Mich App at 518.

[9] *Id*. at 520 (emphasis omitted).

[10] The order granting leave to appeal directed the parties to brief only "whether a plaintiff who seeks to establish an adverse possession claim that would affect property in a recorded plat must file a claim under the Land Division Act, MCL 560.101 *et seq*., if the plaintiff is not expressly requesting that the plat be vacated, corrected or revised." *Beach v Lima Twp*, 485 Mich 1036 (2010).

[11] *Woodman v Kera LLC*, 486 Mich 228, 236; 785 NW2d 1 (2010).

statutory interpretation.[12] In addition, whether plaintiffs were required to bring their action under the LDA is a question of law that we review de novo.[13] An action to quiet title is an equitable action that we also review de novo.[14]

III. ANALYSIS

This Court has long recognized the common law doctrine of adverse possession,[15] which the Legislature has since codified.[16] To establish adverse possession, the party claiming it must show "clear and cogent proof of possession that is actual, visible, open, notorious, exclusive, continuous and uninterrupted for the statutory period of 15 years, hostile and under cover of claim of right."[17] After the statutory period ends, the record owner's title is extinguished[18] and the adverse possessor

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[12] *Dep't of Transp v Tomkins*, 481 Mich 184, 190; 749 NW2d 716 (2008).

[13] *Martin*, 469 Mich at 546.

[14] *Walker v Bowen*, 333 Mich 13, 20; 52 NW2d 574 (1952).

[15] See *Sanscrainte v Torongo*, 87 Mich 69; 49 NW 497 (1891).

[16] See MCL 600.5801, which provides in part:

> No person may bring or maintain any action for the recovery or possession of any lands or make any entry upon any lands unless, after the claim or right to make the entry first accrued to himself or to someone through whom he claims, he commences the action or makes the entry within the periods of time prescribed by this section.
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> (4) In all other cases under this section, the period of limitation is 15 years.

[17] *Burns v Foster*, 348 Mich 8, 14; 81 NW2d 386 (1957) ("It is elementary that the burden of proving adverse possession rests upon the party who alleges it . . . ."); MCL 600.5801.

[18] "Michigan courts have followed the general rule that the expiration of the period of limitation terminates the title of those who slept on their rights and vests title in the party claiming adverse possession." *Gorte v*

acquires "legal title" to the property.[19] Acquisition of title in this manner includes "the right to defend the possession and to protect the property against the trespass of all others."[20] However, the title acquired by adverse possession is neither record title nor marketable title until the adverse possessor files a lawsuit and obtains a judicial decree.[21] Thus, until an adverse possessor obtains the necessary judicial decree, there is no record of the adverse possessor's ownership interest to verify whether the possessor actually satisfied the elements of adverse possession. The circuit court ruled that the Beach family had established the elements of adverse possession and acquired title to the land before 1907.[22] Consequently, the judicial decree quieting title in plaintiffs settled any ownership claims of the township and conferred marketable title of record to the disputed property on plaintiffs.

The question posed by this case is whether a nonrecord property holder seeking to establish marketable title by proof of adverse possession must bring such an action under the LDA, rather than solely as an action to quiet title.

Dep't of Transp, 202 Mich App 161, 168-169; 507 NW2d 797 (1993), citing *Gardner v Gardner*, 257 Mich 172, 176; 241 NW 179 (1932).

[19] *Miller v Miller*, 100 Mich 563, 564; 59 NW 242 (1894).

[20] *Zabowski v Loerch*, 255 Mich 125, 128; 237 NW 386 (1931) (citation and quotation marks omitted).

[21] See *Escher v Bender*, 338 Mich 1, 7-8; 61 NW2d 143 (1953) ("Title established through adverse possession is free from encumbrance and of a character to assure quiet and peaceful enjoyment . . . , but it is not a marketable title of record until there has been a judicial determination of such title."); *Deane v Rex Oil & Gas Co*, 325 Mich 625, 631; 39 NW2d 204 (1949) ("To show a record title by adverse possession requires a suit and the recording of a decree.").

[22] Beginning in 1907, Michigan law precluded obtaining title to publicly owned property through adverse possession. See 1907 PA 46; *Arduino v Detroit*, 249 Mich 382, 387; 228 NW 694 (1930).

The LDA became effective on January 1, 1968. This act and the amendments to it are the most recent manifestations of the Legislature's regulation of platting.[23] In particular, the LDA provides a process for surveying and marking subdivided property, as well as for recording with the local municipality the information compiled on a plat.[24] The LDA also permits a circuit court to vacate, correct, or revise a recorded plat,[25] which the LDA defines as a "map."[26] A land plat describes underlying property interests in conformity with record ownership as nearly as practicable.[27]

For the purposes of this case, the most pertinent portion of the LDA, MCL 560.222, provides:

> Except as provided in section 222a,[28] to vacate, correct, or revise a recorded plat or any part of a recorded plat, a complaint shall be filed in the circuit court by the owner of a lot in the subdivision, a person of record claiming under the owner, or the governing body of the municipality in which the subdivision covered by the plat is located.

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[23] As we noted in *Martin*, 469 Mich at 543:

> In the earliest days of this state, indeed, even before statehood, in order to allow townships to be subdivided into discrete areas containing, for example, residential lots, dedicated streets, alleys, parks, etc., plat legislation was enacted. After Michigan became a state in 1837 there were numerous statutes amending and revising the requirements for recording and changing plats over the years. Further, in 1873 Michigan began centrally maintaining a file of all plats with the State Treasurer so that interested individuals could inspect them and ascertain the rights and limitations of a given plat.

[24] *Tomecek*, 482 Mich at 495 (opinion by KELLY, J.).

[25] *Id.*; MCL 560.221.

[26] MCL 560.102(a) (" 'Plat' means a map or chart of a subdivision of land.").

[27] See MCL 560.206(1).

[28] MCL 560.222a refers to public utility easements and is not relevant to this case.

In addition, MCL 560.223 requires that the complaint set forth "[t]he part or parts, if any, sought to be vacated and any other correction or revision of the plat sought by the plaintiff" and "[t]he plaintiff's reasons for seeking the vacation, correction, or revision." MCL 560.224a sets forth the parties that must be joined in actions under the LDA.[29] And MCL 560.229 requires a plaintiff to record the judgment after the entry of an order for vacation, correction, or revision of a plat.[30]

The creation, termination, and vacation of plats are controlled by the statutory authority of the LDA. Consequently, "the exclusive means available when seeking to vacate, correct, or revise a dedication in a recorded plat is a lawsuit filed pursuant to MCL 560.221 through 560.229."[31] Requiring a lawsuit that seeks to alter any part of a plat to be filed under the LDA ensures that the plats on file remain accurate.[32] However, "[t]he LDA was never intended to enable a court to establish an otherwise nonexistent property

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[29] These parties include the owners of record title of each lot or parcel of land within 300 feet of the lands described for vacation or revision; the municipality where the plat is located; the director of the Department of Energy, Labor, and Economic Growth (now the Department of Licensing and Regulatory Affairs); the drain commissioner; the chairperson of the board of county road commissioners; public utilities with installations or equipment in the plat; and the directors of the state transportation department and the Department of Natural Resources if the plat includes a state highway. MCL 560.224a.

[30] MCL 560.229 provides:

> Within 30 days after entry of judgment, for vacation, correction, or revision of a plat, plaintiff shall record the judgment in the office of the register of deeds. The register of deeds shall place on the original plat the date, liber, and page of the record of the court's judgment.

[31] *Martin*, 469 Mich at 542-543.

[32] *Id*. at 551 n 24.

right. Rather, the act allows a court to alter a plat to reflect property rights already in existence."[33]

We conclude that plaintiffs, who filed an action to quiet title based on adverse possession, were not required to proceed with an action under the LDA. Plaintiffs' quiet title action was the appropriate action to establish their entitlement to hold record title to the property at issue. Because plaintiffs' quiet title action established a substantive property right that was not reflected in the plat or traceable to the platting process, their action involved more than merely correcting the plat to reflect a preexisting interest in land. Plaintiffs' claim to the property developed more than a century ago; however, public recognition of that right depended on plaintiffs' ability to prove the elements of adverse possession in a present-day quiet title action.

The township's challenge to plaintiffs' claim required the circuit court to resolve the merits of plaintiffs' adverse possession claim *before* considering any claims regarding the plat's accuracy. If plaintiffs had failed to *prove* adverse possession by clear and cogent evidence, the township's interest in the land would have been paramount and the plat would have remained accurate. Revising a plat ensures that the plat accurately reflects existing substantive property rights; a revision does not, however, establish rights that did not exist previously.[34] Rather, when a claimant challenges title to land through adverse possession, substantive property rights are established through a quiet title action.[35] Therefore, plaintiffs could not have

[33] *Tomecek*, 482 Mich at 496 (opinion by KELLY, J.).

[34] See *id.*

[35] See MCL 600.2932.

obtained the relief they sought by merely filing a claim under the LDA.[36]

Our conclusion finds support in the plain language of the LDA. The LDA defines a plat as a "map or chart of a subdivision of land."[37] This Court has also described plats as "a description of the physical property *interests* on a particular area of land."[38] When a party files an LDA action to vacate, correct, or revise a recorded plat, MCL 560.223(b) requires the plaintiff to set forth the "reasons for seeking the vacation, correction, or revision of the plat." However, without a judicial decree showing that plaintiffs validly obtained record title to the property, there is no legal or record basis for plaintiffs to seek a vacation, correction, or revision of the plat. Thus, the plat *accurately* reflected the underlying substantive property rights until the change in ownership rights was established by plaintiffs' adverse possession action.[39]

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[36] As early as 1937, this Court acknowledged the distinction between obtaining title by adverse possession and vacating a plat. See *Olsen v Grand Beach*, 282 Mich 364, 368-369; 276 NW 481 (1937).

[37] MCL 560.102(a).

[38] *Tomecek*, 482 Mich at 496 (opinion by KELLY, J.) (emphasis added).

[39] As additional support for this analysis, we note that the LDA affords standing to file a complaint "to vacate, correct, or revise a recorded plat or any part of a recorded plat" *only* to "the owner of a lot in the subdivision, a person of record claiming under the owner, or the governing body of the municipality in which the subdivision covered by the plat is located." MCL 560.222. If we were to hold, as the dissent argues, that an adverse possessor is required to file under the LDA, the adverse possessor may not have standing to pursue the very LDA action that the dissent would require. If a party acquired land in a plat by adverse possession but did not become an "owner of a lot in the subdivision," the party could not file an LDA action under MCL 560.222. Therefore, if, as the dissent argues, an LDA action were a prerequisite to establishing an adverse possession claim, a person who was not already a lot owner would be left without recourse to acquire record title by adverse possession. Such a holding would work a fundamental change in property law by

Our conclusion is also supported by this Court's caselaw addressing the LDA. We previously discussed the scope of LDA actions in *Martin v Beldean* and *Tomecek v Bavas*. In *Martin*, the plaintiffs were landowners in a recorded plat consisting of 21 lots and three outlots who filed a quiet title action to have a provision of the plat language regarding an outlot declared "null and void."[40] The plaintiffs owned a lot in the plat that bordered the outlot in question and also had an ownership interest in the outlot itself. The plaintiffs argued that the restriction regarding use of the outlot had expired and claimed that they were entitled to have the plat language removed. The Court of Appeals agreed.[41]

We reversed and held that the plaintiffs' efforts to have a plat dedication of an outlot declared "null and void" required the filing of an LDA action.[42] This was because the *Martin* plaintiffs' requested order sought relief that only the LDA could afford.[43] The plaintiffs had improperly filed a quiet title action because the removal of plat language constituted an action to vacate, correct, or revise the plat and a lawsuit under the LDA is "the exclusive means available" for a party to vacate, correct, or revise a recorded plat.[44]

The dissent incorrectly concludes that *Martin* requires plaintiffs in the instant case to file under the

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effectively precluding an entire class of litigants from establishing record and marketable title through adverse possession. Nothing in the LDA indicates that the Legislature intended this result.

[40] *Martin*, 469 Mich at 544-545.

[41] *Martin v Redmond*, 248 Mich App 59; 638 NW2d 142 (2001).

[42] *Martin*, 469 Mich at 550.

[43] The *Martin* plaintiffs expressly requested that the court " 'remov[e] the . . . restrictions/reservations from the subject portion of Outlot A owned by the Plaintiffs and/or declaring same null and void.' " *Id.* at 545 n 10.

[44] *Id.* at 542-543.

LDA. *Martin* presents the very opposite situation from the one this case presents. Unlike plaintiffs here, the *Martin* plaintiffs had a *preexisting* substantive property right—reflected in the plat and documented by a deed—in the plat whose language they sought to have declared void. Thus, the issue in *Martin* concerned whether the plat's language accurately reflected the parties' preexisting rights *as outlined* in the plat itself. Furthermore, the relief sought by the *Martin* plaintiffs' quiet title action was to conform the plat at issue to those preexisting property rights. In this case, plaintiffs had no recognized, recorded, preexisting property rights in the disputed land. Plaintiffs' sole claim to the land required *establishing* legally cognizable substantive property rights that were not recognized within the plat, which plaintiffs could *only* accomplish by proving, for the first time in more than 100 years, that they and their predecessors in interest had satisfied the elements of adverse possession. Finally, unlike the action in *Martin*, plaintiffs' successful quiet title action leaves the plat unchanged, but inaccurate. However, *because* plaintiffs have now successfully established their rights to the property, they have a basis on which to request that the plat be corrected.[45]

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[45] Our decision is also consistent with *Hall v Hanson*, 255 Mich App 271; 664 NW2d 796 (2003), which we cited with approval in *Martin*. *Martin*, 469 Mich at 550 n 21. In *Hall*, the defendants filed a counterclaim to quiet title, alleging that the relevant plats "were clouds on their title." *Hall*, 255 Mich App at 277. The *Hall* defendants challenged the validity of a street dedicated in a plat and claimed that the plaintiffs had failed to accept the dedication or, in the alternative, abandoned the street. The defendants in *Hall* did not claim an interest in the street by virtue of adverse possession or on any other basis independent of the plat. Rather, the defendants' claimed interest in the street at issue was directly traceable to and arose from the plat and the platting process. If the street were vacated—that is, if a court determined that the plaintiffs had failed to accept the dedication or abandoned the street—the defendants would, by operation of law, own the vacated portions of the street because, *as*

In *Tomecek*, we considered a dispute over the meaning of a restrictive covenant running with a plat, which prevented the plaintiffs from erecting a building on their lot until that lot had access to a municipal sanitary sewer line.[46] Because the lot at issue was landlocked, the plaintiffs had an easement over two other lots through which they accessed their property, but upon which no utilities were located. The plaintiffs argued that they were entitled to use their easement to access the municipal sewer line.[47] A second easement existed on the plat where plaintiffs' lot was located, and both easements were labeled "drive easement" on the plat. At the time of platting, the second easement was used as a right of way and had utilities located on it as well. Four justices concluded that the original grantor intended both easements to be used for right-of-way access and for utility access.[48] Thus, the plaintiffs were permitted to access utilities through their easement.

Tomecek also addressed whether the LDA permitted a court to affect underlying substantive property rights by vacating, correcting, or revising a recorded plat. Five justices concluded that "[t]he LDA cannot be used to create substantive property rights"[49] and set forth the following principles regarding the parameters of an action under the LDA:

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reflected in the plat, they were abutting landowners. See MCL 560.227a. Unlike plaintiffs here, the *Hall* defendants claimed a property interest that arose from the plat. Thus, the defendants' interest in the relevant property emanated from the plat and the platting process, and the defendants were required to proceed under the LDA because their claim addressed the scope of property interests as reflected in the plat. The *Hall* defendants, in short, were not establishing a substantive right that was not depicted in the plat, whereas, in this case, plaintiffs' claim *did* establish a substantive right that was established *without* regard to the plat.

[46] *Tomecek*, 482 Mich at 487-489 (opinion by KELLY, J.).

[47] *Id*. at 487-488.

[48] *Id.* at 487; *id*. at 499 (opinion by CAVANAGH, J.).

[49] *Id*. at 497 (opinion by KELLY, J.); *id*. at 505 (opinion by YOUNG, J.).

> The LDA defines a plat as a map. A plat is a description of the physical property interests on a particular area of land. A map, by itself, is not a determination of substantive property interests. If one "revises" a map of the United States to show Michigan encompassing half of the country, it does not make it so. The LDA was never intended to enable a court to establish an otherwise nonexistent property right. Rather, the act allows a court to alter a plat to reflect property rights *already in existence*.[50]

Thus, the LDA cannot establish substantive property rights by redrawing the lines in a plat because the plat, as a map, merely reflects preexisting substantive property rights.

The lead opinion in *Tomecek* also concluded that, when the trial court altered the plat at issue, the plaintiffs' LDA action did not "create" a property right:

> In this case, the LDA did not *create* new substantive property rights when the circuit court altered the plat to reflect that the central easement encompasses utility access. This right existed with respect to the central easement *since its inception*, when the original grantors recorded the central easement intending it to include utilities. The trial court merely used the LDA as the tool to validate property rights that already existed.[51]

Because the right to use the easement in question for utility access existed *at the time of platting*, the LDA did not *create* a property right. Thus, the issue in *Tomecek* concerned the scope of the easement rights that existed

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[50] *Id*. at 496 (opinion by KELLY, J.) (emphasis added); accord *id*. at 505 (opinion by YOUNG, J.). It is not clear how the dissent reconciles its position with *Tomecek*, which compels the conclusion that plaintiffs' quiet title action was appropriate. In this case, without first quieting title, plaintiffs' LDA action would have involved the establishment of a substantive right, which, as five justices held in *Tomecek*, is relief that the LDA cannot provide.

[51] *Id*. at 496 (opinion by KELLY, J.) (emphasis added).

in the plat. By contrast, in this case, plaintiffs' legal entitlement to the property existed independently of the plat.

Contrary to the dissent's arguments, our analysis does not draw "hypertechnical distinctions" between this case and our precedents analyzing the LDA.[52] Rather, our analysis simply recognizes the limitations of the LDA and the common thread that runs through *Hall*, *Martin*, and *Tomecek*.[53] In those cases, the disputes centered on whether a plat accurately reflected existing substantive property rights as determined by the relevant plat language. In this case, the dispute concerns the establishment of a substantive right neither reflected in the plat nor traceable to the platting process. The LDA's language, coupled with the applications of the LDA set forth earlier, highlights the crucial limitation of LDA actions to vacate, correct, or revise a

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[52] *Post* at 148.

[53] Contrary to the dissent's assertions, our decision does not suggest that *Martin* was decided incorrectly. As stated throughout this opinion, the factual and legal differences that distinguish the instant matter from *Martin* compel the result of this case. Moreover, the dissent's repeated efforts to transform plaintiffs' quiet title claim into an LDA action to revise a plat erroneously conflates two distinct legal actions. Yet, notwithstanding the attempt to mesh these different claims such that we should require plaintiffs to proceed under the LDA, the dissent agrees that plaintiffs could not file an LDA action without first establishing a substantive interest in the land: "If the plat had been simply altered without a judicial decree that plaintiffs were the true owners of the property, the LDA would have served as the vehicle to '*establish* an otherwise nonexistent property right,' which would be contrary to our holding in *Tomecek* . . . ." *Post* at 145-146.

The quiet title action at issue serves precisely that (limited) purpose: to obtain the necessary judicial decree. Unless and until plaintiffs affirmatively demonstrate their superior interest in the land, the LDA is inapplicable. The dissent errs by treating plaintiffs' lawsuit, which did not seek and could not have obtained a plat revision without first succeeding in this claim, as an action that must be filed under the LDA.

recorded plat. If a party's interest in land is traceable to the plat or the platting process, the LDA is the appropriate avenue for relief. If, as here, a party seeks to establish a substantive interest in land that is not traceable to the plat nor the platting process, the LDA cannot provide the necessary relief.

Additionally, plaintiffs' quiet title action did not seek to have the plat language regarding North, East, and Cross Streets declared "null and void," nor does it "vacate, correct, or revise" the plat. Rather, plaintiffs' quiet title action served a very different purpose from the purpose served by an LDA action.[54] Unlike the factual situations in *Hall*, *Martin*, and *Tomecek*, plaintiffs' interest in the disputed property did not depend on the plat, the plat's dedication language, or whether the township abandoned the streets.[55] Plaintiffs ac-

[54] The dissent argues that plaintiffs' quiet title action "for all practical purposes sought to vacate or otherwise alter the plat . . . ." *Post* at 140. However, in actuality, plaintiffs' quiet title action served the entirely *separate* purposes of establishing a cognizable substantive property right in land and obtaining record ownership of the property. The inescapable conclusion of plaintiffs' action—and the gravamen of plaintiffs' claim—is that plaintiffs sought to establish an otherwise unrecognized substantive interest in land. As this Court recognized in *Tomecek*, the LDA is incapable of providing the relief plaintiffs requested. Moreover, as outlined earlier and conceded by the dissent, plaintiffs' action was a necessary prerequisite to an LDA action. We agree with the dissent that the essential issue is "whether plaintiffs' quiet-title action seeks to 'vacate, correct, or revise a recorded plat or any part of a recorded plat.' " *Post* at 154. However, because we believe that plaintiffs' quiet title action did not seek such relief—either in form or in substance—we do not require plaintiffs to proceed under the LDA.

[55] The dedication provision of MCL 560.253(1) does not change our analysis. The plain language of § 253 addresses itself to the conveyance of substantive property rights by a landowner when the plat is initially created and how those rights are reflected in a plat. When a landowner certifies, signs, acknowledges, and records a plat pursuant to the LDA, that process is "deemed" sufficient to convey property interests to the

quired their interest in the land by adverse possession, the very nature of which requires acting in a manner *contrary* to another person's interests, including interests that are reflected in a plat. Plaintiffs' quiet title action required plaintiffs to affirmatively establish their entitlement to the disputed land and, thus, merely revising the plat could not provide plaintiffs the necessary relief.

We agree with the township that the Legislature has expressed an intent that a plat may only be properly altered, in whole or in part, by following the procedures set forth in the LDA. We are not persuaded, however, by the township's argument that because the consequence of plaintiffs' successful quiet title action altered substantive rights created by the dedication of land in a recorded plat, they were required to bring their action under the LDA *in the first instance*. This position is inconsistent with the holding in *Tomecek*.[56] If the rights indicated in the plat were superior to the underlying substantive property rights indicated in the register of deeds, the township would be correct. However, we see nothing to suggest that the LDA elevates the plat description above the underlying substantive property rights contained therein. Thus, the LDA does not require a party to proceed under its procedures unless

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donees represented in the plat. The LDA indicates that the *only* time at which a plat establishes substantive rights is when a plat is *created* in conformity with the LDA's requirements. Thus, although a property owner may convey substantive rights by creating a plat because the LDA "deem[s]" it so, the plat that results from this process merely *reflects* those conveyed rights because a plat, as defined by the LDA, is a "map or chart of a subdivision of land." MCL 560.102(a). Section 253 does not undermine our conclusion that plaintiffs' quiet title action was appropriate because plaintiffs established a substantive interest in the disputed property that was neither represented in the plat nor traceable to the platting process.

[56] *Tomecek*, 482 Mich at 496 (opinion by KELLY, J.).

that party is seeking to alter the plat or the dedication language of the plat to which the party has a preexisting substantive property right as the owner of the property or a person of record claiming under the owner.[57]

Furthermore, we reject the claim that plaintiffs' action to quiet title by adverse possession is merely a disguised action to alter a plat and the assertion that our decision encourages artful pleading or gamesmanship. Plaintiffs in this case merely pleaded what they sought to accomplish, which was to establish a substantive interest in property on the basis of adverse possession. Although we see no reason why plaintiffs could not have addressed both the adverse possession claim and the LDA claim in bifurcated proceedings—in which the court would have first addressed the quiet title claim and then, if necessary, resolved any issues regarding the plat—there is nothing in the LDA that *requires* a

[57] The dissent's effort to harmonize the quiet title statute with the LDA highlights the basic disagreement between the two opinions. The dissent argues that plaintiffs' quiet title action overlaps with and must yield to the LDA and accuses the majority of "view[ing] it as of little moment whether a plaintiff avails himself of the quiet-title statute or the LDA[.]" *Post* at 142. On the contrary, we find the distinction of considerable moment, and our analysis recognizes the separate purposes served by quiet title actions and actions under the LDA, as well as the limitations of each. Quiet title actions enable a party to establish a substantive right. LDA actions, on the other hand, are concerned with whether a map accurately reflects the substantive rights described therein and do not authorize a court to establish an otherwise nonexistent right. *Tomecek*, 482 Mich at 496 (opinion by KELLY, J.). Had plaintiffs merely filed an LDA action grounded on the bare assertion that the plat was inaccurate because of an unproven claim of adverse possession, plaintiffs would not have been entitled to relief because the LDA could not have provided the requested substantive relief. Thus, the distinction between the two claims is of substantial importance, and it is unnecessary for quiet title actions to yield to the LDA when the LDA plainly cannot provide the same relief. Therefore, because each claim serves a separate purpose—as demonstrated previously—there is no tension between the statutes and no need to harmonize them.

litigant to proceed in that manner. The action to quiet title was a necessary prerequisite, permitting plaintiffs to obtain the marketable title of record that is essential to supporting a subsequent claim for altering the plat under the LDA.[58] Thus, a meaningful and necessary distinction exists between establishing marketable title of record by adverse possession and having that property interest accurately reflected in the plat.[59]

Finally, we hold that the circuit court erred when it ordered the unrequested relief that, "[t]o the extent that it is necessary[,] the Harford Plat shall be corrected to remove Cross, North, and East Street and vest[] title in favor of the plaintiffs." Because the LDA provides the *exclusive* means to vacate, correct, or revise a plat,[60] and plaintiffs did not proceed under the LDA, the circuit court lacked the authority to order a correction of the plat. Although plaintiffs *now* have a basis on which to seek a revision of the plat, the circuit court was without jurisdiction to order the correction of the plat at the time plaintiffs sought to quiet title to the property. Therefore, we order the circuit court to strike that portion of its order. [61]

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[58] That a quiet title action to establish title to land is a "necessary prerequisite to the alteration of [a] plat" is a proposition with which the dissent agrees. *Post* at 145. The dissent errs by conflating the plat alteration with the action to quiet title despite recognizing that a party must establish title—accomplished here through a quiet title action—*before* any alteration to a plat becomes necessary.

[59] See *Olsen*, 282 Mich at 368-369 (recognizing the distinction between claiming title by adverse possession and vacating a plat); *Howard v Berrien Springs*, 311 Mich 567, 568, 570; 19 NW2d 101 (1945) (recognizing the plaintiff's right to quiet title based on adverse possession "as to any claim of defendant village in the premises," which included land in a recorded plat dedicated " 'to remain open and free for the benefit of the public' ").

[60] *Martin*, 469 Mich at 542-543.

[61] We recognize that the practical effect of our analysis is to render the plat inaccurate. But the township is not without recourse to correct the

IV. CONCLUSION

We conclude that plaintiffs were not required to file their action under the LDA. Although plaintiffs could have filed an action under the LDA contingent on establishing their substantive right in a quiet title action, they were not required to do so because they did not expressly request the alteration of the plat and because plaintiffs' quiet title action established a substantive property right for the first time. Accordingly, we affirm the judgment of the Court of Appeals that plaintiffs were not required to bring their action under the LDA on the basis of the preceding analysis and remand the matter for the circuit court to strike the erroneous portion of its order instructing that the plat be revised.

MARILYN KELLY, HATHAWAY, MARY BETH KELLY, and ZAHRA, JJ., concurred with YOUNG, C.J.

MARKMAN, J. (*dissenting*). I respectfully dissent. The exclusive way to "vacate, correct, or revise a recorded plat or any part of a recorded plat" is to file a lawsuit pursuant to the procedures of the Land Division Act (LDA), MCL 560.101 *et seq*. MCL 560.222; *Martin v Beldean*, 469 Mich 541, 542-543; 677 NW2d 312 (2004). This rule is compelled by the explicit language of the LDA, and was explicitly recognized in *Martin*. Even the majority appears to acknowledge this rule. Yet, disregarding the core purpose of the LDA—to "ensure[] that plats on file remain accurate," *Martin*, 469 Mich at 551

plat because it has standing under the LDA, as the municipality in which the subdivision covered by the plat is located, to seek to correct the plat. MCL 560.222. Although the township is not required to file such an action, it may certainly do so if it desires to rectify the inaccuracy of the plat by having it altered to indicate that plaintiffs have record title to the disputed property. Plaintiffs, as lot owners, may do the same. *Id*.

n 24—the majority holds that plaintiffs, who filed an action to quiet title based on adverse possession, were not required to proceed with an action under the LDA because they sought to establish a substantive property right that was neither "traceable to the plat" nor to "the platting process," even though now that plaintiffs have prevailed in this action, a recorded plat will *necessarily* have been "vacated, corrected, or revised." By undermining the protections established by the LDA for persons who purchase property in reliance on the representations made in a plat, the majority introduces uncertainty and instability into Michigan property law. Under the majority's interpretation, Michigan plats are destined, over time, to become certainly, and increasingly, more inaccurate, defeating the fundamental purpose of the act. I would require that plaintiffs proceed with their action under the LDA, but allow them to amend their complaint and add all necessary parties.

I. STANDARD OF REVIEW

A trial court's ruling on a motion for summary disposition presents an issue of law that is reviewed de novo on appeal. *Shepherd Montessori Ctr Milan v Ann Arbor Charter Twp*, 486 Mich 311, 317; 783 NW2d 695 (2010). The interpretation of statutes also constitutes a question of law that this Court reviews de novo on appeal. *Eggleston v Bio-Med Applications of Detroit, Inc*, 468 Mich 29, 32; 658 NW2d 139 (2003).

II. ANALYSIS

A. BACKGROUND

The purpose of the LDA, as suggested by its title, is "to regulate the division of land" and also to "further the orderly layout and use of land," "provide for proper

ingress and egress to lots and parcels," "promote proper surveying and monumenting of land subdivided and conveyed by accurate legal descriptions," and "establish the procedure for vacating, correcting, and revising plats." Title of 1967 PA 288. In pursuit of these objectives, real property information is compiled on a plat that is recorded with the local municipality. See MCL 560.131 to 560.198. A plat consists of "a map or chart of a subdivision of land," MCL 560.102(a), and the LDA requires that the plat

> contain sufficient information to completely define, for the purpose of a resurvey, the location of any boundary, corner or angle point within the plat. All land lying within the boundaries of the plat shall be shown thereon in such a manner that title to the area may be clearly established as to whether dedicated to public use or reserved to private use. [MCL 560.135.]

A plat in Michigan is more than a mere map. Rather, it communicates the existence of property rights that are derived from the plat itself. In *Kirchen v Remenga*, 291 Mich 94, 109; 288 NW 344 (1939), this Court explained:

> "Where land is represented on a map or plat as a park, public square, or common, the purchasers of adjoining lots acquire as appurtenant thereto a vested right to have the space so designated kept open for the purpose and to the full extent which the designation imports. The sale and conveyance of lots according to such plat implies a covenant that the land so designated shall never be appropriated by the owner or his successors in interest to any use inconsistent with that represented on the original map. And the purchaser of an adjoining lot acquires such an easement in the park or public square in front of it as entitles him to proceed in equity to prevent by injunction the appropriation of the park or square to any use other than that designated on the map or plat by reference to which he purchased his lot; he is not a mere volunteer

> seeking to enforce the rights of the public; he has a special interest of his own to protect." [Citation omitted.]

Likewise, in *Little v Hirschman*, 469 Mich 553, 564; 677 NW2d 319 (2004), a unanimous opinion of this Court, we held that it is well established by our caselaw that "dedications of land for private use in plats before [the LDA] took effect convey at least an irrevocable easement in the dedicated land." Indeed, "a private dedication is effective upon the sale of a lot because it is reasonably assumed that the value of that lot, as enhanced by the dedication, is reflected in the sale price. That is, purchasers [have] relied upon the dedications that made the property more desirable." *Id.* at 559.

In addition to our caselaw interpreting rights derivable from the plat, the Legislature has granted property rights to individuals solely on the basis of the plat. MCL 560.253(1) states that

> [w]hen a plat is certified, signed, acknowledged and recorded as prescribed in this act, every dedication, gift or grant to the public or any person, society or corporation marked or noted as such on the plat shall be deemed sufficient conveyance to vest the fee simple of all parcels of land so marked and noted, and shall be considered a general warranty against the donors, their heirs and assigns to the donees for their use for the purposes therein expressed and no other.

Therefore, under this provision of the LDA, if a plat is duly recorded, a property right is effectively created. That property right consists of a fee simple interest in "every dedication, gift or grant . . . marked or noted as such on the plat," to be used for "the purposes expressed therein and no other." *Id.*; see also *Martin*, 469 Mich at 549 n 19 (recognizing the fact that "purchasers of parcels of property conveyed with reference to a

recorded plat have the right to rely on the plat reference and are presumed to 'accept' the benefits and any liabilities that may be associated with the private dedication"). Thus, as our caselaw and statutes make plain, a plat is more than merely a map because it conveys property rights to the purchasers of platted property. With this background, we examine whether plaintiffs, who ultimately seek to have North, East, and Cross Streets struck from the Harford Village plat, should have been required to file their claim pursuant to the procedures of the LDA.

B. LAND DIVISION ACT

The primary goal of statutory interpretation is "to ascertain the legislative intent that may be reasonably inferred from the words expressed in the statute." *G C Timmis & Co v Guardian Alarm Co*, 468 Mich 416, 420; 662 NW2d 710 (2003). If statutory language is clear, we presume that the Legislature intended the meaning expressed. *Id.* If the statute does not define a word, we may consult a dictionary to determine the plain and ordinary meaning of the word. *People v Morey*, 461 Mich 325, 330; 603 NW2d 250 (1999).

MCL 560.222 provides:

> Except as provided in [MCL 560.222a], to *vacate, correct, or revise a recorded plat or any part of a recorded plat*, a complaint shall be filed in the circuit court by the owner of a lot in the subdivision, a person of record claiming under the owner, or the governing body of the municipality in which the subdivision covered by the plat is located. [Emphasis added.]

As recognized in *Martin*, the LDA provides the "exclusive" procedure "to vacate, correct, or revise" a recorded plat or any part of a recorded plat. *Martin*, 469 Mich at 542-543. The LDA does not define the terms "to

vacate," "to correct," or "to revise." Therefore, we may consult a dictionary to determine the plain and ordinary meaning of these terms. "To vacate" means "to render inoperative"; "to correct" means "to set or make right; remove the errors or faults from"; and "to revise" means "to alter (something written or printed), in order to correct, improve, or update[.]" *Random House Webster's College Dictionary* (1997). These definitions make evident that plaintiffs' cause of action in this case seeks to "vacate," "correct," and "revise" part of the Harford Village plat.[1]

First, plaintiffs sought to "vacate" part of the plat because they desired "to render inoperative" the areas platted as North, East, and Cross Streets. Pursuant to its property rights derived from the dedication in the plat, Lima Township claims that it is entitled to use these streets. According to the township, a successful adverse-possession action by plaintiffs would render the township's use rights under the plat inoperative, and it is obviously correct in this assertion. Through the operation of adverse possession, plaintiffs are attempt-

[1] MCL 560.222 provides that an LDA action is appropriate if the action seeks to "vacate, correct, or revise" a recorded plat. But rather than analyzing plaintiffs' action in regard to these words that the Legislature actually used, the majority prefers to analyze plaintiffs' action in terms of whether their property interest is "traceable to the plat or the platting process," which according to the majority constitutes a "crucial limitation" on actions that seek to "vacate, correct, or revise" a plat. *Ante* at 116-117. However, it is unclear where this newly identified "crucial limitation" comes from, given that neither the LDA nor caselaw sets forth any such "limitation" on actions that seek to "vacate, correct, or revise" a plat. See MCL 560.221 through 550.229 and part IV(B) of this opinion (observing that the plaintiffs in *Martin* lacked any interest that was "traceable to the plat or the platting process," and thus failed to satisfy the majority's new "crucial limitation" on LDA actions). By introducing a new generalization into the law, one having no apparent foundation within the actual law itself, the majority subtly but unmistakably transforms the law.

ing to extinguish all other interests in the property, including any easement interest of the township. That is, a successful adverse-possession claim would vest plaintiffs with title to the disputed property, *Gorte v Dep't of Transp*, 202 Mich App 161, 168; 507 NW2d 797 (1993), and would afford them " 'the right to defend the possession, and to protect the property against the trespass of others,' " *Zabowski v Loerch*, 255 Mich 125, 128; 237 NW 386 (1931) (citation omitted). The majority recognizes this fact and states that "the judicial decree quieting title in plaintiffs settled *any* ownership claims of the township . . . ." *Ante* at 107 (emphasis added). Thus, when the trial court quieted title to the disputed streets in plaintiffs, they acquired a right to defend their possession and to protect the property against the trespass of the township and all others. Plaintiffs thereafter had a fee simple interest in the platted streets, unencumbered by any remaining interest of the township. By quieting title in plaintiffs, the "part of the plat" that granted the township an easement in the depicted streets was rendered null and void, and therefore "vacated."

Second, plaintiffs sought "to correct" the plat because they desired "to set or make right" the plat to conform to the actual use of the platted streets. Plaintiffs' quiet-title action sought judicial recognition that they are the exclusive owners of the disputed streets and that their ownership interest is unencumbered by the township's easement. A declaration of exclusive ownership thus "correct[ed]" the township's claimed interest in the plat.

Third, plaintiffs sought to "revise" the plat because they desired "to alter [the plat] in order to correct, improve, or update" it to reflect the nonexistence of the

township's easement in the platted streets.[2] The majority again agrees that the plat has been altered, and therefore "revise[d]," when it asserts that a "consequence of plaintiffs' successful quiet title action [was to] alter[] substantive rights created by the dedication of land in a recorded plat . . . ." *Ante* at 118. Accordingly, because plaintiffs' quiet-title action sought to "vacate, correct, or revise" the Harford Village plat (indeed to do all three), plaintiffs should have been required to file their claim pursuant to the LDA. Once again, the LDA provides the *exclusive* procedure "to vacate, correct, or revise a dedication in a recorded plat." *Martin*, 469 Mich at 542-543.[3]

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[2] Notwithstanding the foregoing, the majority concludes that plaintiffs' quiet-title action does not seek to "vacate, correct, or revise" the plat because their action merely sought a judicial determination of title, and not alteration of the plat. But this is an incomplete analysis. What plaintiffs, in fact, sought in addition to a judicial declaration of title was that the title be free and clear of any interests that the township had in the property. Thus, when title was granted in this action, and the township's easement extinguished, the property interests underlying the plat, which granted the township an easement, were ineluctably altered. A plat that did not reflect this alteration would be inaccurate.

[3] Although the instant quiet-title action should have been brought pursuant to the LDA, that is not to say that *every* action that seeks to quiet title to property through adverse possession must proceed under the LDA. As we stated in *Martin*,

> if a party merely wants to maintain the status quo, e.g., to be declared an owner or someone with use rights under a plat, such party would not be seeking to vacate, correct, or revise the plat and thus would not be limited to filing a lawsuit pursuant to the LDA. [*Martin*, 469 Mich at 550 n 21.]

Thus, if an adverse possessor merely sought in an adverse-possession action to be substituted for an owner of a parcel of platted property without affecting the plat's boundary lines, which are to be shown on the plat "in such a manner that title to the area may be clearly established," MCL 560.135, that party would not be required to comply with the procedures of the LDA because it would be maintaining the "status quo" of the plat. It would not be "vacating, correcting, or revising" the plat. If,

C. LDA AND ACCURACY OF PLATS

This interpretation is consistent with the underlying purposes of, and protections afforded by, the LDA. Specifically, the LDA requires a plaintiff seeking to "vacate, correct, or revise a recorded plat or any part of a recorded plat," MCL 560.222, to (a) set forth the "part or parts, if any sought to be vacated and any other correction or revision of the plat sought" and "[t]he plaintiff's reasons for seeking the vacation, correction, or revision," MCL 560.223; (b) serve with process an extensive group of parties who have a potential interest in the platted property, MCL 560.224a; and (c) if the plaintiff's action is successful, prepare "either a new plat of the part of the subdivision affected by the judgment or a new plat of the entire subdivision if the court's judgment affects a major part of the subdivision," MCL 560.229(1). These procedures ensure that every party with an interest or right in the platted property is brought before the court.[4] As this Court stated in *Martin*:

> Allowing this action to proceed as one to quiet title is contrary to the statutes, which not only outline the specific procedures to be followed and what must be pleaded, but also require that an extensive group of parties be served, including everyone owning property located within three

on the other hand, as here, the adverse possessor sought to alter the boundary lines of platted property, that party would be required to comply with the procedures of the LDA because that action would alter the "status quo" of the plat.

[4] One amicus curiae, the Department of Energy, Labor and Economic Growth (now the Department of Licensing and Regulatory Affairs), for example, observes, that it is statutorily obligated as the successor of the State Treasurer to review plats to ensure that the requirements of the LDA are satisfied. MCL 560.151. Requiring that it be joined in an action that seeks to "vacate, correct, or revise a recorded plat" enables it to perform these statutory obligations.

> hundred feet of the lands described in the petition, the municipality, the State Treasurer, the drain commissioner, the county road commissioners, affected public utilities, and in certain instances, the directors of the Department of Transportation and the Department of Natural Resources. [*Martin*, 469 Mich at 550-551.]

The Court further stated:

> Requiring lawsuits seeking to correct, alter, or amend a plat to be filed only pursuant to MCL 560.221 through 560.229 ensures that plats on file remain accurate. The reason is that MCL 560.229 requires that a plaintiff who obtains a court order to vacate, correct, or amend a plat must obtain a new plat and have it filed with the State Treasurer. In this way, the plats on file remain accurate. [*Id.* at 551 n 24.]

Martin thus recognized that purchasers of property have a right to rely on a plat as an *accurate* reflection of the property rights received through their purchase. Ensuring that plats on file remain accurate protects those purchasers who have rightfully relied on plats as evidence of property rights received through their purchase.[5] The rule adopted today by the majority contravenes this core purpose of the LDA by permitting, indeed incentivizing, the increasing inaccuracy of recorded plats. The majority agrees that a principal rationale for requiring a lawsuit under the LDA that seeks to "vacate, correct, or revise a recorded plat" is to ensure that plats remain accurate. Yet, at the same time, it recognizes that "the practical effect of [its] analysis is to render the plat inaccurate." *Ante* at 120 n

[5] Moreover, as three amici curiae (the Michigan Municipal League, the Michigan Township Association, and the State Bar's Public Corporation Law Section) point out, purchasers of platted property are hardly the only ones who rely on the accuracy of plats. Local governments, in particular, also rely on plats for zoning, infrastructure, utility placement, liability, and property taxation purposes.

61; see also *ante* at 111 (stating that "the plat accurately reflected the underlying substantive property rights *until the change* in ownership rights was established by plaintiffs' adverse possession action") (emphasis altered). How can the majority's rule reflect the better interpretation of the LDA where, as the majority itself recognizes, its rule undermines the central purpose of the act? How can its rule reflect a consistent interpretation of the LDA where, as the majority further recognizes, its rule contradicts *Martin*, in which we stated unanimously that "[r]equiring lawsuits seeking to correct, alter, or amend a plat to be filed only pursuant to [the LDA] ensures that plats on file remain accurate"? *Martin*, 469 Mich at 551 n 24. And how can the majority's rule reflect a reasonable interpretation of the LDA and fundamental Michigan property law where, as the majority again recognizes, its rule will ensure, over time, that recorded plats become certainly and increasingly inaccurate?

The majority reasons that all this is acceptable because the LDA grants *other* persons, such as the township, the right to file a complaint to correct erroneous plats. However, the fact that the Legislature may have afforded other persons standing to file a claim to "vacate, correct, or revise" a plat does not ensure that such persons will see fit to actually file such a claim. Plats will indeed remain accurate if they *do* choose to file, but will become increasingly inaccurate if they do *not*, or if they file in a dilatory manner. This legal regime stands in contrast to that established by the LDA, under which plats will always remain accurate, without relying on the fortuitousness of what "other" persons do.[6] Requiring plaintiffs to file their claim

[6] The Legislature actively sought to ensure that plats on file remain, and become increasingly more, accurate over time by amending MCL

pursuant to the LDA ensures that the plat remains accurate because the Legislature has also mandated that if a plaintiff succeeds in such an action, "the court shall also direct plaintiff to prepare . . . a new plat . . . ." MCL 560.229. In this way, the "plats on file remain accurate." *Martin*, 469 Mich at 551 n 24. The fact that "other" persons may have standing to file, based on their *private* interests, is not the equivalent of persons being required to comply with a law designed to ensure that a particular *public* interest is upheld—namely, a public interest in accurate recorded plats.

The majority's decision effectively allows private litigants to alter plats, with no assurance that any of the persons who must be informed of this under the LDA will be apprised of such changes in the plat, be made aware of possibly antagonistic property interests, or be enabled to assert and defend their property rights. Allowing plaintiffs to dispense with the procedures of the LDA, including notice to the municipality and other governmental entities, also undermines the ability of local governments to rely on plats for these same purposes.

D. CASELAW

Requiring plaintiffs to file their quiet-title action pursuant to the LDA would be consistent with the

560.222 to require parties seeking to "vacate, correct, or revise a plat or any part of a recorded plat" to file their claim pursuant to the LDA. As originally enacted, MCL 560.222 was permissive in nature and stated that to "vacate, correct, alter or revise a recorded plat or any part of it. . . . [a party] *may* apply to the appropriate circuit court." See 1967 PA 288, § 222(2) (emphasis added). However, in 1978, § 222 was amended to mandate that a party seeking to "vacate, correct, or revise a recorded plat or any part of a recorded plat" "*shall*" file a complaint in the circuit court. MCL 560.222, as amended by 1978 PA 367 (emphasis added). This mandatory directive remains in the current version of MCL 560.222.

guidance of *Martin*, and with *Hall v Hanson*, 255 Mich App 271; 664 NW2d 796 (2003), a case that is on all fours. In *Martin*, the plaintiffs purchased a parcel of property that was one of 21 platted parcels in the Tan Lake Shores Subdivision plat. The plaintiffs also purchased the northerly part of an adjoining outlot referred to as outlot A. When the plaintiffs applied for a permit to build a home on their parcel and a portion of outlot A, they learned that the plat had dedicated outlot A for the use of all lot owners in the subdivision. The plaintiffs filed a quiet-title action to have the plat language " '[o]utlot A is reserved for the use of the lot owners' " declared null and void. *Martin*, 469 Mich at 544-545. The trial court granted the plaintiffs the requested relief in an order stating that the plaintiffs "shall hereinafter have the exclusive right and use of the portion of Outlot A . . . ." *Id.* at 545 n 11. This Court reversed. First, we held that the LDA clearly authorizes private dedications and that the dedication in the Tan Lake Shores Subdivision plat that outlot A " 'is reserved for the use of lot owners' " constituted a private dedication that conveyed a fee simple to the purchasers of lots in the plat. *Id.* at 549 (citation omitted). Second, we held that the plaintiffs, "who ultimately were seeking to have the plat conveyance of outlot A declared 'null and void,' " were "required to file their claim under [the LDA]." *Id.* at 550. In addition to the rationales discussed earlier, we reasoned that allowing the plaintiffs' action to proceed as one to quiet title rather than pursuant to the LDA deprived parties or interested persons of " 'substantial right[s] or privilege[s].' " *Id*. at 551-552 (citation omitted). Specifically, we stated:

> MCL 560.224a requires that certain fellow lot owners and affected utilities, as well as numerous governmental officials, to be made parties to a lawsuit to vacate, correct, or revise a plat. Here several of these necessary parties

> were not joined in the lawsuit and it is clear that they have a statutory right to participate fully in the lawsuit. [*Id.* at 552.]

There is no relevant difference between this case and *Martin*. The Harford Village plat's dedication language states that the plat shall be used "for the uses and purposes therein contained." Therefore, according to the Harford Village plat, North Street, East Street, and Cross Street were to be used as streets. Although these streets were never developed, by platting them, the purchasers of the platted property obtained "at least an irrevocable easement in the dedicated land." *Little*, 469 Mich at 564. See also *Martin*, 469 Mich at 548 n 18 (stating that "[a]s we explain[ed] in *Little*, a private dedication made before [the LDA] took effect conveyed an irrevocable easement, whereas MCL 560.253[1] now indicates that a private dedication conveys a fee interest"). Thus, all purchasers of lots in the Harford Village plat had a right to rely on the dedications contained in the plat itself, each of which presumably affected (for the better) the value of their property.

In their quiet-title action, plaintiffs, just as the plaintiffs in *Martin*, sought, although not explicitly, to have a plat conveyance declared "null and void." That is, through their quiet-title action, plaintiffs sought to extinguish the irrevocable easement in North Street, East Street, and Cross Street that the plat conveyed to purchasers of lots in the Harford Village plat. Now that plaintiffs have succeeded in this, purchasers will no longer be capable of using the streets for the purposes for which they were granted, and any rights that are incident to the reasonable and proper enjoyment of the easement will also be extinguished. These facts are indistinguishable from those of *Martin*, in which the plaintiffs sought to exclude other purchasers of lots in

the platted property from using a portion of outlot A. Plaintiffs in the instant case also sought to exclude other purchasers of lots in the platted property from exercising their rights in the platted streets. Thus, as this Court held in *Martin*, plaintiffs, who ultimately sought to have the plat conveyance of North Street, East Street, and Cross Street declared "null and void," should have been required to file their claim pursuant to the LDA.

As the majority correctly points out, unlike the plaintiffs in *Martin*, plaintiffs did not "expressly" seek to alter a recorded plat. But the majority's reasoning that *Martin* is distinguishable on this basis is troublesome and misdirected. Allowing plaintiffs to nullify the protections, and to undermine the purposes, of the LDA solely because their pleadings did not "expressly" request that the Harford Village plat be altered elevates form over substance and incentivizes artful pleading and gamesmanship in an area of law—the law of real property—in which there should be little tolerance for such conduct.

Plaintiffs' complaint in this case sought the following relief:

> A decree that title to the land . . . is owned by the Plaintiff[s], . . . free and clear of any right, title, claim, or interests of the Defendants.

The only potential "right, title, claim, or interest" that the township has in the undeveloped, but platted, streets is derived from the plat itself. Plaintiffs were not, as the majority claims, merely seeking judicial recognition of title to protect their lands, but were seeking recognition that *usage rights derived from the plat* were no longer in existence and could no longer be relied upon by the township. According to the majority, plaintiffs should be relieved from the imperative of

filing their claim under the LDA because they did not incant the magic words "plat," "vacate," "correct," or "revise" in their prayer for relief. Apparently, if plaintiffs' complaint *had* sought a decree that title to the land was held by plaintiffs, and that the township's interest in the property pursuant to the plat must be "vacated," they would have been required to file their claim under the LDA.

However, there is no meaningful difference between such a hypothetical complaint and plaintiffs' actual complaint, which requested that title be vested in them "free and clear of any right, title, claim, or interests" of the township. The certainty and stability of property rights in this state, and compliance with the Legislature's mandate, should not be allowed to rest upon so flimsy, and irrelevant, a distinction, one that effectively allows the plaintiffs themselves to determine the application of one of the foundational property laws of our state and the extent to which the property rights of other persons will be protected. The majority's distinction not only erodes the protections of the LDA, but is in tension with Michigan's fact-pleading system, which only requires a complaint to contain a statement of the facts and the allegations reasonably necessary to inform the adverse party of the nature of the claims against that party. See MCR 2.111(B).

> [It is a] well-established principle that Michigan courts are "not bound by a party's choice of label for its action [because this would] put form over substance . . . ." Instead, as we [have] explained . . . , "the gravamen of plaintiff's action is determined by considering the *entire* claim." [*O'Neal v St John Hosp & Med Ctr*, 487 Mich 485, 527; 791 NW2d 853 (2010) (MARKMAN, J., concurring in the result only) (citation omitted; second alteration in original).]

Whether a plaintiff labels a claim as an action to quiet title or an action to "vacate, correct, or revise a recorded plat" cannot be allowed to control whether the action is, in fact, treated as a traditional action to quiet title or as an action to "vacate, correct, or revise a recorded plat."

> This established principle ensures that the governing *law*, and not the label the parties attach to that law, controls the outcome of an action. As the United States Supreme Court has observed, any other approach would allow a party to avoid the requirements of a legislative mandate simply by artful pleading. See *Allis-Chalmers Corp v Lueck*, 471 US 202, 211; 105 S Ct 1904; 85 L Ed 2d 206 (1985). [*Id.*][7]

Quieting title to the disputed streets in plaintiffs established plaintiffs as the sole owners of the property, to the exclusion of all others in the platted area. See

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[7] The majority rejects the claim that its opinion invites artful pleading or gamesmanship by asserting that "[p]laintiffs in this case merely pleaded what they sought to accomplish, which was to establish a substantive interest in property on the basis of adverse possession." *Ante* at 119. By sanctioning a rule that enables plaintiffs' pleadings to determine whether the requirements of the LDA must be satisfied, the majority incentivizes plaintiffs to obscure what may be the *necessary consequences* of their claims in order to avoid the requirements of the LDA. It cannot be overemphasized that the premise of the LDA is that interests *other* than those of the plaintiff must be taken into account in the legal process as a prelude to a plat being rendered inaccurate. It is the sum of such *private* interests, including but not *limited* to that of the plaintiff, that conduces to define the *public* interest that informs the LDA. It should not be viewed as surprising that at least some plaintiffs might prefer to introduce as few competing private interests into the legal process as possible in defining their own property rights, and they have now been afforded the opportunity by the majority to avoid the imperatives of the LDA through artful pleadings and gamesmanship. The plaintiffs in *Martin* also simply pleaded what they "sought to accomplish"—a quiet-title action declaring themselves to be the sole owners of outlot A—but, somehow, this Court was able in that case to look beyond such pleadings, and to what the plaintiffs "sought to accomplish," in concluding that "[a]llowing this action to proceed as one to quiet title is contrary to the [LDA] . . . ." *Martin*, 469 Mich at 550.

Lawson v Bishop, 212 Mich 691, 699; 180 NW 596 (1920) (noting that when title is established by adverse possession, the "rights of all others claiming any interest in the land have been extinguished"). This was done outside the confines of the LDA, which requires that an extensive group of parties be served and afforded an opportunity to participate in the litigation, including everyone owning property located within 300 feet, utility companies, the municipality, and others.[8] As a result, the fundamental purpose of the LDA, that "plats on file remain accurate," has been circumvented. *Martin*, 469 Mich at 551 n 24. We did not permit this in *Martin*, and we should not permit it in this case. *Martin* properly compels the conclusion that plaintiffs were required to file their action pursuant to the LDA because that act constitutes "the exclusive means available when seeking to vacate, correct, or revise a dedication in a recorded plat . . . ." *Id.* at 542-543.[9]

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[8] "Others" that must be joined include what is now the Department of Licensing and Regulatory Affairs (as the successor to the State Treasurer), the drain commissioner, and the chairperson of the board of county road commissioners. In addition, depending on the nature of the plat to be "vacate[d], correct[ed], or revise[d]," MCL 560.221, MCL 560.224a requires that additional parties be joined. For example, if the proposed change includes or borders a state highway or federal aid road the director of the state transportation department and the director of the Department of Natural Resources must be joined, MCL 560.224a(f); and if the proposed change involves a lake or stream, the Department of Natural Resources must be joined, MCL 560.224a(g).

[9] The majority concludes that in contrast to *Martin*, "plaintiffs' successful quiet title action leaves the plat unchanged, but inaccurate." *Ante* at 113. Perhaps this would be better stated as "unchanged, and *therefore* inaccurate." That the plat remains "unchanged, but inaccurate" following plaintiffs' successful quiet-title action is precisely the reason that they should be required to file their action under the LDA. The LDA provides a statutory scheme to ensure that all persons with a potential interest in a plat are allowed to participate in any action to vacate, correct, or revise it. Allowing a plat that was accurate on Monday to become inaccurate on Wednesday after a quiet-title decision on Tuesday,

Requiring plaintiffs' lawsuit to be filed in accordance with the LDA would also be consistent with *Hall v Hanson*. In *Hall*, the plaintiffs brought suit, claiming that the defendants had interfered with their right to use a publicly platted boulevard. The defendants counterclaimed, "seeking, among other things, to quiet title to the disputed property in themselves and to enjoin plaintiffs from doing anything other than accessing the surface of the lake for reasonable activities." *Hall*, 255 Mich App at 274. As in this case, the plaintiffs argued in the trial court that the defendants' quiet-title action was improper because the exclusive way to "vacate, correct, or revise" the plat was through an action under the LDA. *Id.* at 278-279. Nevertheless, the trial court quieted title to the disputed boulevard in the defendants. The Court of Appeals reversed and held that, because the defendants "sought to vacate or otherwise alter the plats dedicating the boulevard to the public, they should have brought their [counterclaim] pursuant to the LDA." *Id.* at 286. The instant case is essentially indistinguishable from *Hall*.[10] Plaintiffs, as with the defendants in *Hall*, sought to quiet title to the

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in the absence of all parties who are entitled to assert their contrary claims or competing interests, is simply incompatible with the Legislature's design in the LDA. Moreover, once again, there is no meaningful distinction between this case and *Martin*. If in *Martin* this Court had affirmed the quieting of title in the plaintiffs, the plat, under the majority's reasoning, would also have remained "unchanged, but inaccurate."

[10] Despite citing *Hall* as instructive authority, the majority distinguishes *Hall* on the grounds that

> [t]he defendants in *Hall* did not claim an interest in the street by virtue of adverse possession or on any other basis independent of the plat. Rather, the defendants' claimed interest in the street at issue was directly traceable to and arose from the plat and the platting process. If the street were vacated—that is, if a court determined that the plaintiffs had failed to accept the dedication or abandoned the street—the defendants would, by operation of law,

disputed streets free and clear of any claim of right or interests that the township had pursuant to the Harford Village plat, and the outcome here should be no different.[11] Because plaintiffs for all practical purposes sought to vacate or otherwise alter the plat, they should have been required to bring their complaint under the LDA.[12]

> own the vacated portions of the street because, as reflected in the plat, they were abutting landowners. [*Ante* at 113-114 n 45 (emphasis omitted).]

It is, of course, true that the specific property interest asserted by the defendants in *Hall* was not identical to the specific property interest asserted by plaintiffs in this case, but that is a distinction of no relevance. What *is* relevant is that *Hall* illustrated one means by which the terms "vacate," "correct," and "revise" could be implicated in a property claim in which the plaintiffs did not explicitly assert an interest in "vacating," "correcting," or "revising" a plat. Surely, *Hall*'s proposition that courts addressing property claims will look to the true nature of what a party is seeking, and to the real impact thereof, was not limited to the specific details of the asserted interest in that case. Instead, a reasonable interpretation of the LDA would have the *Hall* rule encompass *any* action that had the necessary effect of "vacating," "correcting," or "revising" a plat. The majority distinguishes *Hall* on the grounds that the grass on the property in question is fescue rather than bluegrass.

[11] The majority attempts to distinguish *Martin* and *Hall* because unlike the factual situations in those cases, "plaintiffs' interest [here] in the disputed property did not depend on the plat, the plat's dedication language, or whether the township abandoned the streets." *Ante* at 117. But again, this distinction is meaningless. Although the issue in those cases may have concerned the claimants' interests in platted property, MCL 560.222 does not limit its application to cases that pertain to platted property; instead, it applies to actions that seek to "vacate, correct, or revise a recorded plat or any part of a recorded plat." The fact that plaintiffs' interest in the disputed property does not arise from the plat is irrelevant; the important thing is that, as a result of legal action, the plat would be "vacated," "corrected," or "revised." Moreover, *the township's* property interest *does* arise from the plat, and it is entitled to the protections of the LDA.

[12] While holding that the defendants' action was required to be brought pursuant to the LDA, *Hall* also decided that it was unnecessary to

III. HARMONIZATION OF STATUTES

The majority asserts that there is a relevant distinction for purposes of compliance with the LDA between quieting title by adverse possession in a manner that would alter a plat and requesting the alteration of that plat.[13] As a result, because plaintiffs here only sought to do the former, they were relieved of any obligations under the LDA. The majority is, of course, correct that our law recognizes a distinction between actions to quiet title, MCL 600.2932, and actions to "vacate, correct, or revise a recorded plat," MCL 560.222. But what the majority fails to acknowledge is that, while under *ordinary* circumstances these actions serve different purposes and do not impinge on one another, under somewhat *less ordinary* circumstances, the actions overlap and do impinge on one another, as in this case, in which a quiet-title action has directly and necessarily altered a plat. This overlap, or tension, will

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remand for additional proceedings under the LDA because the bench trial was "full and fair." *Hall*, 255 Mich App at 286; see also *Binkley v Asire*, 335 Mich 89; 55 NW2d 742 (1952). Although I have no doubt that defendants in this case received both a "full and fair" trial, I would not fashion the same remedy. While such a remedy may have been appropriate in *Hall* because all necessary lot owners, as well as numerous governmental officials, had been joined as parties, here by contrast, a number of necessary parties under the LDA were absent. In my judgment, plaintiffs should be allowed to amend their complaint, and to add all necessary parties. See *Martin*, 469 Mich at 552.

[13] The majority refers to *Olsen v Grand Beach*, 282 Mich 364; 276 NW 481 (1937), and *Howard v Berrien Springs*, 311 Mich 567; 19 NW2d 101 (1945), for this proposition, but those cases have little relevance to the instant case. While both acknowledge that title to platted property may be established by adverse possession—an entirely unremarkable proposition—neither purported to answer whether plaintiffs *must* bring an adverse-possession claim pursuant to the LDA. Further, those cases were decided before the 1978 amendment of MCL 560.222 that made compliance with the LDA *mandatory* for actions seeking to "vacate, correct, or revise a plat."

not arise in every quiet-title action, and it will not arise in every adverse-possession action, but it has arisen in this case. Under these specific circumstances, the quiet-title action must be brought under the auspices of the LDA because, necessarily and indisputably, if successful, it will cause a recorded plat to be "vacated, corrected, or revised," and the "exclusive" means of doing so is through the LDA.[14]

Because the majority sees no tension between these statutes—the majority views it as of little moment whether a plaintiff avails himself of the quiet-title statute or the LDA—it engages in no effort to harmonize these statutes. On the other hand, because I believe that there is tension between these statutes under the instant circumstances, and because I believe that it is of *considerable* moment—in terms of the procedural rights of affected persons, the public interest in accurate platting, and regard for the Legislature's intentions in enacting the LDA—an effort to harmonize these statutes is required, in my judgment, and such harmonization compels the conclusion that plaintiffs must file under the LDA.

First, it is axiomatic that the more specific statute prevails over the more general. *Jones v Enertel, Inc*, 467 Mich 266, 270-271; 650 NW2d 334 (2002). "[T]o determine which provision is truly more specific and, hence, controlling, we consider which provision applies to the more narrow realm of circumstances, and which to the

[14] *Martin* recognized this point when it remanded the plaintiffs' quiet-title action to the trial court to proceed under the LDA. If *Martin* had followed the majority's approach here, it would have fashioned the same remedy as the majority: an affirmance of the trial court's grant of title to the plaintiffs, but a nullification of that portion of the trial court's order revising the plat. But *Martin* did not do this, and instead held that the plaintiffs' quiet-title action was required to be brought under the LDA.

more broad realm." *Miller v Allstate Ins Co*, 481 Mich 601, 613; 751 NW2d 463 (2008). The quiet-title statute provides that "[a]ny person . . . who claims any right in, title to, equitable title to, interest in, or right to possession of land, may bring an action in the circuit courts against any other person who claims or might claim any interest inconsistent with the interest claimed by the plaintiff . . . ." MCL 600.2932(1). This statute, which applies to any person claiming any interest in property, seemingly applies to plaintiffs' action seeking to establish title to the land free and clear of the township's interest. On the other hand, MCL 560.222 provides the exclusive means available to "vacate, correct, or revise a recorded plat or any part of a recorded plat . . . ." This statute is applicable only to a much smaller subset of property actions. Thus, because MCL 600.2932 applies to all property actions and MCL 560.222 applies only to a limited subset of property actions, it would seem that the latter, the more specific provision, would tend to control.

Second, there are relatively few quiet-title actions under MCL 600.2932 that also seek to "vacate, correct, or revise" a plat, while nearly all actions that seek to "vacate, correct, or revise" under MCL 560.222 also seek to quiet title. See, e.g., *Martin*, *supra*; *Hall*, *supra*. That is, actions to quiet title are rarely accompanied by a claim to "vacate, correct, or revise," while actions to "vacate, correct, or revise" are often accompanied by a claim to quiet title. Not only does this suggest that the more efficient means of proceeding in cases in which these claims coexist would be through an LDA action, but it underscores that the likely legislative intention when these statutes overlapped was that the more specific statute would control. If, after all, in a relatively high proportion of "vacate, correct, or revise" cases there would exist an alternative quiet-title action, it

would seem that this would create a reasonably high likelihood that the Legislature's intention to render plats increasingly accurate over time through the LDA could well be undermined. By contrast, there would be a relatively small proportion of quiet-title cases in which there would be the alternative of a "vacate, correct, or revise" action, and therefore a reasonably small likelihood that the LDA could interfere in any significant way with the Legislature's intentions in enacting the quiet-title statute.

Third, the potential harm that might arise if plaintiffs proceeded with their cause of action pursuant to the LDA, rather than in an action to quiet title, is inconsequential in comparison with the harm that might arise if plaintiffs proceeded with their cause of action as one to quiet title. Specifically, if plaintiffs proceed with their quiet-title action under the LDA, the only apparent harm is that a greater burden would be placed on plaintiffs to apprise persons with a potential interest in litigation of the pendency of such litigation. By contrast, the potential harm of not bringing an action to "vacate, correct, or revise" under the LDA is that persons with a potential property interest in ongoing litigation would not be apprised at all of such litigation and, as a result, would either be prejudiced in later asserting their interests or compelled to file new lawsuits, or that later property transactions would be thrown into confusion as a result of inaccurate plats and affected persons compelled to file new lawsuits. Of these respective harms, I believe that the latter is far more potentially injurious to the integrity of the law, which again argues in favor of resolving the tension between these statutes in favor of compliance with the LDA.

Finally, although the Legislature has provided plaintiffs with two avenues to assert their interests in the

disputed property, the "doctrine of last enactment" also supports the position that plaintiffs' quiet-title action must yield to the mandate that an action seeking to "vacate, correct, or revise" a plat be brought under the LDA.

> That doctrine presumes that the Legislature is aware of the existence of the law in effect at the time of its enactments and recognizes that, since one Legislature cannot bind the power of its successor, existing statutory language cannot be a bar to further exceptions set forth in subsequent, substantive enactments. [*Pittsfield Charter Twp v Washtenaw Co*, 468 Mich 702, 713; 664 NW2d 193 (2003).]

Section 222 of the LDA was substantially altered in 1978 to state that a party seeking to "vacate, correct, or revise" a recorded plat "*shall*" file a complaint pursuant to the LDA. MCL 560.222, as amended by 1978 PA 367. On the other hand, MCL 600.2932 has not been substantively altered since its enactment in 1961. Compare 1961 PA 236, § 2932 and MCL 600.2932, as amended by 1964 PA 8. The fact that the LDA is the most recent statement of the Legislature again argues in favor of compliance with the requirements of the LDA.

IV. FURTHER RESPONSE TO MAJORITY

A. ESTABLISHING TITLE IN LDA ACTIONS

The majority concludes that in this case establishing title is a necessary prerequisite to the alteration of the plat. I agree.[15] If the plat had been simply altered without a judicial decree that plaintiffs were the true

[15] In supposing that this dissent would hold that "an LDA action [is] a prerequisite to establishing an adverse possession claim," *ante* at 111 n 39, the majority misapprehends this dissent. The argument here is not that an LDA action is a prerequisite to the establishment of an adverse-possession claim, but only that, when an adverse-possession claim overlaps an action to "vacate, correct, or revise a plat," the former must

owners of the property, the LDA would have served as the vehicle to "*establish* an otherwise nonexistent property right," which would be contrary to our holding in *Tomecek v Bavas*, 482 Mich 484, 496; 759 NW2d 178 (2008) ("The LDA was never intended to enable a court to establish an otherwise nonexistent property right.").[16] But that does not mean that plaintiffs should be relieved from filing their cause of action pursuant to the LDA. MCL 560.223 requires the plaintiff in an LDA action to set forth the "reasons for seeking the vacation, correction, or revision" of a plat, which in this case would obviously be that the plaintiff acquired an interest in the platted property by adverse possession.[17] The trial court would then proceed with the case as with any other adverse-possession action, and the plaintiff would be required to show "clear and cogent proof of possession that [has been] actual, visible, open, notorious, exclusive, continuous and uninterrupted for the statu-

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be brought within the LDA in order to ensure that the protections afforded by the LDA inure to the benefit of persons whom the statute was intended to protect.

[16] Although I continue to believe that *Tomecek* was correct that an LDA action seeking to "vacate, correct, or revise a recorded plat" does not enable a court to establish an otherwise nonexistent property right, Justice CAVANAGH, who joins this opinion, does not. See *Tomecek*, 482 Mich at 499 (CAVANAGH, J., concurring in part and dissenting in part). However, neither of our positions in *Tomecek* is inconsistent with the position asserted in this dissent.

[17] Contrary to the majority's position, the doctrine of standing would not bar an adverse possessor from proceeding in this manner, even one who was not already the owner of a platted lot. MCL 560.222 provides that a complaint may be filed by "the owner of a lot in the subdivision, a person of record claiming under the owner, or the governing body of the municipality in which the subdivision covered by the plat is located." Because title vests automatically in the adverse possessor upon expiration of the period of limitations, *Gardner v Gardner*, 257 Mich 172, 176; 241 NW 179 (1932), the adverse possessor would be an "owner of a lot in a subdivision" and thus would have standing to file a complaint under MCL 560.222.

tory period of 15 years, hostile and under color of claim of right." *Burns v Foster*, 348 Mich 8, 14; 81 NW2d 386 (1957). If the plaintiff is able to meet this burden of proof, the trial court would then "vacate, correct, or revise all or a part of a recorded plat," as provided in sections 222 to 229 of the LDA. MCL 560.221. In this way, persons who purchase property in reliance on the representations made in a plat, as well as future purchasers of platted property, are protected by the requirements of the LDA, and the plat remains accurate because a new plat must then be prepared in whole or part. MCL 560.229(1).[18]

Indeed, the majority itself sees "no reason why plaintiffs could not have addressed both the adverse possession claim and the LDA claim in bifurcated proceedings . . . in which the court would have first addressed the quiet title claim and then, if necessary, resolved any issues regarding the plat[.]" *Ante* at 119. However, it simply believes that "there is nothing in the LDA that *requires* a litigant to proceed in that manner." *Ante* at 119-120. To me, what compels a litigant to proceed in that manner is, equally simply, that the LDA constitutes the *exclusive* manner by which to "vacate, correct, or revise" a plat. The township's easement is a "part of the plat," and when that interest is altered—or in this case entirely terminated—outside the scope of the LDA, the mandate that actions seeking to "vacate, correct, or revise" must be undertaken in a particular

[18] Requiring plaintiffs to proceed in this manner does not run afoul of *Tomecek* because the LDA is not being used here to create substantive property rights. Rather, the doctrine of *adverse possession* itself created these rights, which passed to plaintiffs upon the expiration of the requisite period of limitations. *Gardner*, 257 Mich at 176. Thus, the LDA does not serve as a vehicle to create substantive property rights, but only serves as the "tool to validate property rights that already exist[]." *Tomecek*, 482 Mich at 496 (opinion by KELLY, J.).

manner is disregarded. Although plaintiffs could establish title in a quiet-title action, if the LDA and the quiet-title statutes are to be harmonized, plaintiffs must file such an action under the LDA. If nothing requires a litigant to proceed in that manner, and if a litigant can proceed in a piecemeal fashion by bringing only a quiet-title action, and then—*and only if he so chooses*—a subsequent action to alter the plat under the LDA, then why did this Court reverse in *Martin*, in which the plaintiffs proceeded in the identical manner now deemed acceptable by the majority? Our analysis in that case answers this question, and it merits reiteration:

> *Allowing this action to proceed as one to quiet title is contrary to the statutes*, which not only outline the specific procedures to be followed and what must be pleaded, but also require that an extensive group of parties be served, including everyone owning property located within three hundred feet of the lands described in the petition, the municipality, the State Treasurer, the drain commissioner, the county road commissioners, affected public utilities, and, in certain instances, the directors of the Department of Transportation and the Department of Natural Resources. [*Martin*, 469 Mich at 550-551 (emphasis added).]

B. *MARTIN v BELDEAN*

The majority errs in its understanding of *Martin v Beldean*, both factually and legally. As already discussed, *Martin* held that a plaintiff "seeking to vacate, correct, or revise a dedication in a recorded plat" must file a lawsuit pursuant to the LDA. *Martin*, 469 Mich at 542-543. This precedent is now made the subject of hypertechnical distinctions that have no grounding in either the LDA or in *Martin* itself. Given the importance of *Martin* to this case, the majority's analysis warrants further response.

The majority states that this dissent "incorrectly concludes that *Martin* requires plaintiffs in the instant case to file under the LDA," because

> the *Martin* plaintiffs had a *preexisting* substantive property right—reflected in the plat and documented by a deed—in the plat whose language they sought to have declared void. Thus, the issue in *Martin* concerned whether the plat's language accurately reflected the parties' preexisting rights *as outlined* in the plat itself. Furthermore, the relief sought by the *Martin* plaintiffs' quiet title action was to conform the plat at issue to those preexisting property rights. [*Ante* at 112-113.]

The majority's points are straightforward, but its asserted distinctions fail. First, the *Martin* plaintiffs did not have a "preexisting substantive property right . . . reflected in the plat," because the plat reflected only that the disputed property, outlot A, was " 'reserved for the use of the lot owners.' " *Martin*, 469 Mich at 545. Thus, contrary to the majority's assertion, the plat granted absolutely no rights to the plaintiffs in outlot A, but instead, just as the plat in this case, granted use rights to someone *other than* the plaintiffs.[19] In *Martin*, the plat granted use rights to the other 21 lot owners; in this case, the plat granted use rights to assorted other persons, including the township. Thus, the *Martin* plaintiffs had no preexisting substantive property right reflected in the plat.

Second, just as in *Martin*, plaintiffs here "had a preexisting substantive property right"—the right of title which passed upon the expiration of the statutory period of limitation—"in the plat whose language they sought to have declared void." The majority might

[19] In fact, it was not until the plaintiffs applied for a permit to build on outlot A that they learned that it had been dedicated for the use of the other lot owners. *Martin*, 469 Mich at 544-545.

better explain why the *Martin* plaintiffs, whose claimed title to the disputed property was established by a deed, were required to bring their quiet-title action pursuant to the LDA while plaintiffs in this case, whose title to the disputed streets was established by adverse possession, are not.[20] Any putative distinction based on the *method* of acquiring title lacks statutory support and suggests, without any apparent basis in the law, that title acquired by deed constitutes a legally superior method of acquiring title for purposes of an LDA action. In any event, plaintiffs here *did* acquire title to the disputed streets by deed. The trial court found that North and East Streets were included in a deed to General William G. Beach (plaintiffs' predecessor) in 1853, and that Cross Street was included in a deed to the Beach family in 1897. Accordingly, even under the majority's interpretation of *Martin*, because plaintiffs did have a "preexisting substantive property right . . . in the plat whose language they sought to have declared void," they are required to file their action pursuant to the LDA.

Third, the majority repeatedly emphasizes that the *Martin* plaintiffs' deed "preexisted" the filing of the plat. This purported distinction is again without merit

[20] In this regard, the majority states that "plaintiffs had no recognized, recorded, preexisting property rights in the disputed land," *ante* at 113, but I fail to understand the relevance of this distinction for two reasons. First, the majority cites no authority for the suggestion that a plaintiff must have some type of "recognized" and "recorded," "preexisting" property right in the disputed land. MCL 560.222 contains no such requirement. Second, plaintiffs *do* have a "recognized" property right. As even the majority acknowledges, expiration of the period of limitations vests title in the party claiming adverse possession, *Gardner*, 257 Mich at 176, and, further, plaintiffs also have deeds that reflect their property rights in the disputed streets. Thus, plaintiffs *do have* a "recognized recorded preexisting property right[] in the disputed land," as now required by the majority for the LDA to be applicable.

for two reasons: (1) MCL 560.222 contains no requirement that *only* claims based on property rights that "predated" or "preexisted" the filing of a plat must be brought under the LDA and (2) *Martin* itself did not rely on this distinction, or even allude to it, in holding that the plaintiffs' action had to be filed under the LDA. Presumably, this is because the *Martin* plaintiffs and their predecessors received a deed to outlot A *after* the subdivision was platted, not before, as asserted by the majority. See *Martin v Redmond*, 248 Mich App 59, 61; 638 NW2d 142 (2001).

Fourth, the majority states that because the plaintiffs had a preexisting property right reflected in the plat whose language they sought to have declared void, the issue in *Martin* concerned "whether the plat's language accurately reflected the parties' preexisting rights *as outlined* in the plat itself," *ante* at 113. Again, I disagree. The *Martin* plaintiffs did not claim that the plat's dedication of outlot A was in error[21]—that is, they did not claim that the plat inaccurately dedicated outlot A for the use of all owners in the subdivision because that would have been inconsistent with their deed. Instead, the plaintiffs in *Martin* only claimed that the dedication had expired pursuant to the terms of the plat itself, which limited all restrictions, conditions, covenants, and rights to 25 years; by laches or estoppel, as the trial court had held; or because the dedication was invalid, as the Court of Appeals had held. See *Martin*, 248 Mich App at 62-63. This Court then addressed only the following issues: (1) the Court of Appeals' holding that a private dedication in a recorded plat is invalid under Michigan law, and (2) whether the plaintiffs, who ulti-

[21] Nor could they have, as the owner at the time of the plat's dedication, specifically signed the dedications and restrictions that depicted outlot A as among those reserved for the use of all lot owners.

mately sought to have the plat conveyance of outlot A declared "null and void," were required to file their claim under the LDA. *Martin*, 469 Mich at 542-543. From all of this, it seems clear that the issue in *Martin* was not, as the majority claims, whether the plat language "accurately" reflected the "parties preexisting rights *as outlined* in the plat itself," but only whether the dedication was valid in the first place and, if it was, whether plaintiffs could alter that dedication outside the confines of the LDA. Nothing in *Martin* concerned the "accuracy" or "scope" of existing rights under a recorded plat, and thus the majority's purported distinctions are inapt.

Fifth, the majority states that "the relief sought by the *Martin* plaintiffs' quiet title action was to *conform* the plat at issue to those preexisting property rights." *Ante* at 113 (emphasis added). I fail to see how the *Martin* plaintiffs, who filed suit to declare their interest obtained by deed superior to the interests of those who claimed an interest in the property as a result of the plat's dedication language, sought to "conform the plat at issue," but plaintiffs here did not. Did not *both* sets of plaintiffs file suit to quiet title to establish their respective preexisting titles as superior to those who claimed an interest in the property stemming from the plat's dedication language? Did not *both* sets of plaintiffs file suit to declare "null and void" that very dedication language? Yet according to the majority, only the *Martin* plaintiffs sought to "conform" the plat to their preexisting property rights. The distinctions are invisible.

Sixth, under the majority's holding, if a party is only required to file a cause of action pursuant to the LDA "[i]f [his] interest in land is traceable to the plat or the platting process," *ante* at 117, then it must follow that *Martin*, a recent and unanimous decision of this Court,

was wrongly decided. As already noted, the *Martin* plaintiffs' interest in the platted property arose from a deed conveyed *after* the property was platted. Their interest was neither "traceable to the plat" nor to "the platting process." Consequently, under the majority's holding, our decision in *Martin*, requiring the plaintiffs' quiet-title action to proceed under the LDA, was in error because the LDA could not have provided the necessary relief. Yet the majority does not overrule *Martin*. This leads to the second practical question arising from the majority's opinion, in addition to how plats are to remain as accurate depictions of the realities of property boundaries in Michigan: If the majority cannot reconcile its holding in this case with the Court's holding in *Martin*, how are the bench and bar to comprehend the nuances of difference apparently recognizable to the majority that justify the disparate treatment of these cases? The majority leaves in place alternative, and incompatible, formulations of the law, each of which will be invoked as convenient by different plaintiffs, defendants, and judges.

In the final analysis, the majority, in attempting to justify its holding that plaintiffs are not required to file their claims under the LDA, deeply misunderstands *Martin*, both factually and legally. The *Martin* plaintiffs had neither a "preexisting substantive property right . . . reflected in the plat" nor a deed that "preexisted" the filing of the plat, and their case did not concern the "accuracy" or "scope" of the plat at issue. In addition, the *Martin* plaintiffs' interest in the land was not "traceable to the plat or the platting process," as now required by the majority in order for the LDA to apply. What the *Martin* plaintiffs *did* have was a deed that reflected their interest in the property, and they *did* seek to "conform the plat at issue" to that deed, but, as discussed, those are similarities rather than differ-

ences. Thus, just as in *Martin*, "plaintiffs, in seeking to vacate, correct, or revise the plat, [are] required to file their lawsuit under the Land Division Act." *Martin*, 469 Mich at 552.[22]

C. THRESHOLD QUESTION

According to the majority, the "basic disagreement" between our respective analyses is that this dissent views LDA and quiet-title actions as sometimes "overlap[ping]" and in tension with each other, and thus concludes that it is necessary to harmonize the relevant statutes, while the majority views those actions as separate and distinct, and thus concludes that it is unnecessary to harmonize. *Ante* at 119 n 57. However, the disagreement between our opinions is even simpler and more fundamental, in my judgment. The question is simply whether plaintiffs' quiet-title action seeks to "vacate, correct, or revise a recorded plat or any part of a recorded plat." If answered in the affirmative, plaintiffs must file this action pursuant to the LDA, and only then would the statutes have to be harmonized. If answered in the negative, plaintiffs may proceed with their action as one to quiet title only, without the need to comply with the LDA. Thus, the critical question once again is whether this particular quiet-title action

[22] Notwithstanding the foregoing analysis, the majority maintains that the "factual and legal differences that distinguish the instant matter from *Martin* compel the result of this case." *Ante* at 116 n 53. Never mind that the supposed "factual differences" are nonexistent—the *Martin* plaintiffs did not have a preexisting property right reflected in the plat, they did not have a deed that preexisted the filing of the plat, and their case did not concern the accuracy or scope of the plat—both bench and bar are now left utterly without guidance as to how supposed "factual and legal differences" in future cases should be understood in characterizing these as either *Martin* or *Beach* cases. The majority's legacy here is to leave property law murkier and increasingly subject to judicial discretion and arbitrariness.

seeks to "vacate, correct, or revise a recorded plat or any part of a recorded plat."

On this note, it is worth reflecting again on the majority's approach to answering this question. According to the majority, plaintiffs only seek to establish a substantive interest in property and are unconcerned with "vacat[ing], correct[ing], or revis[ing] the plat." This analysis is straightforward, but straightforwardly wrong. A plaintiff's subjective and self-characterized interest cannot be the determining factor in assessing whether an action seeks to "vacate, correct, or revise a recorded plat or any part of a recorded plat," for, as discussed, *other* persons may also have affected property interests in the plat, and the fundamental premise of the LDA is that each of these is entitled to be heard in actions "vacat[ing], correct[ing], or revis[ing] the plat." Each is entitled to notice, to participate fully in the lawsuit, and to have his or her interests accurately depicted on the plat. By focusing exclusively upon a plaintiff's subjective and self-characterized interests, the majority: (1) fails to take other persons, and other interests, into account, as required by the LDA, (2) fails to adhere to the express language of the LDA, which requires that an LDA action be undertaken whenever the "vacat[ion], correct[ion], or revis[ion]" of a plat is sought—not merely when it has been *stated* that it is sought—and instead substitutes its own "crucial limitation," limiting the LDA to cases in which the plaintiff has a property interest "traceable to the plat or the platting process," and (3) substantially undermines the LDA as a means for ensuring the accuracy of plats in this state.

V. CONCLUSION

The Land Division Act mandates that the exclusive way to "vacate, correct, or revise a recorded plat or any

part of a recorded plat" is to file a lawsuit pursuant to the LDA. In this case, plaintiffs' quiet-title action necessarily sought to "vacate, correct, or revise" the Harford Village plat, and thus plaintiffs should have been required to bring their cause of action pursuant to the LDA. In my judgment, if plaintiffs wish to proceed under the LDA, they should be allowed to amend their complaint and to add all necessary parties. The majority's contrary interpretation undermines the primary purpose of the LDA, which is to ensure that plats on file remain accurate. The majority's holding will introduce greater uncertainty and instability into this state's property law, while incentivizing artful pleadings and gamesmanship. Under the law of this case, Michigan plats are destined over time to become increasingly more inaccurate and increasingly less reflective of actual property interests in this state. Accordingly, I respectfully dissent and would reverse the judgment of the Court of Appeals.

CAVANAGH, J., concurred with MARKMAN, J.

LOWEKE v ANN ARBOR CEILING & PARTITION CO, LLC

Docket No. 141168. Argued March 8, 2011 (Calendar No. 6). Decided June 6, 2011.

Richard and Sherri Loweke brought a negligence action in the Wayne Circuit Court against Ann Arbor Ceiling & Partition Co., L.L.C., after Richard was injured at a construction site when several cement boards fell on him. Richard was an employee of an electrical subcontractor that had been hired to work on the construction project. The boards had been leaned against a wall by employees of defendant, a carpentry and drywall subcontractor that had also been hired to work on the project. Defendant moved for summary disposition, asserting that under *Fultz v Union-Commerce Assoc*, 470 Mich 460 (2004), it could not be held liable for negligence because it owed no duty to Richard that was separate and distinct from its contractual duties to the general contractor. The court, Kathleen Macdonald, J., granted the motion. The Court of Appeals, MURPHY, C.J., and JANSEN and ZAHRA, JJ., affirmed in an unpublished opinion per curiam, issued April 22, 2010 (Docket No. 289451). The Supreme Court granted plaintiffs' application for leave to appeal. 488 Mich 876 (2010).

In an opinion by Justice CAVANAGH, joined by Chief Justice YOUNG and Justices MARILYN KELLY, MARKMAN, and MARY BETH KELLY, the Supreme Court *held*:

A contracting party's assumption of contractual obligations does not extinguish or limit separately existing common-law or statutory tort duties owed to noncontracting third parties in the performance of the contract.

1. *Fultz* has been incorrectly interpreted as creating a legal rule barring negligence causes of action on the basis of a lack of duty if a third-party plaintiff alleges a hazard that was the subject of the defendant's contractual obligations with another. *Fultz*, however, directed courts to focus on whether a particular defendant owes any duty at all to a particular plaintiff. Courts should not permit the contents of the contract to obscure this threshold question of whether any independent duty to a third party exists. Thus, when analyzing tort actions based on a contract and brought by a noncontracting third party, courts must determine whether,

aside from the contract, the defendant was under any legal obligation to act for the benefit of the plaintiff. Such a separate and distinct duty may arise by statute or general tort principles, including those duties imposed because of a special relationship between the parties and the general duty to use due care in undertakings.

2. Defendant was not relieved of its common-law duty to use ordinary care in order to avoid physical harm to foreseeable persons and property in the execution of its undertakings by performing an act under its contract with the general contractor because the common-law duty was separate and distinct from its contractual obligations. However, because defendant's motion for summary disposition was brought and decided under an erroneous interpretation of *Fultz*, the Court declined to preemptively decide whether defendant owed plaintiff a duty of care under the common law.

Reversed and remanded to the trial court for further proceedings.

Justice HATHAWAY concurred in the result only.

Justice ZAHRA did not participate because he was on the Court of Appeals panel in this case.

NEGLIGENCE — DUTY — CONTRACTUAL OBLIGATIONS — SEPARATE AND DISTINCT DUTY.

A contracting party's assumption of contractual obligations does not extinguish or limit separately existing common-law or statutory tort duties owed to noncontracting third parties in the performance of the contract; when analyzing tort actions based on a contract and brought by a noncontracting third party, courts must determine whether, aside from the contract, the defendant was under any legal obligation to act for the benefit of the plaintiff.

Goren, Goren & Harris, P.C. (by *Steven E. Goren*), and *Mark Granzotto, P.C.* (by *Mark Granzotto*), for plaintiffs.

Plunkett Cooney (by *Ernest R. Bazzana*) for defendant.

Amici Curiae:

Cardelli, Lanfear & Buikema, P.C. (by *Anthony F. Caffrey III*), for Michigan Defense Trial Counsel, Inc.

Mark Granzotto, P.C. (by *Mark Granzotto*), for the Michigan Association for Justice.

CAVANAGH, J. Plaintiff, an employee of an electrical subcontractor, was injured at a construction site when several cement boards fell on him. The boards had been leaned against a wall by employees of defendant, a carpentry and drywall subcontractor, which, like plaintiff's employer, had been hired by a general contractor to work on the construction project. Plaintiff sued defendant for negligence and defendant moved for summary disposition, asserting that, under *Fultz v Union-Commerce Assoc*, 470 Mich 460, 469-470; 683 NW2d 587 (2004), and its progeny, it owed no duty to plaintiff that was "separate and distinct" from defendant's contractual duties to the general contractor. The trial court granted defendant's motion and the Court of Appeals affirmed. We granted plaintiff's application for leave to appeal. *Loweke v Ann Arbor Ceiling & Partition Co, Inc*, 488 Mich 876 (2010).

We take this opportunity to clarify *Fultz*'s " 'separate and distinct' mode of analysis," 470 Mich at 467, and hold that a contracting party's assumption of contractual obligations does not extinguish or limit separately existing common-law or statutory tort duties owed to noncontracting third parties in the performance of the contract. *Davis v Venture One Constr, Inc*, 568 F3d 570, 575, 577 (CA 6, 2009).[1] In this case, plaintiff asserts that defendant had a common-law duty, separate and dis-

[1] Although the United States Court of Appeals for the Sixth Circuit has subsequently opined that Michigan courts would have decided *Davis* differently, see *Bennett v MIS Corp*, 607 F3d 1076, 1096 (CA 6, 2010), the Sixth Circuit's interpretation of Michigan law is not binding on this Court. *Rasheed v Chrysler Corp*, 445 Mich 109, 123 n 20; 517 NW2d 19

tinct from its contractual obligations to the general contractor, to use ordinary care in order to avoid physical harm to persons and property in the execution of its undertakings. See, e.g., *Clark v Dalman*, 379 Mich 251, 261; 150 NW2d 755 (1967); *Rinaldo's Constr v Mich Bell Tel Co*, 454 Mich 65, 84; 559 NW2d 647 (1997). Because defendant raised its motion for summary disposition on the basis of an improper understanding of *Fultz*, and the Court of Appeals affirmed the trial court's decision granting summary disposition on that basis, we reverse the judgment of the Court of Appeals and remand this case to the trial court for further proceedings consistent with this opinion.

I. FACTS AND PROCEDURAL HISTORY

Plaintiff, Richard Loweke,[2] was an electrician employed by Shaw Electric, a subcontractor on a construction project at Detroit Metro Airport. Walbridge Aldinger Company, the general contractor for the project, also subcontracted with defendant to provide carpentry and drywall services. Defendant's employees leaned numerous 4- by 8-foot sheets of cement board against a wall in a hallway where plaintiff was working. Plaintiff claimed that at the time of the accident, he was standing midway in front of the cement boards when, for unknown reasons, sheets of the cement board began to fall. Plaintiff attempted to stop the boards from falling on him, but to no avail: several sheets of cement board fell onto plaintiff's right leg, injuring him.

(1994). And, for the reasons stated later in this opinion, we reject *Bennett*'s overly broad reading of *Fultz*.

[2] Because plaintiff Sherri Loweke's claims are derivative of the injuries suffered by her husband Richard, we will refer to Richard Loweke as the singular "plaintiff."

Plaintiff sued defendant, alleging that defendant was negligent in stacking the cement boards in an unstable position, creating a new hazard that previously did not exist. Relying primarily on *Fultz*, defendant moved for summary disposition, asserting that it was not liable to plaintiff in tort because plaintiff's allegations were based on an assertion that defendant negligently performed its contractual obligations to the general contractor and, thus, were not based on any separate and distinct duty that defendant owed to plaintiff. To support its argument, defendant cited its contract with Walbridge, which held defendant responsible for "unloading, moving, lifting, protection, securing and dispensing of its materials and equipment at the Project Site." Defendant asserted that it had not violated any duty that was independent of the contract because, in its view, the management and storage of its materials was a subject of its contract with Walbridge. The trial court agreed with defendant and granted its motion for summary disposition, reasoning that what had happened was within defendant's obligations under the contract. Plaintiff appealed.

The Court of Appeals affirmed. The Court explained that, under *Fultz*, a "court must look at the terms of the contract and determine whether the defendant's action was required under the contract." *Loweke v Ann Arbor Ceiling & Partition Co, Inc*, unpublished opinion per curiam of the Court of Appeals, issued April 22, 2010 (Docket No. 289451), p 3. Because defendant was required under its contract with Walbridge to secure the cement board at the project site, the Court reasoned that plaintiff's claim was based on defendant's negligence in performing its obligations under the contract and that the alleged hazard had not presented any unique risk that was not contemplated by the contract. Finally, the Court claimed that its holding was sup-

ported by two peremptory orders of this Court: *Mierzejewski v Torre & Bruglio, Inc*, 477 Mich 1087 (2007), and *Banaszak v Northwest Airlines, Inc*, 477 Mich 895 (2006). We granted plaintiff's application for leave to appeal. *Loweke*, 488 Mich 876.

II. STANDARD OF REVIEW

This Court reviews de novo a trial court's decision on a motion for summary disposition. *In re Egbert R Smith Trust*, 480 Mich 19, 23; 745 NW2d 754 (2008). This Court also reviews de novo questions of law. *Byker v Mannes*, 465 Mich 637, 643; 641 NW2d 210 (2002). Whether a defendant is under a legal obligation to act for a plaintiff's benefit—i.e., whether a defendant owes a particular plaintiff a duty—is a question of law. *Dyer v Trachtman*, 470 Mich 45, 49; 679 NW2d 311 (2004); *Valcaniant v Detroit Edison Co*, 470 Mich 82, 86; 679 NW2d 689 (2004).

III. ANALYSIS

To establish a prima facie case of negligence, a plaintiff must prove the following elements: (1) the defendant owed the plaintiff a legal duty, (2) the defendant breached the legal duty, (3) the plaintiff suffered damages, and (4) the defendant's breach was a proximate cause of the plaintiff's damages. *Roulo v Auto Club of Mich*, 386 Mich 324, 328; 192 NW2d 237 (1971). Accordingly, a defendant is not liable to a plaintiff unless the defendant owed a legal duty to the plaintiff. *Beaty v Hertzberg & Golden, PC*, 456 Mich 247, 262; 571 NW2d 716 (1997). In this case, the issue is when a duty of care arises between a party to a contract and a noncontracting third party. In other words, when two parties enter into a contract and a noncontracting third party, i.e., one who is a stranger to the contract, is

injured, under what circumstances does a duty of care arise between the contracting party and the third party?

In *Fultz*,[3] this Court attempted to clarify the standards for determining when a negligence action based on a defendant's contractual obligations with another and brought by a third party to that contract may lie. Since *Fultz* and its progeny were issued, however, courts have erroneously interpreted this Court's decisions as rejecting accepted tort-law principles and creating a legal rule "unique to Michigan tort law," which bars negligence causes of action on the basis of a lack of duty if a third-party plaintiff alleges a hazard that was the subject of the defendant's contractual obligations with another. *Bennett v MIS Corp*, 607 F3d 1076, 1091-1092, 1094-1095 (CA 6, 2010); see, also, *Hatcher v Senior Home Health Care Inc*, unpublished opinion per curiam of the Court of Appeals, issued August 19, 2010 (Docket No. 289208), p 5 (stating that a claim is barred if an injury is "caused by a hazard that is even remotely connected to a contractual relationship"). Because this broad interpretation is misguided, we write to clarify *Fultz*.

A. LEGAL BACKGROUND

Before *Fultz*, when a plaintiff pleaded a tort arising out of a defendant's breach of contractual obligations, Michigan courts historically drew a distinction between "misfeasance" of a contractual obligation—i.e., "active misconduct"—and "nonfeasance" of a contractual obligation—i.e., "passive inaction," *Williams v Cun-*

[3] Although the two concurring justices in *Fultz* remain committed to their positions in that case, see 470 Mich at 470-476 (MARILYN KELLY, J., concurring), we recognize that the principles announced by the *Fultz* majority are the law in Michigan and will apply them here.

ningham Drug Stores, Inc, 429 Mich 495, 498; 418 NW2d 381 (1988), or "failing to do what one has promised to do in the absence of a duty to act apart from the promise made," *Ferrett v Gen Motors Corp*, 438 Mich 235, 245 n 11; 475 NW2d 243 (1991) (quotation marks and citation omitted). Under this dichotomy, a contracting party generally was not liable in tort for the complete nonperformance of a contractual obligation, or nonfeasance, whereas defective performance of a contractual obligation, or misfeasance, could support an action in tort or contract. *Rinaldo's Constr*, 454 Mich at 83-84; *Ferrett*, 438 Mich at 245 n 11; *Chase v Clinton Co*, 241 Mich 478, 486; 217 NW 565 (1928). As this Court has stated, however, the fundamental principle distinguishing a cause of action in tort from one in contract is the concept of duty. *Rinaldo's Constr*, 454 Mich at 83. Accordingly, in cases of nonfeasance, a defendant who fails to perform his contractual duties is ordinarily not liable in tort because, as a general tort rule, "there is no duty that obligates one person to aid or protect another." *Williams*, 429 Mich at 498-499.[4] As a result, when a defendant completely fails to perform his contractual obligations, "[w]hat we are left with is defendant's failure to complete his contracted-for performance," which "is not a duty imposed by the law upon all, the violation of which gives rise to a tort action" but, instead, is "a duty arising out of the intentions of the [contracting] parties themselves and owed only to those specific individuals to whom the promise runs." *Hart v Ludwig*, 347 Mich 559, 565-566; 79 NW2d 895 (1956).

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[4] See, also, 1 Torts: Michigan Law & Practice (2d ed), § 10.18, p 10-23. But see *Williams*, 429 Mich at 499 (noting the existence of an exception to this general rule when there is a special relationship between the parties).

In contrast, cases that recognized a cause of action in tort arising out of the negligent performance of a contract by a defendant "generally involve[d] a separate and distinct duty imposed by law for the benefit of the plaintiff that provide[d] a right to maintain [the] action without regard to whether there was a contractual relationship between the plaintiff and the defendant." *Ferrett*, 438 Mich at 245. This separate and distinct duty "imposed by law" could arise by operation of a statute or under the "basic rule of the common law, which imposes on every person engaged in the prosecution of any undertaking an obligation to use due care, or to so govern his actions as not to unreasonably endanger the person or property of others." *Clark*, 379 Mich at 261; see, also, *Rinaldo's Constr*, 454 Mich at 84; *Parker v Port Huron Hosp*, 361 Mich 1, 11; 105 NW2d 1 (1960) ("It should be noted that . . . at the common law . . . the general rule has been that one is liable for his negligence or tortious acts."). Thus, in cases alleging misfeasance of contractual obligations, although there was a contract, it "merely create[d] the state of things which furnishe[d] the occasion of the tort." *Clark*, 379 Mich at 261.

This Court, however, has recognized that determining whether an action in tort can arise out of a contractual promise is often largely semantic and difficult to discern. *Rinaldo's Constr*, 454 Mich at 83; *Hart*, 347 Mich at 564-565. In *Fultz*, a majority of this Court recognized the often "slippery distinction" between misfeasance and nonfeasance of contractual obligations and attempted to disentangle the misfeasance/nonfeasance dichotomy by shifting the focus to whether the particular defendant owed a duty to the plaintiff. *Fultz*, 470 Mich at 467 (quotation marks and citation omitted). Noting that this Court had described a tort action arising from the misfeasance of

contractual obligations as a " 'violation of a legal duty separate and distinct from the contractual obligation,' " the *Fultz* majority explained that this " 'separate and distinct' definition of misfeasance" offered better guidance in determining whether a negligence action based on a contract and brought by a third party could lie. *Id*., quoting *Rinaldo's Constr*, 454 Mich at 84. Accordingly, after *Fultz*, courts were to forgo the misfeasance/nonfeasance distinction and, instead, employ a " 'separate and distinct' mode of analysis" to determine the threshold question: "whether the defendant owed a duty to the plaintiff that is separate and distinct from the defendant's contractual obligations." *Fultz*, 470 Mich at 467; see, also, 1 Torts: Michigan Law and Practice (2d ed), § 10.18, p 10-24. Under this analysis, an action would lie in contract if it was based solely on a defendant's failure or refusal to perform a contractual promise. In contrast, an action *could* lie in either contract or in tort if a "defendant negligently performs a contractual duty or breaches a duty arising by implication from the relation of the parties created by the contract . . . ." *Fultz*, 470 Mich at 469. In the latter category of cases, however, no tort liability would arise "for failing to fulfill a promise in the absence of a duty to act that is separate and distinct from the promise made." *Id*. at 470.

Applying these principles, *Fultz* concluded that the plaintiff, who had slipped on a snow- and ice-covered parking lot, did not have a negligence cause of action against the contractor hired by the premises owner to plow and salt the lot because, in essence, the plaintiff merely claimed that the contractor had breached its contract by failing to perform its contractual duties. *Id*. at 468. Thus, because the plaintiff did not claim that she was a third-party beneficiary of the contract be-

tween the defendant and the premises owner or claim that the law otherwise imposed a duty on the defendant to complete the contracted-for performance, the plaintiff had failed to plead a duty owed to her that was independent, or "separate and distinct," from the defendant's contractual duty to the premises owner. *Id*. at 463, 468. After explaining that the *Fultz* plaintiff alleged no duty owed to her that was independent of the contract, this Court distinguished the facts of *Fultz* from *Osman v Summer Green Lawn Care, Inc*, 209 Mich App 703; 532 NW2d 186 (1995), overruled in part on other grounds by *Smith v Globe Life Ins Co*, 460 Mich 446; 597 NW2d 28 (1999). The majority explained that *Osman* was factually similar, insofar as the *Osman* plaintiff was injured when she slipped on ice that the *Osman* defendant had contracted to remove from the premises owner's property. However, the facts of *Fultz* were distinguishable from the facts of *Osman* in a few significant respects: in *Osman*, the defendant *breached* a duty owed to the plaintiff that was separate and distinct from its contractual obligations when it created a "new hazard" in carrying out its snow-removal duties. Specifically, in acting under the contract, the defendant moved snow to a portion of the premises that created a condition that it should have known would pose a danger to individuals traversing the area. *Fultz*, 470 Mich at 468-469. In contrast to the plaintiff in *Osman*, the *Fultz* plaintiff failed to establish *the existence of a duty* owed to her by the defendant and, thus, could not meet the threshold requirement for bringing a negligence action. The plaintiff simply asserted that the defendant had failed to perform its contractual obligations to the premises owner, which was insufficient to establish that the defendant owed her a duty in tort. *Id*. at 468-469. Accordingly, the plaintiff's remedy in *Fultz* rested solely against the premises owner.

B. CLARIFICATION OF *FULTZ*

Although *Fultz* clearly stated that a defendant's legal duty to act must arise separately and distinctly from a defendant's contractual obligations, *Fultz*'s "separate and distinct mode of analysis" has been misconstrued to, in essence, establish a form of tort immunity that bars negligence claims raised by a noncontracting third party. This is due, in part, to two orders from this Court, *Mierzejewski*, 477 Mich 1087, and *Banaszak*, 477 Mich 895. Courts have misconstrued *Fultz*'s test requiring a "separate and distinct duty" by erroneously focusing on whether a defendant's conduct was separate and distinct from the obligations required by the contract or whether the hazard was a subject of or contemplated by the contract. See, e.g., *Carrington v Cadillac Asphalt, LLC*, unpublished opinion per curiam of the Court of Appeals, issued February 9, 2010 (Docket No 289075); *Hatcher*, unpub op at 5; see, also, 1 Torts: Michigan Law and Practice, § 10.18, p 10-25. This interpretation is incorrect because, in analyzing tort actions based on a contract and brought by a noncontracting third party, *Fultz* directed courts to focus on "[w]hether a particular defendant owes *any duty at all* to a particular plaintiff," *Fultz*, 470 Mich at 467 (emphasis added), and, thus, generally required an inquiry into whether, aside from the contract, "a defendant is under *any* legal obligation to act for the benefit of the plaintiff," *Valcaniant*, 470 Mich at 86 n 4.[5] See, also, *Davis*, 568 F3d at 575-576.

[5] While this Court's orders in *Banaszak* and *Mierzejewski* may have understandably caused confusion, as explained later in this opinion, *Fultz* did not purport to overrule longstanding common law. Instead, *Fultz* intended to provide a simplified test to disentangle the sometimes difficult distinction between misfeasance and nonfeasance by directing courts to focus on the " 'separate and distinct' definition of misfeasance," as previously recognized by this Court. *Fultz*, 470 Mich at 467. Notably, the *Banaszak* and *Mierzejewski* orders only cited *Fultz* and did not claim

Thus, in determining whether an action in tort will lie, *Fultz* recast the test to focus on whether any legal duty independent of the contract existed. *Fultz*, 470 Mich at 466. Notably, in requiring courts to focus on whether a defendant owed a legal duty to the plaintiff, *Fultz* directed courts to utilize the " 'separate and distinct' definition of misfeasance." *Id.* at 467. In shifting the focus to this Court's "separate and distinct definition of misfeasance," however, *Fultz* did not modify the aforementioned historical understandings of this Court's "separate and distinct mode of analysis." Instead, *Fultz* favorably cited *Rinaldo's Constr*, 454 Mich at 84, and *Ferrett*, 438 Mich at 245, which, like *Fultz*, focused on whether a *legal duty* independent of a contract existed, rather than whether defendant's conduct was separate and distinct from the tasks required by the contract or whether the hazard was contemplated by the contract. *Davis*, 568 F3d at 576.

Determining whether a duty arises separately and distinctly from the contractual agreement, therefore, generally does not necessarily involve reading the contract, noting the obligations required by it, and determining whether the plaintiff's injury was contemplated by the contract. *Id.* Instead, *Fultz*'s directive is to determine whether a defendant owes a noncontracting, third-party plaintiff a legal duty apart from the defendant's contractual obligations to another. *Fultz*, 470 Mich at 461-462. As this Court has historically recog-

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to extend it. Moreover, *Fultz* did not claim to overrule the common law, and, just as "legislative amendment of the common law is not lightly presumed," *Dawe v Dr Reuven Bar-Levav & Assoc, PC*, 485 Mich 20, 28; 780 NW2d 272 (2010) (quotation marks and citation omitted), this Court does not heedlessly modify the common law. Accordingly, to the extent that *Banaszak* and *Mierzejewski* have been misconstrued to support an overly expansive reading of *Fultz*, we note that such an interpretation is incorrect and reject it as inconsistent with *Fultz*.

nized, a separate and distinct duty to support a cause of action in tort can arise by statute, *Clark*, 379 Mich at 261, or by a number of preexisting tort principles, including duties imposed because of a special relationship between the parties, see, e.g., *Williams*, 429 Mich at 499, and *Fultz*, 470 Mich at 468 n 4, and the generally recognized common-law duty to use due care in undertakings, see, e.g., *Clark*, 379 Mich at 261; *Hart*, 347 Mich at 564. As this Court has explained:

> Cases recognizing a right to maintain an action in tort arising out of a breach of contract by the defendant, generally involve a separate and distinct duty imposed by law for the benefit of the plaintiff that provides a right to maintain an action without regard to whether there was a contractual relationship . . . . In *Clark* [379 Mich at 261-262], the duty "imposed by law" was "[t]he general duty of a contractor to act so as not to unreasonably endanger the well-being of employees of either subcontractors or inspectors, or anyone else lawfully on the site of the project . . . ." [*Ferrett*, 438 Mich at 245-246 (second alteration in *Ferrett*).]

Stated another way, under the "separate and distinct mode of analysis," " '[e]ntering into a contract with another pursuant to which one party promises to do something does not alter the fact that there [exists] a preexisting obligation or duty to avoid harm when one acts.' " *Rinaldo's Constr*, 454 Mich at 84, quoting Prosser & Keeton, Torts (5th ed), § 92, pp 656-657; see, also, *Davis*, 568 F3d at 575, 577.

Thus, under *Fultz*, while the mere existence of a contractual promise does not ordinarily provide a basis for a duty of care to a third party in tort, "the existence of a contract [also] does not extinguish duties of care otherwise existing . . . ." 1 Torts: Michigan Law and Practice, § 10.18, p 10-25; see, also, *Fultz*, 470 Mich at 468-469. *Fultz* did not extinguish the "simple idea that is embedded deep within the American common law of

torts . . . : if one 'having assumed to act, does so negligently,' then liability exists as to a third party for 'failure of the defendant to exercise care and skill in the performance itself.' " *Davis*, 568 F3d at 575, quoting *Hart*, 347 Mich at 564.

In summary, "[w]hether a particular defendant owes *any duty at all* to a particular plaintiff [in tort]," *Fultz*, 470 Mich at 467 (emphasis added), is generally determined without regard to the obligations contained within the contract, *Davis*, 568 F3d at 577. See, also, *Churchill v Howe*, 186 Mich 107, 114; 152 NW 989 (1915) (explaining that although a tort can grow out of a contract, in general, a tort is a "wrong independent of a contract"). Accordingly, with the aforementioned principles in mind, we clarify that when engaging in the "separate and distinct mode of analysis" in *Fultz*'s analytical framework, see 470 Mich at 469-470, courts should not permit the contents of the contract to obscure the threshold question of whether any independent legal duty to the noncontracting third party exists, the breach of which could result in tort liability. Instead, in determining whether the action arises in tort, and thus whether a separate and distinct duty independent of the contract exists, the operative question under *Fultz* is whether the defendant owed the plaintiff any legal duty that would support a cause of action in tort, including those duties that are imposed by law.

C. APPLICATION

Unlike the plaintiff's cause of action in *Fultz*, 470 Mich at 468-469, plaintiff's cause of action in this case was not brought solely on the basis of defendant's failure to perform its contractual obligations to the general contractor. Instead, plaintiff claims that defendant breached the common-law duty to exercise reason-

able care and avoid harm when one acts. *Clark*, 379 Mich at 261; *Rinaldo's Constr*, 454 Mich at 84. Defendant's motion for summary disposition, however, was raised and decided on the basis of a misinterpretation of *Fultz*. Specifically, defendant's motion was brought exclusively under the erroneous belief that defendant owed no duty to plaintiff because defendant's performance and the hazards associated with that performance were the subject of defendant's contract with the general contractor. Because defendant's motion was brought solely under the mistaken belief that *Fultz* extinguished preexisting common-law duties, we need not and do not preemptively decide whether *this particular plaintiff* was owed a duty of care under the common law.

IV. CONCLUSION

Under *Fultz*, a contracting party's assumption of contractual obligations does not extinguish or limit separate, preexisting common-law or statutory tort duties owed to noncontracting third parties in the performance of a contract. Accordingly, we clarify that when engaging in *Fultz*'s "separate and distinct mode of analysis," courts should not permit the contents of the contract to obscure the proper initial inquiry: whether, aside from the contract, the defendant owed any independent legal duty to the plaintiff. In this case, defendant—by performing an act under the contract—was not relieved of its preexisting common-law duty to use ordinary care in order to avoid physical harm to foreseeable persons and property in the execution of its undertakings. That duty, which is imposed by law, is separate and distinct from defendant's contractual obligations with the general contractor. Accordingly, we reverse the judgment of the Court of Appeals and

remand this case to the trial court for further proceedings that are consistent with this opinion.

YOUNG, C.J., and MARILYN KELLY, MARKMAN, and MARY BETH KELLY, JJ., concurred with CAVANAGH, J.

HATHAWAY, J. I concur in the result only.

ZAHRA, J., did not participate because he was on the Court of Appeals panel in this case.

PEOPLE v PELTOLA

Docket No. 140524. Argued on application for leave to appeal March 9, 2011. Decided June 14, 2011.

Drew J. Peltola was convicted by a jury in the Dickinson Circuit Court of delivery of less than 50 grams of heroin and conspiracy to deliver less than 50 grams of heroin. Defendant's recommended minimum sentence range under the sentencing guidelines was 5 to 23 months' imprisonment. As a repeat controlled substances offender, defendant was subject to MCL 333.7413(2), which authorizes the sentencing court to impose a term of imprisonment twice the term otherwise authorized. The court, Richard J. Celello, J., doubled both defendant's maximum sentence and the minimum sentence range that it had calculated under the guidelines and sentenced defendant to 46 months to 40 years in prison. Defendant appealed. The Court of Appeals, HOEKSTRA, P.J., and BANDSTRA and SERVITTO, JJ., affirmed in an unpublished opinion per curiam, issued October 20, 2009 (Docket No. 288578). Defendant, through appointed counsel and *in propria persona*, sought leave to appeal. The Supreme Court denied the application for leave to appeal that defendant filed *in propria persona*, but ordered and heard oral argument on whether to grant the application filed by defendant's counsel or take other peremptory action, instructing the parties to address whether the scoring of prior record variables (PRVs) is improper when a defendant's minimum and maximum sentences may be doubled pursuant to MCL 333.7413(2). 488 Mich 876 (2010).

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

A sentencing court calculating a defendant's recommended minimum sentence range under the sentencing guidelines when the defendant's minimum and maximum sentences may be enhanced pursuant to MCL 333.7413(2) must score the prior record variables.

1. Subsection (1) of MCL 777.21 sets forth the general rule for determining a defendant's minimum sentence range, while subsections (2) through (5) set forth exceptions to the general rule and additional explanations regarding how the sentencing guidelines

are applied to specific classes of defendants and offenses. MCL 777.21(1) instructs that all the PRVs must be scored for an offender when determining his or her minimum sentence range. The Legislature's use of the phrase "[e]xcept as otherwise provided" in MCL 777.21 at the beginning of subsection (1) does not mean that when another subsection applies, MCL 777.21(1) is entirely inapplicable. Rather, MCL 777.21(1) is inapplicable only to the extent that one of the other subsections is inconsistent with an instruction in it.

2. MCL 777.21(4) applies to violations described in MCL 777.18, including subsequent controlled substance violations under MCL 333.7413(2). MCL 777.21(4) does not replace the general requirement that all the PRVs be scored or provide a contrary instruction. Rather, MCL 777.21(4) provides guidance regarding how to determine the offense variable (OV) level and the offense class for offenders falling under MCL 777.18. When applicable, as in this case, the instructions in MCL 777.21(4)(a) and (b) replace the directives concerning the OVs to be scored and the offense class found in MCL 777.21(1)(a) and (c). However, because there is no reference in MCL 777.21(4) to PRVs, the general rule of MCL 777.21(1)(b) requiring the court to score the PRVs still applies.

3. The 2006 amendments of MCL 777.21, which removed references to the PRVs from subsection (4), did not alter this analysis. Those amendments only clarified how a court determines the applicable OVs and offense class for offenders falling under MCL 777.21(4). No further clarification was needed with regard to the scoring of the PRVs because the PRVs are scored the same way no matter what the underlying offense is. To the extent that statements made in *People v Lowe*, 484 Mich 718 (2009), concerning the effect of the absence of a reference to PRVs in MCL 777.21(4) were contrary to this opinion, they were obiter dicta, and the holding of *Lowe* is limited to whether MCL 333.7413(2) permits a sentencing court to enhance a defendant's minimum and maximum sentence.

Affirmed.

Justice CAVANAGH, joined by Justice MARILYN KELLY, dissenting, would have reversed the judgment of the Court of Appeals and remand for resentencing consistent with his dissent in *Lowe*. MCL 333.7413(2) does not permit a sentencing court to double a defendant's minimum sentence range if that range is determined under the sentencing guidelines. Rather, it only permits a sentencing court to double a penalty provided within the controlled substances act, MCL 333.7101 *et seq*. Because defendant's minimum sentence range in this case must be determined under the

sentencing guidelines, Justice CAVANAGH would have held that defendant's minimum sentence was not subject to enhancement under MCL 333.7413(2) and that the sentencing court erred by imposing a minimum sentence that exceeded the guidelines range in violation of MCL 769.34(2), which provides that absent a properly justified departure, all minimum sentences for the enumerated felonies must fall within the range calculated under the sentencing guidelines. He further rejected defendant's argument that the PRVs should not have been scored, noting that under that approach, defendant's sentence could fall below the minimum sentence range calculated under the guidelines, which would also conflict with the requirement in MCL 769.34(2).

SENTENCES — CONTROLLED SUBSTANCES — REPEAT OFFENDERS — SENTENCING GUIDELINES — PRIOR RECORD VARIABLES.

A sentencing court calculating a defendant's recommended minimum sentence range under the sentencing guidelines when the defendant's minimum and maximum sentences may be enhanced pursuant to MCL 333.7413(2) must score the prior record variables (MCL 777.21[1], [4]).

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Joel D. McGormley*, Assistant Attorney General, and *Stephanie S. Brule*, Prosecuting Attorney, for the people.

State Appellate Defender (by *Jacqueline J. McCann*) for defendant.

ZAHRA, J. This case presents the question whether scoring prior record variables (PRVs) when calculating a defendant's recommended minimum sentence range under the statutory sentencing guidelines is improper when a defendant's minimum and maximum sentences may be enhanced pursuant to MCL 333.7413(2). The sentence enhancement in MCL 333.7413(2) falls under the purview of MCL 777.21(4), and, therefore, the answer necessarily turns on the language of MCL 777.21, which sets forth the instructions for calculating a defendant's minimum sentence range. Reading all the

provisions of this statute together, and thus giving effect to the Legislature's stated intent, we hold that MCL 777.21 requires the scoring of the PRVs when MCL 333.7413(2) is applicable. Accordingly, we affirm defendant's sentences.

I. FACTS AND PROCEDURAL HISTORY

A jury convicted defendant of delivery of less than 50 grams of heroin[1] and conspiracy to deliver less than 50 grams of heroin.[2] The trial court scored the PRVs and the relevant offense variables (OVs), calculating defendant's minimum sentence range at 5 to 23 months in prison with a statutory maximum of 20 years. Because defendant had a prior conviction for a controlled substance offense, the trial court applied the sentence enhancement in MCL 333.7413(2).[3] The trial court doubled both the minimum and maximum sentences for each conviction and sentenced defendant within the enhanced guidelines range to concurrent terms of 46 months to 40 years' imprisonment.

Defendant appealed as of right his convictions and sentences, which the Court of Appeals affirmed in an unpublished opinion per curiam.[4] In particular, defendant challenged the enhancement of his minimum sentences under MCL 333.7413(2). While defendant's appeal was pending in the Court of Appeals, we issued *People v Lowe*,

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[1] MCL 333.7401(2)(a)(*iv*).

[2] MCL 750.157a.

[3] MCL 333.7413(2) states, "Except as otherwise provided in subsections (1) and (3), an individual convicted of a second or subsequent offense under this article may be imprisoned for a term not more than twice the term otherwise authorized or fined an amount not more than twice that otherwise authorized, or both."

[4] *People v Peltola*, unpublished opinion per curiam of the Court of Appeals, issued October 20, 2009 (Docket No. 288578).

484 Mich 718; 773 NW2d 1 (2009), holding that when MCL 333.7413(2) is applicable, it authorizes a court to enhance both a defendant's minimum and maximum sentences. Relying on *Lowe*, the Court of Appeals rejected defendant's challenge to his sentences.

Defendant subsequently moved for reconsideration, recognizing the holding in *Lowe*, but arguing that additional language from *Lowe* indicated that PRVs should not be scored if a defendant's sentence may be enhanced under MCL 333.7413(2). The Court of Appeals denied defendant's motion for reconsideration without further comment.[5]

Defendant sought leave to appeal in this Court through counsel in the State Appellate Defender Office (SADO) and by filing a separate application *in propria persona*. We directed the prosecuting attorney to answer the application for leave filed by SADO on defendant's behalf.[6] After receiving the prosecutor's answer, we denied the application that had been filed *in propria persona*.[7] With respect to the application filed by SADO, we scheduled oral argument, instructing the parties to address whether the scoring of PRVs is improper when a defendant's minimum and maximum sentences may be doubled pursuant to MCL 333.7413(2).[8]

II. STANDARD OF REVIEW

We review questions of statutory interpretation de novo.[9]

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[5] *People v Peltola*, unpublished order of the Court of Appeals, entered December 14, 2009 (Docket No. 288578).

[6] We directed the prosecutor to specifically address the argument that *Lowe*, 484 Mich 718, precludes the scoring of the PRVs in this case.

[7] *People v Peltola*, 488 Mich 876 (2010).

[8] *Id*.

[9] *People v Krueger*, 466 Mich 50, 53; 643 NW2d 223 (2002).

III. ANALYSIS

The question here is whether the Legislature intended that a court score the PRVs when calculating the minimum sentence range for an offender whose sentence may be enhanced under MCL 333.7413(2).[10] MCL 777.21, which instructs on the calculation of the minimum sentence range, provides:

> (1) Except as otherwise provided in this section, for an offense enumerated in part 2 of this chapter [MCL 777.11 through MCL 777.19], determine the recommended minimum sentence range as follows:
>
> (a) Find the offense category for the offense from part 2 of this chapter. From [MCL 777.22], determine the offense variables to be scored for that offense category and score only those offense variables for the offender as provided in part 4 of this chapter [MCL 777.31 through MCL 777.49a]. Total those points to determine the offender's offense variable level.
>
> (b) Score all prior record variables for the offender as provided in part 5 of this chapter [MCL 777.50 through MCL 777.57]. Total those points to determine the offender's prior record variable level.
>
> (c) Find the offense class for the offense from part 2 of this chapter. Using the sentencing grid for that offense class in part 6 of this chapter [MCL 777.61 through MCL 777.69], determine the recommended minimum sentence range from the intersection of the offender's offense variable level and prior record variable level. The recom-

[10] It is undisputed that if the PRVs should not have been scored, defendant is entitled to resentencing. See *People v Francisco*, 474 Mich 82, 88-92; 711 NW2d 44 (2006). If the trial court had not scored the PRVs, defendant's minimum sentence range would have been zero to 6 months, which if doubled would have resulted in a zero- to 12-month minimum sentence range, rather than the 10- to 46-month minimum range calculated by the trial court, and the trial court would have been required to impose an intermediate sanction rather than a prison term absent a reason justifying a departure. MCL 769.34(4)(a).

mended minimum sentence within a sentencing grid is shown as a range of months or life.

(2) If the defendant was convicted of multiple offenses, subject to [MCL 771.14], score each offense as provided in this part [MCL 777.21 through MCL 777.22].

(3) If the offender is being sentenced under [MCL 769.10, MCL 769.11, or MCL 769.12], determine the offense category, offense class, offense variable level, and prior record variable level based on the underlying offense. To determine the recommended minimum sentence range, increase the upper limit of the recommended minimum sentence range determined under part 6 for the underlying offense as follows:

(a) If the offender is being sentenced for a second felony, 25%.

(b) If the offender is being sentenced for a third felony, 50%.

(c) If the offender is being sentenced for a fourth or subsequent felony, 100%.

(4) If the offender is being sentenced for a violation described in [MCL 777.18], both of the following apply:

(a) Determine the offense variable level by scoring the offense variables for the underlying offense and any additional offense variables for the offense category indicated in [MCL 777.18].

(b) Determine the offense class based on the underlying offense. If there are multiple underlying felony offenses, the offense class is the same as that of the underlying felony offense with the highest crime class. If there are multiple underlying offenses but only 1 is a felony, the offense class is the same as that of the underlying felony offense. If no underlying offense is a felony, the offense class is G.

(5) If the offender is being sentenced for an attempted felony described in [MCL 777.19], determine the offense variable level and prior record variable level based on the underlying attempted offense.

Our overriding goal for interpreting a statute is to determine and give effect to the Legislature's intent.[11] The most reliable indicator of the Legislature's intent is the words in the statute.[12] We interpret those words in light of their ordinary meaning and their context within the statute and read them harmoniously to give effect to the statute as a whole.[13] Moreover, "every word should be given meaning, and we should avoid a construction that would render any part of the statute surplusage or nugatory."[14] If the statutory language is unambiguous, no further judicial construction is required or permitted because we presume the Legislature intended the meaning that it plainly expressed.[15]

MCL 777.21(1) sets forth the general rule for determining a defendant's minimum sentence range, while subsections (2) through (5) set forth exceptions to the general rule and additional explanations regarding how the sentencing guidelines are applied to various specific classes of defendants and offenses. Reading § 21(1) as the general rule is supported by the clear language of that subsection, which begins by stating, "Except as otherwise provided in this section, . . . determine the recommended minimum sentence range as follows[.]" The minimum sentence range is thus determined by following the instructions in § 21(1) unless one of the other subsections applies and provides an instruction that is inconsistent with the language in § 21(1).

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

[12] *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999).

[13] *People v Morey*, 461 Mich 325, 330; 603 NW2d 250 (1999); *Farrington v Total Petroleum, Inc*, 442 Mich 201, 209; 501 NW2d 76 (1993).

[14] *AFSCME v Detroit*, 468 Mich 388, 399-400; 662 NW2d 695 (2003) (quotation marks and citations omitted).

[15] *Morey*, 461 Mich at 330.

The Legislature's use of "[e]xcept as otherwise provided" does not mean that when one of the other subsections is applicable, § 21(1) is entirely inapplicable. Rather, giving effect to the statute as a whole, § 21(1) is inapplicable only to the extent that one of the other subsections is *inconsistent* with an instruction in it.[16] For the purposes of this case, § 21(1)(b) instructs that a court "[s]core all prior record variables for the offender . . . ." The general rule applicable in *all* cases is thus to score the PRVs unless the language in another subsection of the statute directs otherwise.

In this case, the only other subsection relevant to the calculation of defendant's recommended minimum sentence range was § 21(4), which applies to violations "described in section 18 of this chapter . . . ." Section 18 of chapter XVII of the Code of Criminal Procedure refers to MCL 777.18, which includes subsequent controlled substance violations under MCL 333.7413(2).[17] As a result, the determination of defendant's minimum sentence range was also subject to the instructions in MCL 777.21(4). We must therefore consider the interplay between MCL 777.21(1) and MCL 777.21(4).

When applicable, § 21(4) provides additional rules relating to the scoring of OVs and the determination of the offense class of the sentencing offense. These in-

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[16] See *Vega v Lakeland Hosps*, 479 Mich 243, 250-251; 736 NW2d 561 (2007) (treating the phrase " [e]xcept as otherwise provided" in the same manner).

[17] MCL 777.18 also applies to a controlled substance offense or offense involving gamma-butyrolactone on or near school property or a library, MCL 333.7410; recruiting or inducing a minor to commit a controlled substance felony, MCL 333.7416(1)(a); conspiracy, MCL 750.157a(a); inducing a minor to commit a felony, MCL 750.157c; voluntarily suffering a prisoner to escape, MCL 750.188; a felony committed in a weapon-free school zone, MCL 750.237a; and larceny of rationed goods, MCL 750.367a.

structions replace the OV and offense class directives in § 21(1)(a) and (c)[18] with the directives in § 21(4)(a) and (b). In particular, § 21(4) directs a court to determine the OV level by scoring the OVs for the underlying offense *and* any additional OVs for the offense category indicated in § 18. It also directs a court to determine the offense class using the underlying offense, while specifying that if there are multiple underlying felony offenses, the offense class is the same as that of the underlying felony with the highest crime class. It further directs that when there are multiple underlying offenses, but only one is a felony, the offense class is the same as that of the underlying felony. If no underlying offense is a felony, the offense class is G. However, § 21(4) does not explicitly instruct a court not to score the PRVs. Rather, absent from § 21(4) is any reference whatsoever to PRVs. Consequently, when read as a whole, the statute's language plainly supports the conclusion that the general rule to score PRVs still applies because § 21(4) has not "otherwise provided."

The language of § 21(4) further supports this interpretation by stating, "If the offender is being sentenced for a violation described in section 18 of this chapter, *both* of the following apply[.]"[19] The subsection continues with *two* specific provisions regarding how to determine the OV level and the offense class. Significantly, the Legislature did not state that "*only* both of the following apply" or "both of the following apply *exclusively*" when determining an offender's minimum sentence range under § 21(4). The absence of such exclusive language further

[18] Section 21(1)(a) instructs on the offense category and the OVs to score in determining the OV level. Section 21(1)(c) instructs on finding the offense class and using the grid for that offense class to determine the recommended minimum sentence range on the basis of the intersection of the OV level and the PRV level.

[19] Emphasis added.

demonstrates that that § 21(4) works in conjunction with, and not independently from, § 21(1).

We reject defendant's argument that the absence of a reference to PRVs in § 21(4) shows that the Legislature intended that the PRVs are not to be scored with respect to a defendant whose offense falls under § 21(4). Crucial in addressing this argument are the 2006 amendments of MCL 777.21.[20] Specifically, the amendments inserted "[e]xcept as otherwise provided in this section" in the opening sentence of § 21(1) and rewrote § 21(4), which had previously stated, "If the offender is being sentenced for a violation described in section 18 of this chapter, determine the offense class, offense variable level, and prior record variable level based on the underlying offense."[21] As a result

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[20] 2006 PA 655.

[21] The amendments also corrected a Roman numeral in § 21(2) to reflect the correct chapter number applicable to that subsection, but that change is irrelevant to the analysis here. The relevant changes to the statute were as follows, with strikeout showing deleted language and underlining showing new language:

> (1) Except as otherwise provided in this section, f~~F~~or an offense enumerated in part 2 of this chapter, determine the recommended minimum sentence range as follows:
>
> * * *
>
> (4) If the offender is being sentenced for a violation described in section 18 of this chapter, ~~determine the offense class, offense variable level, and prior record variable level based on the underlying offense.~~ both of the following apply:
>
> (a) Determine the offense variable level by scoring the offense variables for the underlying offense and any additional offense variables for the offense category indicated in section 18 of this chapter.
>
> (b) Determine the offense class based on the underlying offense. If there are multiple underlying felony offenses, the offense class is the same as that of the underlying felony offense with the highest crime class. If there are multiple underlying offenses but

of these amendments, § 21(4) no longer refers to PRVs.

Defendant contends that the removal of the reference to scoring PRVs in MCL 777.21(4) and the retention of the references to PRVs in MCL 777.21(3) and (5) show that the Legislature intended that a court not score PRVs when § 21(4) is applicable. Defendant also argues that scoring the PRVs on the basis of the language of § 21(1) when § 21(4) applies would render the references to scoring PRVs in the other subsections superfluous.

The Legislature did not alter *any* language in subsections (3) and (5), and thus those subsections retain their references to PRVs. Generally, when language is included in one section of a statute but omitted from another section, it is presumed that the drafters acted intentionally and purposely in their inclusion or exclusion.[22] Similarly, "[c]ourts cannot assume that the Legislature inadvertently omitted from one statute the language that it placed in another statute, and then, on the basis of that assumption, apply what is not there."[23]

We conclude that the 2006 amendments only clarified the OVs and offense class applicable to offenders falling under the purview of § 21(4). Removing the reference to PRVs did not affect the general direction that the PRVs be scored. Significantly, not all OVs are scored for each class of crime.[24] Thus, for offenses to which MCL 777.18

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only 1 is a felony, the offense class is the same as that of the underlying felony offense. If no underlying offense is a felony, the offense class is G. [MCL 777.21, as amended by 2006 PA 655.]

[22] See *Russello v United States*, 464 US 16, 23; 104 S Ct 296; 78 L Ed 2d 17 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (quotation marks and citation omitted) (alteration in *Russello*).

[23] *Farrington*, 442 Mich at 210.

[24] MCL 777.22.

is applicable, legislative clarification was necessary because a court must consider the § 18 offense and the underlying offense when scoring the OVs.[25] The amendments of § 21(4) inform a trial court which OVs should be scored when § 18 comes into play, as well as which crime class applies, in order to clarify which sentencing grid must be used when calculating a defendant's minimum sentence range. Section 21(4) is thus not a standalone, independent sentencing statute, but merely part of the larger whole meant to provide additional guidance and the potential for heightened OV scoring for offenders falling under § 18, as well as clarity concerning the applicable offense class for those offenders.[26]

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[25] As an illustration, defendant's subsequent substance abuse offense violated MCL 333.7413(2), which, as noted, is an offense listed in MCL 777.18. In applying the instructions under MCL 777.21(4), the trial court scored the OVs for the underlying offense, delivery of less than 50 grams of heroin, MCL 333.7401(2)(a)(*iv*), which falls under the controlled substance offense category, as well as the offense variables applicable to MCL 333.7413(2), which falls under the public trust offense category. Consequently, in addition to the variables scored as a result of defendant's controlled substance offense, the trial court also scored OVs 4, 9, 10, and 16 as a result of defendant's public trust offense. Defendant's offense class was D because delivery of less than 50 grams of heroin is a class D offense and MCL 777.21(4) instructs that the offense class is based on the underlying offense.

[26] The verb selections in MCL 777.21 lend additional support to our conclusion that the amendments of § 21(4) had no impact on the general rule to score PRVs when determining the guidelines range under that subsection. When setting forth the general rule for PRVs in § 21(1)(b), the Legislature used the verb "score," instructing "score all prior record variables as provided in part 5 of this chapter." In § 21(4), however, the Legislature merely used the verb "determine," stating "[d]etermine the offense variable level" and "[d]etermine the offense class . . . ." The word "determine" is also used in the general rule in § 21(1)(a), instructing courts on how to determine the OVs to be scored and the offender's OV level. Conversely, "determine" is not used for the PRV instruction, which instead uses the word "score." The direction to "score" is a command, meaning that unless directed otherwise, a court *must* score an offender's

The retention of the reference to PRVs in MCL 777.21(3) and (5) does not undermine our conclusion. When considering the actual language of these subsections, each, when applicable, instructs a court to "determine the . . . prior record variable level *based on the underlying offense*."[27] Before the 2006 amendments, § 21(4) contained the same language. Thus, when read in context, subsections (3) and (5) do not contain freestanding instructions to score the PRVs. Rather, they indicate that when those subsections are applicable, the determination of a defendant's PRV level is based on the underlying offense.

Significantly, all seven PRVs are scored for *all felonies*.[28] And the scoring of the PRVs generally only considers a defendant's *prior* conduct.[29] As a result, the underlying offense has no effect on the scoring of the PRVs because they are determined by reviewing a defendant's criminal history regardless of the underlying offense. Therefore, the instruction to determine the PRV level on the basis of the underlying offense is inherently illogical. A court cannot determine the PRV score on the basis of the underlying offense when the

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PRVs in order to calculate the guidelines. "Determine," on the other hand, simply provides additional explanation concerning which OVs to score. Thus, when comparing the use of "determine" in § 21(1) with the use of "determine" § 21(4), the word choices in the statute support the conclusion that the amendments of § 21(4) were merely intended to provide further explanation regarding how to determine the OV level and the offense class for a defendant who committed an offense listed in § 18.

[27] MCL 777.21(3) (emphasis added). The language of subsection (5) is identical, except that it directs that the PRVs be scored on the basis of the "underlying attempted offense" because subsection (5) concerns attempted felonies.

[28] MCL 777.21(1)(b); 2 Gillespie, Michigan Criminal Law & Procedure (2d ed), § 22:96, p 204.

[29] MCL 777.50 *et seq*. PRV 7, MCL 777.57, provides an exception to this general rule in that it concerns subsequent and concurrent convictions, but this exception does not alter our analysis.

scoring of any of the PRVs is in no way contingent on the underlying offense. Yet reading the statute in the manner that defendant suggests would give an artificial meaning to the references to PRVs in § 21(3) and (5), contrary to the language of the statute, because it would require that we overlook the full instruction to determine a defendant's PRV level on the basis of the underlying offense.

We conclude that § 21(4) does not provide an instruction regarding the scoring of the PRVs contrary to that set forth in § 21(1). Rather, the 2006 amendments clarified how a court determines the applicable OVs and offense classes for offenders falling under the purview of § 21(4). No distinction or further clarification was needed with regard to the PRVs because, as previously addressed, the PRVs are scored the same way no matter what the underlying offense. Reading the various changes enacted as part of the 2006 amendments of the statute together supports the conclusion that the general rule to score the PRVs still applies to § 21(4) because § 21(4) does not provide otherwise. The addition of the phrase "except as otherwise provided" to § 21(1) works in conjunction with the new language in § 21(4), stating that "both of the following apply," in introducing the substantive changes regarding the applicable OVs and offense classes. Thus, the rules "otherwise provided" *only* relate to the OV and offense class directions. Drawing this conclusion does not restore to the statute language that the Legislature omitted. Instead, the general direction in § 21(1) to score PRVs carries through to § 21(4) because there is no explicit language in § 21(4) instructing courts not to score PRVs. The PRVs are scored *not* because the Legislature removed the reference to scoring them, but because in the amendments to § 21(4), the Legislature simply did

not provide a contrary rule that displaced the general PRV rule or an explicit direction not to score the PRVs.[30]

We recognize that our conclusion is contrary to statements made in *Lowe*, in which we stated, in a section of that decision responding to the dissent, that the absence of a reference to PRVs in § 21(4) appeared to indicate that the Legislature intended that offenders falling under § 21(4) should not be scored with regard to the repeat nature of the offense.[31] The reference that

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[30] We note that our reading of the statute is consistent with and effectuates the Legislature's intent to promote uniformity and consistency in sentencing through the use of the sentencing guidelines and the general legislative purpose to punish recidivist offenders more severely. See MCL 769.10; MCL 769.11; MCL 769.12; MCL 333.7413; see also *People v Babcock*, 469 Mich 247, 263; 666 NW2d 231 (2003) ("The premise of our system of criminal justice is that, everything else being equal, the more egregious the offense, and the more recidivist the criminal, the greater the punishment."). By requiring the scoring of the PRVs, our analysis effectuates this purpose by avoiding the untoward consequence of punishing a recidivist drug offender less severely than a first-time drug offender.

[31] *Lowe*, 484 Mich at 729-730. Specifically, this Court stated:

> The dissent further argues that, because the sentencing guidelines apply to defendant's underlying offense—the possession of methamphetamine—the sentence must be within the minimum sentence guideline range as calculated for that offense. *Post* at 737. However, the Legislature expressly provided that the guidelines specifically apply to sentencing done pursuant to [MCL 333.7413(2)], MCL 777.18, and implemented a specific scheme for when "the offender is being sentenced for a violation [of § 7413(2)]," MCL 777.21(4). Under this scheme, the trial court is directed to calculate the minimum sentence range based on the offense variables and offense class for the underlying felony. MCL 777.21(4). Notably, § 21(4) includes no scoring for prior record variables, even though MCL 333.7413(2) only applies if a defendant has, in fact, committed a prior offense. In light of this, it seems reasonable to conclude that the Legislature, knowing that § 7413(2) allowed an enhancement of the minimum sentence, intended the minimum sentence guideline range to be calculated without respect to the underlying offense's repeat nature. If the Legislature had intended for § 7413(2) to operate only as an

Lowe made to § 21(4) not encompassing scoring of the PRVs was merely a statement of the obvious because § 21(4) does not mention PRVs at all, due to the fact that PRVs are addressed in *other* subsections of the statute. Moreover, the pertinent statements in *Lowe* are clearly nonbinding obiter dicta.[32] The only issue in *Lowe* was whether MCL 333.7413(2) permitted a trial court to enhance the minimum and maximum portions of a defendant's sentence or whether the trial court could instead only enhance the maximum portion of the sentence. The issue presented here is whether the PRVs should be scored for an offender who falls under the purview of MCL 777.21(4). The issue here is not contingent on the issue decided in *Lowe*, and the statements regarding § 21(4) in *Lowe* were not essential to the determination of that case. Consequently, we clarify that the holding in *Lowe* is limited to whether MCL 333.7413(2) permits a trial court to enhance a defendant's minimum and maximum sentence.

IV. CONCLUSION

We hold that when calculating a defendant's recommended minimum sentence range under the sentencing guidelines when the defendant's minimum and maximum sentences may be enhanced pursuant to MCL 333.7413(2), a trial court should score the PRVs. Reading MCL 777.21(1) and (4) in conjunction with one

> enhancement of the maximum sentence, then MCL 777.21(4) would have been unnecessary, and the Legislature would have had no reason to apply the minimum sentence guidelines to sentencing under MCL 333.7413(2). [*Id*. (second alteration in *Lowe*).]

[32] Obiter dicta are not binding precedent. Instead, they are statements that are unnecessary to determine the case at hand and, thus, "lack the force of an adjudication." *Wold Architects & Engineers v Strat*, 474 Mich 223, 232 n 3; 713 NW2d 750 (2006) (citations and quotation marks omitted).

another, MCL 777.21(1) instructs that the PRVs must be scored for each offender when determining the minimum sentence range. MCL 777.21(4), when read as a part of the larger whole, and in context with how the sentencing guidelines operate generally, does not displace this general requirement or provide a contrary instruction. Rather, MCL 777.21(4) is merely intended to provide guidance regarding how to determine the OV level and offense class for offenders falling under MCL 777.18. Accordingly, the trial court properly scored the PRVs. Defendant's sentences are affirmed.[33]

YOUNG, C.J., and MARKMAN, HATHAWAY, and MARY BETH KELLY, JJ., concurred with ZAHRA, J.

CAVANAGH, J. (*dissenting*). I respectfully dissent because I remain committed to my dissent in *People v Lowe*, 484 Mich 718, 732-743; 773 NW2d 1 (2009) (CAVANAGH, J., dissenting), and applying my *Lowe* dissent to this case renders the issue addressed by the majority irrelevant.

As I explained in *Lowe*, MCL 333.7413(2) does not permit a sentencing court to double a defendant's minimum sentence range if that sentence range is determined under the sentencing guidelines. Rather, MCL 333.7413(2) only permits a sentencing court to double a penalty provided within the controlled substances act, MCL 333.7101 *et seq*. In my judgment, this is the proper interpretation of MCL 333.7413(2) because, to the extent possible, it construes the applicable statutes harmoniously and avoids a potential conflict with MCL 769.34(2), which mandates that all minimum

[33] With respect to the other appellate issue raised by defendant regarding his sentencing credit, we deny leave to appeal because we are not persuaded that the question presented should be reviewed by this Court.

sentences fall within the range calculated under the sentencing guidelines, absent a properly justified departure. See *Lowe*, 484 Mich at 733-743 (CAVANAGH, J., dissenting).

Because, under MCL 769.34(2), defendant's minimum sentence range in this case must be determined under the sentencing guidelines, I would hold that defendant's minimum sentence is not subject to enhancement under MCL 333.7413(2). Like that of the defendant in *Lowe*, defendant's offense is listed in MCL 777.13m. As a result, MCL 769.34(2) applies and defendant's minimum sentence must fall within the range calculated under the sentencing guidelines in chapter XVII of the Code of Criminal Procedure, MCL 777.1 through MCL 777.69. See *Lowe*, 484 Mich at 736-739 (CAVANAGH, J., dissenting). To properly calculate defendant's minimum sentence range under the guidelines, the prior record variables (PRVs) must be scored. Thus, in this case, the trial court was correct to score defendant's PRVs. Further, the trial court properly applied MCL 333.7413(2) to double defendant's maximum sentence because that portion of his sentence is determined by the controlled substances act. See *Lowe*, 484 Mich at 732 (CAVANAGH, J., dissenting). The trial court erred, however, when it applied MCL 333.7413(2) to double defendant's *minimum* guidelines range because the doubled minimum sentence range permitted the trial court to impose a sentence that exceeded the range calculated under the sentencing guidelines, contrary to MCL 769.34(2).[1]

[1] Defendant's total PRV score is 60 points and his total OV score is 6 points. Thus, under the sentencing guidelines, defendant's minimum sentence range is 5 to 23 months. But the trial court applied MCL 333.7413(2) to double defendant's minimum sentence range to 10 to 46 months. Furthermore, in setting defendant's minimum sentence at 46 months, the trial court in this case expressly stated that the sentence was

Finally, I also note that, under my *Lowe* dissent, defendant's preferred scoring approach similarly could result in a sentence that impermissibly conflicts with MCL 769.34(2). If defendant's PRVs are not scored (or are scored at zero points) and the resulting guidelines range is doubled, defendant's minimum sentence could fall *below* the minimum range calculated under the sentencing guidelines.[2] Thus, if defendant's preferred approach were applied, the resulting sentence could conflict with the requirement in MCL 769.34(2) that, absent a properly justified departure, all minimum sentences for the enumerated felonies must fall within the range calculated under the sentencing guidelines because the resulting sentence could be shorter than the applicable sentencing guidelines range.

Because the prosecution's preferred approach to sentencing in this case, which the majority adopts, and defendant's preferred approach could both result in sentences that are inconsistent with MCL 769.34(2), I would not apply either approach. Rather, I would reverse the judgment of the Court of Appeals and remand for resentencing consistent with my *Lowe* dissent.

MARILYN KELLY, J., concurred with CAVANAGH, J.

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not a sentencing guidelines departure when, in fact, the sentence exceeded the properly calculated minimum sentence range under the guidelines.

[2] As previously explained, defendant's minimum sentence range under the guidelines is 5 to 23 months. If defendant's PRVs were scored at zero points, his minimum sentence range would be reduced to zero to 6 months and, when doubled under MCL 333.7413(2), his minimum sentence range would become zero to 12 months, which is substantially lower than the 5- to 23-month range calculated under the guidelines.

MICHIGAN EDUCATION ASSOCIATION v SECRETARY OF STATE (ON REHEARING)

Docket No. 137451. Argued November 5, 2010 (Calendar No. 7). Decided December 29, 2010. Reported at 488 Mich 18. Rehearing granted, original opinion vacated, and decided on rehearing June 30, 2011.

The Michigan Education Association (MEA) sought a declaratory ruling from the Secretary of State that a payroll-deduction plan administered by the Gull Lake Public Schools for employee contributions to the MEA's political action committee (MEA-PAC) pursuant to the terms of a collective-bargaining agreement between the Kalamazoo County Education Association/Gull Lake Education Association and the Gull Lake Public Schools would not violate § 57 of the Michigan Campaign Finance Act (MCFA), MCL 169.257. Section 57 prohibits a public body from using or authorizing the use of funds or other public resources to make a contribution or expenditure or provide certain volunteer services as those terms are defined by the MCFA. The Secretary of State declared that the payroll-deduction plan in question would violate MCL 169.257. The MEA petitioned the Ingham Circuit Court for judicial review of the declaratory ruling. The court, Thomas L. Brown, J., determined that the declaratory ruling was arbitrary, capricious, and an abuse of discretion and concluded that the Gull Lake Public Schools would not be making an expenditure by administering the payroll-deduction plan because the MEA would reimburse the costs of administering the plan. The Secretary of State appealed, and the Court of Appeals, O'CONNELL, J., and WILDER, P.J. (WHITBECK, J., dissenting), reversed. 280 Mich App 477 (2008). The MEA appealed. The Supreme Court reversed, holding that a public school's administration of a payroll-deduction plan that remits money to a separate segregated fund under MCL 169.255, such as the MEA-PAC, is not prohibited by MCL 169.257. 488 Mich 18 (2010). The Secretary of State moved for rehearing.

In an opinion by Justice MARKMAN, joined by Chief Justice YOUNG and Justices MARY BETH KELLY and ZAHRA, the Supreme Court granted the motion and on rehearing *held*:

A public school's administration of a payroll-deduction plan that remits money to the MEA-PAC constitutes both a contribution and an expenditure under the MCFA and is therefore prohib-

ited by MCL 169.257. This prohibition is not obviated by reimbursing the school for the costs of administering the plan or by paying those costs in advance.

1. The purpose of MCL 169.257, as reflected in its language, is to mandate the separation of the government from politics in order to maintain governmental neutrality in elections, preserve fair democratic processes, and prevent taxpayer funds from being used to subsidize partisan political activities.

2. MCL 169.257 prohibits a public body from using public resources to make a contribution or expenditure. MCL 169.204(1) defines a "contribution" as a "payment, gift, subscription, assessment, expenditure, contract, payment for services, dues, advance, forbearance, loan, or donation of money or anything of ascertainable monetary value, or a transfer of anything of ascertainable monetary value to a person, made for the purpose of influencing the nomination or election of a candidate, or for the qualification, passage, or defeat of a ballot question." A contribution includes an "in-kind contribution," which MCL 169.209(3) defines in part as a "contribution . . . other than money." MCL 169.206(1) defines an "expenditure" as a "payment, donation, loan, or promise of payment of money or anything of ascertainable monetary value for goods, materials, services, or facilities in assistance of, or in opposition to, the nomination or election of a candidate, or the qualification, passage, or defeat of a ballot question."

3. The school district's administration of a payroll deduction plan that facilitates payments to the MEA-PAC constitutes a prohibited contribution because the school district would be using public resources to make a contribution by employing public resources such as personnel and office supplies to administer the plan that allows MEA members to make a contribution to the MEA-PAC, a partisan political entity. Administration of the plan also constitutes something of ascertainable monetary value because it would result in additional contributions given the ease of the payroll-deduction process and would cost less than undertaking individual solicitations for contributions. Administration of the plan constitutes an in-kind contribution because it would cost the school district less to administer the plan than it would cost the MEA-PAC to establish and maintain its own fundraising apparatus.

4. The school district's administration of the plan on behalf of the MEA-PAC constitutes a prohibited expenditure because the school district would directly provide services and facilities in assistance of the MEA-PAC by using public office space and equipment to develop and execute payroll-deduction authorization

forms and to collect, enter, monitor, and change the payroll-deduction data of MEA members.

5. MCL 169.257 directs that a public body "shall not use or authorize the use of" public resources to make a contribution or expenditure, and nothing in the MCFA indicates that reimbursement or advance payment can remedy something that would otherwise constitute a violation. Moreover, reimbursement or advance payment does not negate what the statute was intended to prohibit—the use of public resources for private political purposes.

Prior opinion vacated; Court of Appeals judgment affirmed.

Justice MARY BETH KELLY, joined by Justice ZAHRA, concurring, wrote separately to emphasize that the Supreme Court's discretion to grant rehearing is not limited to cases in which new legal arguments were presented, to clarify that this was not a case in which precedent can fairly be said to have been disturbed, and to state that rehearing was warranted because the previous decision was incorrect regarding a matter of substantial jurisprudential significance.

Justice CAVANAGH, joined by Justice MARILYN KELLY, dissenting, would have held that the school district's administration of the payroll-deduction plan does not violate the MCFA because it is neither a contribution nor an expenditure as the act defines those terms. The administration of the plan would not be a contribution because the district would not be administering the plan for the purpose of influencing an election and would not be an expenditure because the district's administration of contributions to a separate segregated fund would fall within the exclusion from the definition of "expenditure" provided in MCL 169.206(2)(c).

Justice HATHAWAY, dissenting, would have held that a public school may administer a payroll-deduction plan for its employees who remit funds to a political action committee because MCL 169.257(1) only prohibits a public body from using or authorizing the use of public resources to make an expenditure or a contribution as the MCFA defines those terms or to provide volunteer personal services that are excluded from the definition of "contribution" under MCL 169.204(3)(a). The administration of the plan at issue meets none of those criteria and is therefore permitted under the act.

ELECTIONS — MICHIGAN CAMPAIGN FINANCE ACT — CONTRIBUTIONS TO POLITICAL ACTION COMMITTEES — PUBLIC BODIES — PAYROLL-DEDUCTION PLANS.

A public school's administration of a payroll-deduction plan that remits money to a political action committee constitutes both an expenditure and a contribution under the Michigan Campaign

Finance Act and is therefore prohibited; reimbursement or advance payment by the political action committee of the expenses associated with administering the plan does not remedy or avoid a violation of the act (MCL 169.204, 169.206, 169.255, 169.257).

White, Schneider, Young & Chiodini, P.C. (by *Kathleen Corkin Boyle*), for petitioner.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, and *Heather S. Meingast*, *Denise C. Barton*, and *Ann Sherman*, Assistant Attorneys General, for respondent.

Amici Curiae:

Foster, Swift, Collins & Smith, P.C. (by *Eric E. Doster*), for the Michigan Chamber of Commerce.

Sachs Waldman, P.C. (by *Andrew Nickelhoff*), for Michigan State AFL-CIO; SEIU Michigan State Council; and International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America.

Patrick J. Wright for the Mackinac Center for Public Policy.

ON REHEARING

MARKMAN, J. This case returns to this Court on a motion for rehearing. The Michigan Campaign Finance Act (MCFA) prohibits a "public body" from using public resources to make a "contribution or expenditure" for political purposes. MCL 169.257(1). At issue in this case is whether a public school district's administration of a payroll deduction plan that collects and remits political contributions from its employees to the Michigan Education Association's political action committee (MEA-PAC) runs afoul of § 57 of MCFA, MCL 169.257(1). We hold that it does. Through administration of a payroll deduction

plan that remits funds to a partisan political action committee, a school district makes both a "contribution," because public resources are being used to advance the political objectives of the committee, and an "expenditure," because public "services" and "facilities in assistance of" these same political objectives are being provided. Thus, the school district's payroll deduction plan is prohibited by MCL 169.257. This interpretation is consistent not only with the language of the statute, but also with the evident purpose of § 57, which is to mandate the separation of the government from politics in order to maintain governmental neutrality in elections, preserve fair democratic processes, and prevent taxpayer funds from being used to subsidize partisan political activities. Accordingly, we grant the motion for rehearing, vacate the December 29, 2010, decision of this Court, and affirm the judgment of the Court of Appeals.[1]

I. FACTS AND HISTORY

Petitioner, the Michigan Education Association (MEA), is a voluntary, incorporated labor organization

[1] Concerning Justice HATHAWAY's reference to now Chief Justice YOUNG's dissent in *United States Fidelity & Guaranty Co v Mich Catastrophic Claims Ass'n (On Rehearing)*, 484 Mich 1, 27; 795 NW2d 101 (2009) (*USF&G*), see the Chief Justice's response in his concurring opinion in *Anglers of the AuSable v Dep't of Environmental Quality*, 489 Mich 884, 885 (2011), the thrust of which was that the majority opinion in *USF&G prevailed* over his dissent, as is the fate of most dissents. The Chief Justice casts his vote in this case as justices have traditionally done, in accordance with their original vote in the underlying case, and our new justices, Justices MARY BETH KELLY and ZAHRA, also cast their vote as new justices have traditionally done, in accordance with their best understanding of the law. See, e.g., *USF&G*, in which Justice HATHAWAY herself cast a vote in this manner, and *Duncan v Michigan*, 488 Mich 957 (2010) (DAVIS, J., concurring), in which the fourth justice in support of the former majority opinion in this case also cast his vote in this manner. Justice HATHAWAY would apparently require the majority justices in this case to abide by an entirely different set of legal rules.

that represents approximately 136,000 members employed by public schools, colleges, and universities throughout Michigan. The MEA-PAC is a separate segregated political fund established by the MEA in accordance with § 55 of MCFA, MCL 169.255. The MEA-PAC is significantly funded by payroll deductions of MEA members who have authorized the deductions. The purpose of the MEA-PAC is to facilitate and coordinate the involvement of the MEA in politics by electing candidates favored by the MEA and by furthering the enactment of MEA legislative and executive policy initiatives.

As a public-employee labor organization, the MEA has entered into collective bargaining agreements with various public school districts across the state. Some number of these agreements, including that between the MEA's locally affiliated Kalamazoo County/Gull Lake Education Associations and the Gull Lake Community Schools (the school district), require that a school district administer a payroll deduction plan for the contributions of MEA members to the MEA-PAC. Administration of the payroll deduction plan requires the school district to distribute payroll deduction forms; collect, enter, and monitor the data of participating MEA members; and record, track, and transmit payroll deductions to the MEA-PAC. In return for these services, the MEA has proposed to pay all costs that the school district incurs in administering the plan.

In this case, the school district conditioned acceptance of the collective bargaining agreement on the MEA obtaining a declaratory ruling concerning the validity of the payroll deduction plan. Accordingly, on August 22, 2006, the MEA filed a request for a declaratory ruling with respondent, the Secretary of State, to determine whether the school district could make and

transmit payroll deductions to the MEA-PAC.[2] Respondent ruled that, absent express statutory authority, the school district is prohibited from expending public resources for a payroll deduction plan on behalf of the MEA-PAC. The MEA appealed to the circuit court, which held that respondent's ruling was "arbitrary, capricious and an abuse of discretion," reasoning that, although the school district's administration of the plan constitutes an "expenditure" under MCFA, when the costs of administering the plan have been reimbursed, "no transfer of money to the MEA-PAC has occurred, and therefore an 'expenditure' has not been made within the meaning of the MCFA."

In a split decision, the Court of Appeals reversed, holding that § 57 of MCFA prohibits a "public body," such as a school district, from using public resources "to make a contribution or expenditure." According to the Court, the costs associated with the plan constitute an "expenditure," and the reimbursement of such costs does not alter that conclusion. *Mich Ed Ass'n v Secretary of State*, 280 Mich App 477, 486; 761 NW2d 234 (2008). Judge WHITBECK dissented and would have affirmed the trial court, but on different grounds. He reasoned that the costs incurred by the school district in its administration of the payroll deduction plan do not constitute an "expenditure" as MCFA defines it. *Id.* at 490. The MEA then sought leave to appeal in this Court. On November 5, 2009, we heard oral arguments on the application,[3] and nearly seven months later we

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[2] The Secretary of State is authorized to issue declaratory rulings to implement MCFA, MCL 169.201 *et seq*., in accordance with the Administrative Procedures Act, MCL 24.201 to 24.328.

[3] The Court directed the parties to brief

> (1) whether a school district's use of government resources for a payroll deduction plan for contributions made by members of [the

granted the MEA's application for leave to appeal.[4] Finally, on December 29, 2010, a majority of this Court reversed the judgment of the Court of Appeals and held that a school district's administration of a payroll deduction plan that remits funds to the MEA-PAC "is not precluded by any prohibition in MCL 169.257(1) and is therefore permitted." *Mich Ed Ass'n v Secretary of State*, 488 Mich 18, 21; 793 NW2d 568 (2010). Respondent moved for rehearing of the Court's December 29, 2010, decision, arguing that the Court committed error by holding that a public school's administration of a payroll deduction plan that remits funds to a partisan political action committee was not prohibited by MCL 169.257(1). We now grant respondent's motion for rehearing, and we vacate the December 29, 2010, decision of this Court, and affirm the judgment of the Court of Appeals.

II. STANDARD OF REVIEW

The interpretation of statutes constitutes a question of law that this Court reviews de novo on appeal.

> MEA] to MEA's political action committee is either an "expenditure" or a "contribution" under § 6 of the [MCFA], MCL 169.206; (2) whether § 57(1) of the MCFA, MCL 169.257(1), prohibits a school district from expending governmental resources for such a payroll deduction plan if the costs of the plan are prepaid by the MEA; and (3) whether a school district has the authority to collect and deliver payroll deductions for such contributions. [*Mich Ed Ass'n v Secretary of State*, 483 Mich 1001 (2009).]

[4] The order granting leave to appeal directed the parties to address the effect, if any, of *Citizens United v Fed Election Comm*, 558 US 310; 130 S Ct 876; 175 L Ed 2d 753 (2010). *Mich Ed Ass'n v Secretary of State*, 486 Mich 952 (2010). It was clear from the outset that *Citizens United* had no discernible effect on this case and that the grant of leave to appeal, following the argument on the application, imposed unnecessary expenses on the parties and considerably delayed resolution of an important dispute of statewide importance. See *id.* at 953 (MARKMAN, J., dissenting).

Eggleston v Bio-Med Applications of Detroit, Inc, 468 Mich 29, 32; 658 NW2d 139 (2003).

III. PURPOSE OF MCL 169.257

"It is well settled that the Legislature of this state is empowered to enact laws to promote and regulate political campaigns and candidacies." *Council No 11, AFSCME v Civil Serv Comm*, 408 Mich 385, 395; 292 NW2d 442 (1980) (citations omitted). The people of Michigan have granted the Legislature broad powers to regulate elections. Among other things, our Constitution empowers the Legislature to set forth the qualifications of electors; the time, place, and manner of elections; and limitations on terms of office. Const 1963, art 2, §§ 1 through 10. Furthermore, Const 1963, art 2, § 4 requires the Legislature to preserve the integrity of elections, providing in pertinent part:

> The legislature shall enact laws to preserve the purity of elections, to preserve the secrecy of the ballot, to guard against abuses of the elective franchise, and to provide for a system of voter registration and absentee voting.

Charged to preserve the "purity of elections" and to "guard against abuses of the elective franchise," the Legislature enacted MCL 169.257, commonly referred to as § 57 of MCFA. Section 57 prohibits a "public body" from using public resources "to make a contribution or expenditure" for the purpose of influencing the nomination or election of a candidate, or for the qualification, passage, or defeat of a ballot question. The clear purpose of § 57, as reflected in its language, is to mandate the separation of the government from politics in order to maintain governmental neutrality in elections, preserve fair democratic pro-

cesses, and prevent taxpayer funds from being used to subsidize partisan political activities.[5]

IV. ANALYSIS

MCL 169.257(1) provides, in pertinent part:

> A public body or an individual acting for a public body shall not use or authorize the use of funds, personnel, office space, computer hardware or software, property, stationery, postage, vehicles, equipment, supplies, or other public resources to make a contribution or expenditure or provide volunteer personal services that are excluded from the definition of contribution under [MCL 169.204(3)(a)].

There is no question that a school district constitutes a "public body" within the meaning of § 57.[6] Accordingly, the issue in this case is whether by administering a payroll deduction plan that remits funds to a political action committee, a school district makes a "contribution or expenditure" within the meaning of the same provision. If the plan does, it is expressly prohibited.

A. "CONTRIBUTION"

MCL 169.204(1) defines a "contribution" as follows:

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[5] See also, e.g., the political activities by public employees act, MCL 15.401 *et seq*. (providing that an employee of the state or local unit of government may not engage in political affairs during working hours); the Michigan Gaming Control and Revenue Act, MCL 432.201 *et seq*. (providing that members, employees, or agents of the Michigan Gaming Control Board may not engage in political activity for the duration of their employment); and Civil Service Rule 1-12.6 (prohibiting state employees from participating in political activities during working hours).

[6] MCFA defines a "public body" to include "[a] county, city, township, village, intercounty, intercity, or regional governing body; a council, school district, special district, or municipal corporation; or a board, department, commission, or council or an agency of a board, department, commissioner, or council." MCL 169.211(6)(c).

> "Contribution" means a payment, gift, subscription, assessment, expenditure, contract, payment for services, dues, advance, forbearance, loan, or donation of money or anything of ascertainable monetary value, or a transfer of anything of ascertainable monetary value to a person, made for the purpose of influencing the nomination or election of a candidate, or for the qualification, passage, or defeat of a ballot question.[7]

An "in-kind contribution" is defined as a "contribution . . . other than money." MCL 169.209(3).

The school district's administration of the payroll deduction plan that facilitates payments to the MEA-PAC is prohibited by MCL 169.257(1) because the school district uses its public resources "to make a contribution" in a variety of ways. First, the school district employs public resources to administer the plan that allows MEA members "to make a contribution." For example, the school district must use its paper, pens, and copiers to develop and execute payroll deduction authorization forms; school personnel must collect, enter, and monitor the data of participating MEA members into computers and accounting software, all of which must be specifically configured to record, track, and transmit payroll deductions to the MEA-PAC; school personnel must then be prepared to respond to individual teachers who find it necessary from time to time to adjust or correct or withdraw their own deduction authorizations; and this process must necessarily involve the use of public office space, equipment, and employee time. Use of the school district's resources to facilitate MEA members' "contributions" constitutes a straightforward violation of MCL 169.257(1). More specifically, § 57(1) prohibits the school district from using

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[7] The MEA-PAC is a "person" because, as a separate segregated fund, it functions as the result of an organization or group of persons acting jointly. See MCL 169.211(1).

its resources "to make a contribution." To "make" pertinently means "to cause to exist or happen[.]" *Random House Webster's College Dictionary* (2000), def 2. The school district "makes" a "contribution" to the MEA-PAC because it "causes to exist or happen" "contributions" from MEA members that otherwise would not be made but for the school district's administration of the payroll deduction plan.[8]

Second, the school district itself makes a prohibited "contribution" to the MEA-PAC because its administration of the payroll deduction plan constitutes something of "ascertainable monetary value." There is inherent value to the MEA-PAC in having payroll deductions automatically taken from members' wages as opposed to requiring individual solicitations by the MEA-PAC. That there is such "ascertainable monetary value" is self-evident from the very fact that the MEA-PAC has affirmatively sought out the assistance of the school district and has litigated to the highest court of this state an appeal asserting its right to enter into the instant agreement with the school district. Parties do not typically enter into contracts absent a belief that the rights or benefits accorded them under the contract have some "ascertainable monetary value," and the instant contract seems no different. Such value can

[8] All agree that the MEA members' "payment" or "donation of money" to the MEA-PAC constitutes a "contribution" under MCL 169.204(1) and that the school district facilitates that "contribution" to the MEA-PAC. However, Justice CAVANAGH asserts that the school district does not employ public resources to "make" the MEA members' contribution because it "merely transfers money from one place to another." *Post* at 240-241 n 4. This characterization significantly trivializes the nature of the school district's participation in the MEA-PAC's fundraising. As already discussed, to "make" relevantly means to "cause to exist or happen." Simply put, if the public resources of the school district had not been employed to facilitate the MEA members' contributions, those "contributions" would not have "happened."

almost certainly be identified as the sum of (a) the additional contributions resulting from the ease of the payroll deduction process compared to a political contribution process in which individual solicitations must be undertaken and (b) the reduced administrative and transactional costs of the former process compared to the latter process. The MEA obviously prefers the payroll deduction process because it is a more efficient, and a more productive, process by which to secure funding for its political activities. The school district is not incidental to this process, but constitutes an indispensable element. Without the school district's contracted-for services, some lesser amount of contributions would presumably be raised on behalf of the MEA-PAC, and at a greater cost.[9]

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[9] Relying on the dictionary definition of "ascertain," Justice HATHAWAY asserts that the school district's administration of the payroll deduction plan does not have "ascertainable monetary value" because the monetary benefits conveyed to the MEA-PAC have not been "determined definitely, with certainty and assurance." *Post* at 261. Unfortunately, Justice HATHAWAY has defined the wrong word. "Ascertainable" does not mean "to find out definitely" or "learn with certainty or assurance," as Justice HATHAWAY opines, because that is the definition of "ascertain," not "ascertainable." *Random House Webster's College Dictionary* (2000). Rather, "ascertainable" means "*able* to be ascertained." *New Shorter Oxford English Dictionary* (3d ed) (emphasis added).

While the MEA has not provided this Court with numbers regarding the specific benefits yielded from the district's administration of the deduction plan, it is safe to say that the additional contributions garnered, and the reduction in administrative and transactional costs, are "able to be ascertained." In short, if the school district no longer automatically deducted contributions from the paychecks of its employees, the MEA would have to bear the added cost of individually contacting each of its members and individually soliciting contributions from them. Everyone understands that this procedure would be a far more costly, and less effective, way of collecting political contributions than the current procedure. Such a cost is easily "ascertainable," even if the MEA and Justice HATHAWAY are uninterested in calculating it, and thus the cost of direct solicitation that the MEA avoids by the current procedure constitutes a "contribution" as MCFA defines it.

Third, the administration of the payroll deduction plan also constitutes an "in-kind contribution," defined by MCL 169.209(3) as a "contribution . . . other than money." Although it is clearly possible to quantify the time spent by employees and the resources expended by the school district in administering the deduction plan, and thereby to ascertain the cost of such a "contribution" to the school district, it is more difficult to quantify the intangible benefits that the MEA receives from the deduction plan. However, it is quite certain that these benefits substantially outweigh the costs to the school district, and therefore cannot be calculated simply by reference to the school district's costs. The most significant of these is simply the extent of *access* to a district's MEA membership that is afforded the MEA-PAC by the deduction plan. Such access avoids any need on the part of the MEA-PAC to establish its own administrative apparatus for political fundraising, vitiates its need to engage in mailings and alternative forms of communications with its members, and dispenses with its burden of having to process checks, money orders, or credit cards from contributors, as would be necessary for any other solicitor of political contributions. As MEA's counsel at oral argument acknowledged, this procedure has proven to be an "effective" means to raise money. Almost certainly, the marginal administrative costs of the payroll deduction plan to the school district, which already may have in place a mechanism by which taxes and charitable contributions can be deducted from employees' paychecks, will be less than the administrative costs of an equivalent plan to the MEA, which does not already have a similar mechanism in place. The difference between these respective costs can fairly be described as an "in-kind contribution" by the school district to the MEA-PAC, however difficult it may be specifically to quantify in dollars. It is a "contribution . . . other than money" that is made for the "purpose of influencing the nomination or

election of a candidate, or for the qualification, passage, or defeat of a ballot question."[10]

The services undertaken on behalf of the MEA-PAC are "made for the purpose of influencing the nomination or election of a candidate, or for the qualification, passage, or defeat of a ballot question," MCL 169.204(1), because, as discussed earlier, the purpose of the MEA-PAC is to facilitate and coordinate the involvement of the MEA in partisan politics.[11] Thus, the school district's administration of the deduction plan constitutes a "contribution" as that term is defined by MCL

[10] Justice HATHAWAY asserts that "this argument *ignores* that an in-kind contribution must still be a 'contribution' as defined by the statute." *Post* at 262 (emphasis added). This point is hardly "ignored," for it constitutes the principal focal point of the instant section. That the administration of the deduction plan not only constitutes a "contribution" but also an "in-kind contribution" merely establishes an *additional* way in which the school district's administration of the plan is prohibited by MCFA.

[11] The previous majority opinion stated that "[w]hen a public body administers a payroll deduction plan, it does not do so in an attempt to influence a political race or a ballot question." *Mich Ed Ass'n*, 488 Mich at 37. However, that opinion failed to recognize that MCL 169.204(1) defines "contribution" as "a *payment . . . made for the purpose* of influencing the nomination or election of a candidate, or for the qualification, passage, or defeat of a ballot question." (Emphasis added.) As discussed, the school district uses its public resources "to make" the MEA members' payments. Therefore, the pertinent question is not whether the "public body" *itself* is attempting to influence a political race or ballot question, but whether *payments* that result from its administration of the payroll deduction plan are intended for that purpose. It is obvious here that the "payment[s] [are] made for the purpose of influencing the nomination or election of a candidate, or for the qualification, passage, or defeat of a ballot question." *Id.* This is the purpose that individual MEA members have in mind when they authorize payments, and it is the purpose that the MEA-PAC has in mind when it receives payments from the school district. It is equally obvious that the school district itself must be fully cognizant of this purpose both when it receives payments from individual MEA members and when it delivers payments to the MEA-PAC. That the school district itself might not care whether such payments will influence a political race or ballot question does not alter the fact that the *purpose* of these payments is to do precisely that.

169.204(1).[12] Because the school district employs public resources to make this "contribution," its administration of the deduction plan is a straightforward violation of § 57 of MCFA.

B. "EXPENDITURE"

Section 57 of MCFA also prohibits a "public body" from using public resources to make an "expenditure." MCL 169.257(1). An "expenditure" is defined as

> a payment, donation, loan, or promise of payment of money or anything of ascertainable monetary value for goods, materials, services, or facilities in assistance of, or in opposition to, the nomination or election of a candidate, or the qualification, passage, or defeat of a ballot question. [MCL 169.206(1).]

The school district's administration of the payroll deduction plan on behalf of the MEA-PAC constitutes a prohibited "expenditure" because the school district directly provides "services" and "facilities in assistance of" the MEA-PAC. The school district provides "services" to the MEA-PAC in its administration of the deduction plan by developing and executing payroll deduction authorization forms; by collecting, entering, and monitoring the data of MEA members by means of computers and accounting software, all of which must be configured to record, track, and transmit payroll deduc-

[12] The previous majority opinion erred when it concluded that administration of the plan "merely allows *someone else* to make a contribution for the purpose of influencing a political issue," *Mich Ed Ass'n*, 488 Mich at 37, i.e., the MEA member who has authorized the payroll deduction. Instead, the school district *itself* makes both a "contribution" and an "in-kind contribution" by providing valuable services to the MEA-PAC in aid and furtherance of its political activities. That is, quite independently of the contributions of individual MEA members, the school district contributes something of *further* "ascertainable monetary value" to the MEA-PAC.

tions to the MEA-PAC; and by accommodating individual teachers who find it necessary from time to time to adjust or correct or withdraw their deduction authorizations. Further, the school district provides "facilities in assistance of" the MEA-PAC through the use of public office space and equipment. These "services" and "facilities in assistance of" the MEA-PAC are, once again, made for the purpose of "the nomination or election of a candidate, or the qualification, passage, or defeat of a ballot question," MCL 169.206(1), because, as discussed previously, the purpose of the MEA-PAC is to facilitate and coordinate the involvement of the MEA in politics, by electing candidates favored by the MEA and by enacting MEA legislative and policy initiatives. Thus, the school district's administration of the payroll deduction plan constitutes an "expenditure" as that term is defined by MCL 169.206(1) and is specifically prohibited.

Justice HATHAWAY concedes that the school district's administration of the deduction plan "falls within the general definition of 'expenditure' under MCL 169.206(1) . . . ." *Post* at 256. However, she would hold, as would Justice CAVANAGH, that the plan also falls within a specific statutory *exclusion* from the definition of an "expenditure." This exception provides that an "expenditure" does not include "[a]n expenditure for the establishment, administration, or solicitation of contributions to a separate segregated fund or independent committee." MCL 169.206(2)(c). According to Justice HATHAWAY, a school district's administration of a payroll deduction plan that remits payments to a political action committee constitutes an " 'expenditure for the establishment, administration, or solicitation of contributions to a separate segregated fund or independent committee' " and is, therefore, allowed under § 57. *Post* at 257, quoting MCL 169.206(2)(c). However, her

analysis overlooks the fact that a "*public body*," such as a school district, is not authorized to establish a separate segregated fund under MCFA and, therefore, may not rely on the § 6(2)(c) exclusion.

Instead, this exclusion is clearly designed to apply only to corporations and labor organizations that possess the authority to create, establish, administer, or fund separate segregated funds in the first place. This interpretation, limiting the § 6(2)(c) exclusion to corporations and labor organizations, is a necessary implication from the structure of MCFA for three reasons. First, § 54 of MCFA, MCL 169.254, imposes the same rule, prohibiting the making of a "contribution or expenditure," on corporations and labor organizations that § 57 imposes on public bodies. In pertinent part, § 54 provides:

> Except with respect to the exceptions and conditions in . . . *section 55* [MCL 169.255]. . . a corporation, joint stock company, domestic dependent sovereign, or labor organization shall not make a contribution or expenditure . . . . [MCL 169.254(1) (emphasis added).]

Second, unlike § 57, § 54 does not constitute an absolute prohibition against making a "contribution or expenditure"; rather, pursuant to § 55,

> [a] corporation organized on a for-profit or non-profit basis, a joint stock company, a domestic dependent sovereign, or a labor organization formed under the laws of this or another state or foreign country may make an expenditure for the establishment and administration and solicitation of contributions to a separate segregated fund to be used for political purposes. A separate segregated fund established under this section shall be limited to making contributions to, and expenditures on behalf of, candidate committees, ballot question committees, political party committees, political committees, and independent committees. [MCL 169.255(1).]

Third, there is no similar counterpart in § 57 that allows a "public body" to make "an expenditure for the establishment and administration and solicitation of contributions to a separate segregated fund . . . ." Thus, under § 55, the *only* entities allowed to establish a separate segregated fund are corporations, joint stock companies, domestic dependent sovereigns, or labor organizations, such as the MEA. Considered together, § 55 and the § 6(2)(c) exclusion that permits an "expenditure for the establishment, administration, or solicitation of contributions to a separate segregated fund" provide a limited mechanism allowing entities such as the MEA to create, establish, administer, or fund a separate segregated fund for purposes that would otherwise be disallowed by § 54. In contrast, a "public body," such as a school district, is not entitled to create, establish, administer, or fund a separate segregated fund, under § 55 or any other provision, and thus may not rely on the § 6(2)(c) exclusion from the definition of an "expenditure."[13]

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[13] Justice CAVANAGH asserts that there is "simply no basis in the statutory language to support the majority's position." *Post* at 247. As discussed, our position, limiting the § 6(2)(c) exclusion to § 55 entities, such as corporations and labor organizations, is a necessary and logical implication derived from MCFA. In discerning legislative intent, "[t]he whole act provides [the] proper 'frame of reference,' " and each section must be considered together with other sections. *Metro Council No 23, AFSCME v Oakland Co Prosecutor*, 409 Mich 299, 318; 294 NW2d 578 (1980) (citation omitted). The exclusion of certain expenditures from the definition of "expenditure" in § 6(2)(c) invokes exactly the same operative language as § 55 and is plainly directed toward elaborating on § 55 by making clear that no expenditures authorized by § 55 for the establishment of a separate segregated fund will be treated as a prohibited expenditure by § 54. This does not render § 6(2)(c) "superfluous" or "completely unnecessary," as Justice CAVANAGH claims. *Post* at 247. Rather, as already explained, § (6)(2)(c) serves to underscore, and to make explicit, what is otherwise only implicit in § 55—that "expenditures" permitted by § 55 are not otherwise prohibited by § 54.

Even if, as Justice HATHAWAY claims, the § 6(2)(c) exclusion is not limited to § 55 entities, her application of the exclusion remains illogical. Justice HATHAWAY concludes that although a school district's administration of the payroll deduction plan constitutes an "expenditure," it is nevertheless

> explicitly excluded from the statutory definition under MCL 169.206(2)(c), which provides that an "expenditure for the establishment, administration, or solicitation of contributions to a separate segregated fund or independent committee" is not an "expenditure." A public school's administration of a payroll deduction system falls squarely within the statutory exception. The system is set up to facilitate MEA member contributions to their separate

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Furthermore, if § (6)(2)(c) is interpreted to apply to public bodies, which are not authorized to establish separate segregated funds in the first place, the operative language of § 57, which prohibits the use of public resources to subsidize partisan political activities, would be rendered null and void. When a political action committee commandeers the resources of the government to raise political contributions for its own benefit, as occurred here, that conduct could always be categorized under Justice CAVANAGH's interpretation as falling within the § 6(2)(c) exception and rendered permissible. Thus, the § 6(2)(c) exception would entirely consume the rule prohibiting public bodies from making "expenditures" for political purposes, and the Legislature would effectively have taken with the right hand what it had just given with the left. Under such an interpretation, § 6(2)(c) would allow the Secretary of State's office, for example, to solicit contributions to a partisan or special interest political action committee with each driver's license renewal communication; it would allow Secretary of State employees to administer the political contributions received through this process; it would allow Secretary of State facilities and computers to be deployed to make and print relevant informational pamphlets and political action committee materials; and it would allow the Secretary of State's office to attach the postage for these solicitations. This interpretation cannot conceivably be what the Legislature intended when it enacted MCFA. Reading MCFA in its entirety, and in context, it is clear that the Legislature intended the § 6(2)(c) exception to apply only to those entities that possess the authority to create, establish, administer, or fund separate segregated funds in the first place.

> segregated fund, the MEA-PAC. Therefore, the administration of the system is *not* an "expenditure" under the MCFA. [*Post* at 256.]

Justice HATHAWAY thus concludes that the administration of a payroll deduction plan falls "squarely within the statutory exception." Under MCL 169.206(2)(c), an "expenditure" does not encompass what would otherwise be an "expenditure" for (a) establishment of a separate segregated fund or independent committee, (b) administration of a separate segregated fund or independent committee, or (c) solicitation of contributions to a separate segregated fund or independent committee. Thus, in order to fall within the purview of this exception, a "public body" must be engaged in one of these enumerated activities. In this case, however, the school district is engaged in none.[14]

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[14] Justice CAVANAGH concludes that MCFA excepts from the definition of "expenditure" an "expenditure" for the (a) establishment of contributions to a separate segregated fund, (b) administration of contributions to a separate segregated fund, and (c) solicitation of contributions to a separate segregated fund. Reading § 6(2)(c) in isolation could support his interpretation; however, reading MCFA in its entirety, in particular after due consideration of MCL 169.255(1), makes clear that the only reasonable interpretation of § 6(2)(c) is that it pertains to the "establishment" or "administration" of a "separate segregated fund" and not the "establishment" or "administration" of "contributions." See *Sun Valley Foods Co v Ward*, 460 Mich 230, 237; 596 NW2d 119 (1999) ("The statutory language must be read and understood in its grammatical context, unless it is clear that something different was intended."). His interpretation disregards the fact that this Court must consider § 6(2)(c) and § 55 together, "so as to produce, if possible, an harmonious and consistent enactment" of MCFA. *State Treasurer v Wilson*, 423 Mich 138, 145; 377 NW2d 703 (1985). Unmistakably, the objective of § 55 is to provide authority for certain (private) entities to establish and operate a separate segregated fund, and, in pursuit of this objective, § 55 provides that such entities "may make an expenditure for the establishment and administration and solicitation of contributions to a separate segregated fund." As the only legislative authority allowing for the creation of a separate segregated fund, the use of the terms "establishment" and "administra-

First, the school district is not making an "expenditure" for the *establishment* of a separate segregated fund or independent committee because the separate segregated fund, the MEA-PAC, has already been established by the MEA. In any event, the school district could not establish a separate segregated fund in the first place, because that authority is limited to the entities enumerated in § 55 (corporations, joint stock companies, domestic dependent sovereigns, and labor organizations).

Second, the school district is not making an "expenditure" for the *administration* of a separate segregated fund or independent committee because the school district is not "administering" the MEA-PAC; rather, the school district is simply administering the payroll deduction plan that remits funds to the MEA-PAC. That is, the school district makes no determinations at all concerning amounts of funds to be raised from MEA members or other funding sources; the nature and substance of communications to MEA members and other funding sources about the need and urgency of such contributions; the identification of political candidates and causes as beneficiaries of the MEA-PAC, and in what amounts; or strategies for optimizing the impact of MEA-PAC participation in political campaigns and causes. Justice HATHAWAY, however, would hold that the plain language of the statute dictates that the administration costs at issue are excluded from the statutory term "expenditure." See *post* at 256. In so

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tion" *must* pertain to the "establishment" or "administration" of a "separate segregated fund," and not to the "establishment" or "administration" of "contributions"; otherwise, the ability to establish and administer a separate segregated fund could not exist in the first place. And § 6(2)(c), which uses nearly identical language, must be interpreted the same way, "so as to produce . . . an harmonious and consistent enactment" of MCFA. *Wilson*, 423 Mich at 145.

asserting, Justice HATHAWAY misinterprets the statute, because the only administrative costs that are excluded under this exclusion are those associated with administering a "separate segregated fund or independent committee." MCL 169.206(2)(c). That the school district is administering a *process* by which payments are *remitted* to such a fund is hardly the equivalent of administering the fund itself, such that the § 6(2)(c) exclusion would apply. Justice HATHAWAY is confused in this regard.[15]

Third, the school district is not making an "expenditure" for the *solicitation of contributions* to a separate segregated fund or independent committee; rather, the school district is using public resources for processing payments to the MEA-PAC. As discussed earlier, the school district's "expenditure" consists of the use of personnel, office space, computers, software, and other public resources to remit payments to the MEA-PAC. The school district is not, for example, maintaining an advertising campaign on behalf of the MEA-PAC, cold-

[15] Justice HATHAWAY asserts:

> This argument is unfounded and contrary to the plain language of the statute. The plain language of the statute applies to the administration of *contributions* to a separate segregated fund; the statute does not specify who has to make the contributions. The MEA members' contributions to the MEA-PAC are administered through the payroll deduction system. Thus, the district, by administering the payroll deduction system, is administering contributions to the MEA-PAC, an action that is explicitly allowed according to the plain language of the statute. [*Post* at 256-257.]

This does not make sense. Even if MCL 169.206(2)(c) were not limited to § 55 entities, this provision does not exclude from the definition of "expenditure" an "expenditure" for the "administration of contributions"; rather it excludes an "expenditure" for the administration of a "separate segregated fund or independent committee," which is inapplicable here for the simple reason that the school district is not making an "expenditure" for the administration of a separate segregated fund or independent committee.

calling MEA members, or preparing mailers or brochures to enlist contributors. As such, the school district's use of public resources for processing payments to the MEA-PAC cannot be viewed as *soliciting* contributions, but only as facilitating such contributions, an entirely distinct concept. It follows that because the school district's administration of the payroll deduction plan does not fall within any of the three enumerated exclusions set forth in MCL 169.206(2)(c), it is not excluded from the definition of an "expenditure."[16]

C. RELEVANCE OF ADVANCE PAYMENTS

Having determined that the school district's administration of the payroll deduction plan that remits payments to the MEA-PAC constitutes both a "contribution" and an "expenditure," the question remains whether the MEA's preparedness to pay in advance the school district's costs associated with the plan remedies what would otherwise constitute a violation of § 57. For the reasons that follow, it does not.

The Court of Appeals correctly held that there is "nothing in the plain language of the MCFA that indicates reimbursement negates something that otherwise constitutes an expenditure." *Mich Ed Ass'n*, 280 Mich App at 486. A court's primary purpose in interpreting a statute is to ascertain and effectuate legislative intent. *Frankenmuth Mut Ins Co v Marlette Homes, Inc*, 456 Mich 511, 515; 573 NW2d 611 (1998). "Courts may not speculate regarding legislative intent beyond

[16] Even assuming arguendo that the school district's administration of the payroll deduction plan constitutes "an expenditure for the establishment, administration, or solicitation of contributions to a separate segregated fund or independent committee," which we believe it plainly does not, by its terms, the exclusion only applies to an "expenditure" and not to a "contribution."

the words expressed in a statute. Hence, nothing may be read into a statute that is not within the manifest intent of the Legislature as derived from the act itself." *Omne Fin, Inc v Shacks, Inc*, 460 Mich 305, 311; 596 NW2d 591 (1999) (citations omitted). The Legislature declined to provide that advance payments remedy what would otherwise constitute a violation of § 57.

The suggestion that advance payments remedy a violation of § 57 is belied by the terms of the statute. Section 57 provides that "[a] public body . . . *shall not use or authorize the use*" of public resources to make a "contribution or expenditure . . . ." MCL 169.257(1) (emphasis added). The use of "shall" in a statute generally "indicates a mandatory and imperative directive." *Burton v Reed City Hosp Corp*, 471 Mich 745, 752; 691 NW2d 424 (2005) (citations omitted). As such, the statute mandates that the school district not "use or authorize the use of" its public resources to make a "contribution" or an "expenditure." Nothing in MCFA leads to the conclusion that the Legislature intended § 57 to be interpreted any differently. Irrespective of whether the school district is reimbursed for its administration of the payroll deduction plan, the school district nonetheless has employed public resources to make a "contribution or expenditure" for political purposes.[17] The advance payment of expenses simply does not negate what § 57 is intended to prohibit. That is,

[17] Moreover, the advance payment of the school district's *expenses* in administering the deduction plan does not avoid the question of the *extent* to which an exchange of something of "ascertainable monetary value" has taken place. If the school district has provided a service "at cost" to the MEA-PAC, even though the "ascertainable monetary *value*" of that service to the MEA-PAC exceeds that cost, as it almost always will in an economy in which service providers typically seek to profit from their services, further inquiry would be necessary concerning the specific terms of the school district-political action committee transaction, even if such a transaction were permissible in the first place under § 57.

the gravamen of § 57 is not that a "public body" whose resources have been employed for private political purposes be compensated on a dollar-for-dollar basis, but that public resources not be used for such purposes in the first place. That the costs of dismantling the wall separating government and partisan political campaigning are to be paid by those who desire to use taxpayer resources for partisan political campaigning is not the point of § 57; rather, it is that the wall not be dismantled.[18]

Furthermore, the unquantifiable cost to the school district, as well as to taxpayers, parents, and students, of having time and resources diverted from the school district's primary responsibilities of administering schools and educating students in order to administer a process of raising political contributions for the MEA-PAC cannot simply be paid in advance or reimbursed. Time is a zero-sum resource, and it is irretrievably lost to taxpayers, parents, and students when it is taken away from the former responsibilities and redirected to the latter responsibilities. If some lesser portion of each day is devoted to the interests of the school district and a greater portion of each day is devoted to the partisan political interests of a labor organization, taxpayers, parents, and students suffer. Although advance payment may recompense the school district its employees' salaries for the time spent on administration of the plan and for the use of supplies and other public resources, monetary reimbursement, paid in advance or otherwise, is simply insufficient to recover the time that is diverted from the primary obligations of the school district.

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[18] If the MEA-PAC is allowed to commandeer the resources of a "public body" simply by reimbursing its costs, there is nothing that would prevent the political action committee of any corporation from demanding or receiving the same treatment.

Moreover, because neither advance payments nor reimbursements prevent the prohibited "use" of public resources from occurring in the first place, the act is punishable as a misdemeanor and subject to a fine that may be "equal to the amount of the improper contribution or expenditure." MCL 169.257(2)(b). The fact that one of the penalties for making an improper "contribution or expenditure" requires the violator to pay an amount that is "equal to the amount of the improper contribution or expenditure" indicates strongly that such a payment, whether in the form of a "penalty" or a "reimbursement," does not transform an improper "contribution or expenditure" into a proper one. Had the Legislature intended otherwise, the misdemeanor statute would more likely have read that the criminal sanction to be paid is "equal to the amount of the improper contribution or expenditure, *less any reimbursement of such contribution or expenditure*."[19]

[19] The MEA also argues with regard to reimbursements that because the school district is reimbursed all costs and expenses, its administration of the deduction plan does not amount to a "contribution or expenditure" given that a "contribution" does not encompass "[a]n offer or tender of a contribution if expressly and unconditionally rejected, returned, or refunded in whole or in part within 30 business days after receipt," MCL 169.204(3)(c), and an "expenditure" does not include "[a]n offer or tender of an expenditure if expressly and unconditionally rejected or returned," MCL 169.206(2)(e). However, this argument clearly lacks merit because the MEA-PAC's offer to *reimburse expenses* can hardly be said to constitute a "rejection, return, or refund" of a "contribution" or an "expenditure." When the school district collects and remits payments from MEA members to the MEA-PAC, it makes an "offer or tender" of a "contribution or expenditure." To qualify for the "offer or tender" exception, the MEA-PAC would have to unconditionally "reject or return" the services of the school district, something that it neither does nor has any intention of doing. Because the school district's services are unconditionally accepted by the MEA-PAC, the school district's administration of the payroll deduction plan is not excluded from the definition of a "contribution" or an "expenditure" under either section of MCFA. Finally, the obvious should be observed, *to wit*, although the Legislature

V. RESPONSE TO DISSENTS

As discussed previously, Justice HATHAWAY's position that the school district's administration of a payroll deduction plan is not an "expenditure" because the cost of administration is an "expenditure for the establishment, administration, or solicitation of contributions to a separate segregated fund or independent committee," MCL 169.206(2)(c)—an enumerated exception to the statutory definition of "expenditure"—lacks merit for two reasons. First, a school district's administration of a payroll deduction plan is not excluded from the definition of an "expenditure" under that section because a "public body," such as a school district, is not authorized to create a separate segregated fund under MCFA and, therefore, may not rely on the § 6(2)(c) exclusion from the definition of an "expenditure." Second, even if a "public body" is entitled to rely on this exclusion, the school district's administration of the payroll deduction plan does not fall within the statutory exception because the school district's "expenditure" cannot be characterized as "[a]n expenditure for the establishment, administration, or solicitation of contributions to a separate segregated fund or independent committee." As also previously discussed, the school district's administration of the payroll deduction system is a prohibited "contribution." However, Justice HATHAWAY reasons that the school district's administration of the payroll deduction plan does not constitute a "contribution." This latter aspect of her opinion warrants further discussion.

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excluded from the definitions of "contribution" and "expenditure" "an offer or tender" of a "contribution or expenditure" that has been rejected, returned, or refunded, there is no similar exclusion for "reimbursements," an exclusion that should be thought to have been obvious, if genuinely intended. Justice HATHAWAY nonetheless intuits from the "reject or return" exception that "contribution" in MCL 169.204(1) "clearly requires . . . a net transfer of value . . . ." *Post* at 260-261.

(a) In circular fashion, Justice HATHAWAY would hold that the definition of "contribution" encompasses the term "expenditure" and, thus, because the school district's administration of the payroll deduction plan does not constitute an "expenditure," it also cannot be a "contribution." Justice HATHAWAY then states that "[t]he only other way that the administration of the system could be a 'contribution' under the MCFA would be if administering the system resulted in a 'transfer of anything of ascertainable monetary value . . . .' " *Post* at 258. This assertion is erroneous. As discussed earlier, an "in-kind contribution," which is a "contribution . . . other than money," also constitutes a "contribution." MCL 169.209(3). Similarly, MCFA defines as a "contribution" a "payment." MCL 169.204(1). The school district arguably makes a "payment" to the MEA-PAC when it transfers money from participating MEA members to the MEA-PAC. Although in these circumstances the school district only acts as a conduit, a "contribution" made at the direction of another person "shall be regarded as an expenditure or contribution attributable to both persons for purposes of expenditure or contribution limits." MCL 169.270.[20]

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[20] Justice CAVANAGH asserts that MCL 169.270 does not apply in this case "because an MEA member is not seeking to circumvent the MCFA's contribution limits," *post* at 243. However, MCL 169.270 contains no subjective component. That is, regardless of whether any MEA member has a desire to "circumvent" MCFA's contribution limits, a "contribution or expenditure which is controlled by, or made at the direction of, another person . . . shall be regarded as an expenditure or contribution attributable to both persons for purposes of expenditure or contribution limits." MCL 169.270. Because the statute is applicable, and because a public body is absolutely prohibited from making a "contribution" for political purposes under MCL 169.257(1), the only logical inference is that the "contribution limit" for a public body is *zero*. Therefore, when the school district facilitates an MEA member's "contribution" and that "contribution" is attributable to the school district pursuant to MCL 169.270, the school district as a public body has surpassed its "contribution limit."

(b) Justice HATHAWAY further errs, in our judgment, as did the former majority opinion, by concluding that her interpretation is necessary to avoid absurd results. In discussing whether the administration of the payroll deduction plan constitutes a "transfer of anything of ascertainable monetary value" and thus a "contribution," Justice HATHAWAY states:

> There are two possible interpretations of the word "transfer" in the statute. The first interpretation would require that any conveyance of value for services provided to a campaign, regardless of whether the services are paid for, would constitute a contribution. The second would require a net conveyance of value in order to be a "transfer of anything of ascertainable monetary value." I believe that the latter is the only logical interpretation. Any other interpretation of "contribution" would lead to an absurd result, and statutes must be construed to prevent absurd results. For example, under the majority's interpretation, a print shop that sells signage to a campaign in the normal course of business would be making a contribution to the campaign because it has transferred something of monetary value to the campaign, even though the shop has been compensated for the cost of providing the signage. Such an interpretation of "contribution" defies common sense, and I do not read the statute in this manner. [*Post* at 259-260 (citations omitted).]

By emphasizing that her interpretation is necessary to avoid "absurd results," Justice HATHAWAY appears to concede that the more natural interpretation of the law is that asserted by this majority opinion. Resort to an "absurd results" analysis is generally necessary only to avoid an interpretation that would otherwise flow from a statute by the application of traditional principles of interpretation.

In essence, Justice HATHAWAY believes that it is necessary to read MCL 169.204(1) as if it referred to a "*net* transfer of anything of ascertainable monetary

value," which it does not, in order to avoid the allegedly "absurd result" to which our interpretation of MCL 169.204(1) would lead. What is this allegedly "absurd result"? What is this result that is "quite impossible that [the Legislature] could have intended"? *Pub Citizen v United States Dep't of Justice*, 491 US 440, 471; 109 S Ct 2558; 105 L Ed 2d 377 (1989) (Kennedy, J., concurring). What is this result that is "unthinkable" or "bizarre"? *Green v Bock Laundry Machine Co*, 490 US 504, 527; 109 S Ct 1981; 104 L Ed 2d 557 (1989) (Scalia, J., concurring). What is this result that "cannot rationally . . . mean" what it seems to mean? *Id*. at 528.[21] That there be no exchanges of value between a "public body" and a partisan political action committee? That the government not further the partisan interests of a political action committee? That taxpayer resources not be employed to collect, and facilitate, partisan political contributions? While these results may be "absurd" to the dissenting justices, we do not find them to be "absurd" at all. Once again, the dissenting justices seem to equate an absurd result with a disagreeable result. *Cameron v Auto Club Ins Ass'n*, 476 Mich 55, 84-86; 718 NW2d 784 (2006) (MARKMAN, J., concurring); *Petersen v Magna Corp*, 484 Mich 300, 370; 773 NW2d 564 (2009) (MARKMAN, J., dissenting). Furthermore, the specific "absurd result" alleged here by Justice HATHAWAY, that a print shop could not sell signs to a campaign because this would constitute a "contribution," is itself absurd. A print shop is not a "public body" and therefore, unlike a school district, is not regulated by § 57 of MCFA.

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[21] Although I continue to abide by an "absurd results" rule—albeit a vastly different "absurd results" rule than that of the dissenting justices—Chief Justice YOUNG, who joins this opinion, does not. See *People v McIntire*, 461 Mich 147, 152-160; 599 NW2d 102 (1999); cf. *Cameron v Auto Club Ins Ass'n*, 476 Mich 55, 78-80, 84-86; 718 NW2d 784 (2006) (MARKMAN, J., concurring).

(c) The former majority opinion also erred when it concluded that MCL 408.477 of the wages and fringe benefits act provides authority for the school district to administer the payroll deduction plan.[22] *Mich Ed Ass'n*, 488 Mich at 38 n 29. "[S]chool districts and school officers have only such powers as the statutes expressly or impliedly grant to them." *Jacox v Van Buren Consol Sch Dist Bd of Ed*, 293 Mich 126, 128; 291 NW 247 (1940). " 'The extent of the authority of the people's public agents is measured by the statute from which they derive their authority, not by their own acts and assumption of authority.' " *Sittler v Mich College of Mining & Technology Bd of Control*, 333 Mich 681, 687;

[22] We recognize that this argument is now absent from Justice HATHAWAY's dissenting opinion. Nonetheless, it is a part of the former majority opinion under reconsideration today. Apparently, § 7 of the wages and fringe benefits act, MCL 408.477, provided authority for the school district to administer the payroll deduction plan on December 29, 2010, but not any longer. Given that Justice HATHAWAY now seems to agree with the majority that the wages and fringe benefits act does not provide authority for the district to administer the deduction plan, does she now have an alternative analysis concerning from where this authority derives?

On this note, Justice CAVANAGH asserts that when MCL 408.477(1) and MCL 423.209, which grants authority for public employees to engage in collective bargaining, are "considered in tandem," they " 'expressly or impliedly grant' school districts the authority to enter collective-bargaining agreements that require a school district to administer a payroll deduction plan." *Post* at 245. But this analysis is flawed. We have no doubt that school districts have the authority to engage in collective bargaining, and also the authority to administer certain types of payroll deduction plans. However, that authority is limited to "engag[ing] in *lawful* concerted activities . . . ." MCL 423.209 (emphasis added). The collective-bargaining agreement in this case required the district to engage in an activity in violation of MCL 169.257 and thus cannot serve as the source of authority to make a "contribution or expenditure." By contrast, we have no doubt that a school district has the authority under the law to administer 401(k) contributions, social security and Medicare deductions, and payroll deductions for the payment of union dues and service fees.

53 NW2d 681 (1952) (citation omitted). Contrary to the former majority opinion, the authority to administer a payroll deduction plan for a political action committee is not expressly or impliedly granted to schools by any statute.

While MCL 408.477 of the wages and fringe benefits act refers to payroll deductions, it does not authorize school districts to administer payroll deductions *for political action committees*. MCL 408.477(1) provides in full:

> Except for those deductions required or expressly permitted by law or by a collective bargaining agreement, an employer shall not deduct from the wages of an employee, directly or indirectly, any amount including an employee contribution to a separate segregated fund established by a corporation or labor organization under section 55 of the Michigan campaign finance act, Act No. 388 of the Public Acts of 1976, being section 169.255 of the Michigan Compiled Laws, without the full, free, and written consent of the employee, obtained without intimidation or fear of discharge for refusal to permit the deduction.[23]

From this provision, the former majority opinion summarily concluded that, "under the plain language of MCL 408.477, public bodies have the authority to administer a payroll deduction plan that contributes money to the MEA-PAC if the MEA enters into a collective bargaining agreement that expressly permits the deductions." *Mich Ed Ass'n*, 488 Mich at 38 n 29. This is another example of the former majority opinion's misinterpretation of a statute. MCL 408.477 has absolutely nothing to do with whether a "public body" may administer a payroll deduction plan for the benefit of the MEA-PAC. Rather, the statute describes the

[23] See also MCL 169.255(6) (regulating the manner in which contributions for a separate segregated fund may be obtained).

approval required for an employer to deduct a portion of an employee's wages and states that in order to deduct wages from an employee, the employer must obtain the employee's voluntary consent. The statute also provides that such consent is not required when the wage deduction is expressly permitted by law or by a collective-bargaining agreement. The most that can be discerned from this statute as it pertains to the instant case is that, if the school district is to deduct wages from its employees, it must obtain the employees' voluntary consent unless the deduction is expressly permitted by law or a collective-bargaining agreement. However, neither MCL 408.477 nor any other statute provides *authority* for a "public body" to administer a payroll deduction plan that contributes money to a *political action committee*. Therefore, even if the school district's administration of a payroll deduction plan did not constitute a "contribution" or an "expenditure," which it clearly does, the school district would still lack the *authority* to administer such a plan because no statute gives the school district this authority and the school district only has the authority granted to it by statute. Indeed, as explained earlier, the Legislature has affirmatively and expressly forbidden a school district, or any other public body, from making a "contribution or expenditure" to a political action committee.

VI. JUSTIFICATION FOR REHEARING

The dissenting justices assert, explicitly or implicitly, that this opinion undoes their opinion of December 29, 2010, upon rehearing without offering any new justification for doing so other than the views expressed in the dissent from that opinion. See *post* at 251 (HATHAWAY, J., dissenting), and *post* at 236 n 1 (CAVANAGH, J., dissent-

ing). For the benefit of the dissenting justices, we will attempt to provide this justification.

First, contrary to Justice HATHAWAY's assertion, we respectfully disagree that the previous majority opinion "followed the language of the law." *Post* at 252. Indeed, we believe that opinion to have interpreted MCFA in a manner that bore little resemblance to its actual language. The previous majority opinion (a) effectively inserted words into the law that are absent from the law, e.g., construing the "transfer of anything of ascertainable monetary value" to require that there be a "transfer of anything of *net* ascertainable monetary value," see *Mich Ed Ass'n*, 488 Mich at 36, (b) effectively altered words in the law, e.g., substituting for "ascertainable monetary value" "*ascertained*" monetary value, *id*. at 37, (c) applied the facts to the law in an implausible fashion, e.g., asserting that the administration of the payroll deduction plan was not done for the " 'purpose of influencing the nomination or election of a candidate, or for the qualification, passage, or defeat of a ballot question,' " *id*., quoting MCL 169.204(1), (d) mischaracterized the facts, e.g., asserting that the administration of the payroll deduction plan by the school constituted no "transfer of ascertainable monetary value" to the MEA-PAC but "merely allow[ed] *someone else* to make a contribution," *Mich Ed Ass'n*, 488 Mich at 37, (e) failed to analyze relevant and determinative provisions of the law, e.g., the definition of an "in-kind contribution," (f) paraphrased the law in an imprecise manner, e.g., summarizing an exception to the law's broad prohibition that is applicable to the administration of a separate segregated fund or independent committee as one applicable to the administration of contributions, *id*. at 29-30, and (g) overlooked words of the law, e.g., asserting that because the administration of the payroll deduction plan does

not constitute an "expenditure," the "only other way" that it could constitute a " 'contribution' " would be if a " 'transfer of anything of ascertainable monetary value' " resulted, *id*. at 34, quoting MCL 169.204(1), despite the fact that MCFA defines a "contribution" in other ways to include "a payment" or an "in-kind contribution."

Second, while the dissenting opinions make light of the fact that we supposedly have little justification for this new opinion other than the views expressed in the dissent from the original opinion, we believe that such a justification is actually rather compelling. That is, we believe that the previous dissent was in accordance with the language and intent of MCFA, while the previous majority opinion was not,[24] and as between an analysis of the law that is in accordance with its language and intent and one that is not, we prefer the former.

Third, we "justify" granting the motion for rehearing, and reconsidering our previous decision, because we believe that the issue before the Court is one of considerable importance to the people of this state and to the integrity of the state's political and public processes. Through MCFA, the people have sought to maintain a separation of politics and the government in order to maintain governmental neutrality in elections, preserve fair democratic processes, and prevent taxpayer funds from being used to subsidize partisan

[24] Justice CAVANAGH claims that we fail to "realize that [his] interpretation of the MCFA is consistent" with the purpose of MCL 169.257. *Post* at 251. This is a rather remarkable proposition. If the purpose of MCL 169.257 is, as we believe it to be, to mandate the separation of the government from politics, then it would seem that Justice CAVANAGH's interpretation, which *permits* the use of public resources in support of partisan political activity, is the antithesis of that purpose. That is, MCL 169.257 prohibits the use of public resources in aid of partisan political activity, and Justice CAVANAGH's interpretation permits it.

political activities. The previous majority opinion, and the present dissenting opinions, would dismantle this separation. They would increasingly involve the taxpayer in the subsidization of partisan political activities and increasingly erode the neutrality of public institutions in these same activities. While the dissenting justices seem very little moved by these concerns, we believe that they are substantial. It should be a matter of great pride to the people of Michigan that its history, with very few exceptions, has been a history characterized by electoral fair play and an honest political process. Both parties, and their supporters, can take credit for this history. We believe that the people of this state understand well the importance to this history of a legal system in which parties and political action committees cannot commandeer taxpayer resources and in which government cannot place a thumb on the scale concerning who will prevail in the political process. In short, we believe that the people understand well, for it is at the root of MCFA, that to breach these principles is incompatible with a government that is "instituted for . . . [the] *equal* benefit . . . and protection" of the people. Const 1963, art 1, § 1.

Finally, we believe that the former majority's remarkable treatment of this case itself constitutes grounds for granting rehearing. This case was alternately subject to unprecedentedly *dilatory* treatment and unprecedentedly *accelerated* treatment. See *Mich Ed Ass'n*, 488 Mich at 64-68 (MARKMAN, J., dissenting). Before this case was heard in November of last year, it was subject to the lengthiest delay, by far, of any of the 280 cases considered under the procedures of MCR 7.302(H)(1), which authorize this Court to order oral argument before deciding whether to grant leave to appeal. See also footnote 4 of this opinion. Subsequently, after finally granting leave to appeal and hearing oral argu-

ments, a majority opinion was prepared in near-record time, the period for dissenting justices to respond to this opinion was substantially shortened, and, in December, these opinions issued in what approached, if not exceeded, record time for a major decision of this Court.

VII. CONCLUSION

MCL 169.257 prohibits a "public body" from using public resources to make a "contribution or expenditure" for political purposes. Through administration of the payroll deduction plan in this case, remitting payments to the MEA-PAC, the school district makes both a "contribution" and an "expenditure" as defined by MCFA. The MEA-PAC's offer to reimburse the school district for expenses incurred in its administration of the plan does not remedy an otherwise clear violation of MCL 169.257. This interpretation is consistent not only with the language of the statute, but also with the evident purpose of MCL 169.257, which is to mandate the separation of the government from politics in order to maintain governmental neutrality in elections, preserve fair democratic processes, and prevent taxpayer funds from being used to subsidize partisan political activities. The payroll deduction plan in this case is inconsistent with this legislative purpose and inconsistent with the language of the law. Accordingly, the judgment of the Court of Appeals is affirmed.

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

MARY BETH KELLY, J. (*concurring*). I concur in Justice MARKMAN's opinion granting the motion for rehearing, vacating this Court's opinion of December 29, 2010, and

affirming the Court of Appeals' judgment of August 28, 2008. I write separately to emphasize, once again, that granting a rehearing motion is not limited to cases in which new legal arguments were presented to the Court and to clarify that this is not a case in which it can fairly be said that "precedent" has been disturbed.

As Justice ZAHRA recently explained in detail in *Anglers of the AuSable, Inc v Dep't of Environmental Quality*,[1] MCR 7.313(E) governs motions for rehearing in this Court. It is a discretionary rule because it does not contain a standard governing when we should grant a motion for rehearing.[2] The rule does not limit our discretion to grant rehearing to only those cases in which a party has presented new legal arguments.[3] The rule's lack of any language limiting our discretion supports the principle that, in addressing a motion for rehearing, it is appropriate for each justice to individually determine whether this Court properly interpreted and applied the law in the case before the Court for rehearing.[4] As Justice ZAHRA observed in *Anglers*, other members of this Court have voted to grant rehearing and overturn precedent, applying this principle, albeit without explicit recognition of the discretion afforded by the rule.[5]

I also share the view articulated by Justice ZAHRA in *Anglers* that in addition to considering whether the matter was previously decided correctly under the gov-

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[1] *Anglers of the AuSable, Inc v Dep't of Environmental Quality*, 489 Mich 884, 885 (2011) (ZAHRA, J., concurring).

[2] *Id*. at 885-886.

[3] *Id*. at 887.

[4] See *id*.

[5] *Id*. at 888, citing *United States Fidelity & Guaranty Co v Mich Catastrophic Claims Ass'n (On Rehearing)*, 484 Mich 1; 795 NW2d 101 (2010); *Duncan v Michigan*, 488 Mich 957 (2010) (DAVIS, J., concurring); *McCready v Hoffius*, 459 Mich 1235 (1999).

erning legal principles, the jurisprudential significance of the legal issues presented should also be considered when deciding a motion for rehearing.[6] It is only with careful review of this Court's prior rulings that I approach a decision on a motion for rehearing.

In this case I agree, first, with the legal analysis of the provisions of the Michigan Campaign Finance Act (MCFA)[7] at issue set forth in Justice MARKMAN's opinion. The public school district's administration of the payroll deduction plan is both a "contribution" and an "expenditure" for political purposes under the MCFA, which violates MCL 169.257(1). Justice HATHAWAY's position that "nothing in the plain language of MCL 169.257(1) prohibits a school district from administering a payroll deduction system that allows [MEA] members to automatically send contributions to the . . . MEA-PAC"[8] misconstrues the MCFA.

Second, this case plainly involves issues of substantial jurisprudential importance to our state. This case concerns "the separation of the government from politics in order to maintain governmental neutrality in elections, preserve fair democratic processes, and prevent taxpayer funds from . . . subsidiz[ing] partisan political activities."[9] The legality of the administration of the payroll deduction plan is of considerable public interest given that the plan would have essentially allowed taxpayers to help fund a political action committee. Moreover, the case involved an issue of first impression that is not likely to reappear before the Court on a regular basis. Through the MCFA, the

[6] See *Anglers*, 489 Mich at 889.

[7] MCL 169.201 *et seq*.

[8] *Post* at 251.

[9] *Ante* at 231.

Legislature intended to keep public resources out of the political process, and the statute could not make this plainer.

Notably, the grant of the rehearing motion, which was timely filed, asked the Court to rehear a case that was decided several days before I was sworn in and after the case had pended for more than two years in our Court.[10] To the extent that this case may be deemed to be precedent, its precedential value is *de minimis*, at best. As noted by Justice MARILYN KELLY in *Petersen v Magna Corp*, "[s]tare decisis attempts to balance two competing considerations: the need of the community for stability in legal rules and decisions and the need of courts to correct past errors."[11] In *Robinson v Detroit*,[12] this Court set forth four factors to be considered before this Court overrules a previously decided case. The purpose of enunciating these factors was to ensure that respectful consideration would be given to the cases decided by our predecessors before such cases are overruled. "The first question, of course, should be whether the earlier decision was wrongly decided."[13] Consistently with Justice MARILYN KELLY's explanation in *Petersen*[14] of the competing considerations that the doctrine of stare decisis attempts to reconcile, the

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[10] The Court of Appeals issued its opinion in this case on August 28, 2008. The MEA applied for leave to appeal on October 8, 2008. On May 8, 2009, this Court ordered oral argument on the application. Nearly six months later, on November 5, 2009, this Court heard oral argument on the application. Approximately seven months later, on June 4, 2010, this Court granted the MEA's application for leave to appeal. Then, three days before the composition of the Court was set to change, the prior majority entered an opinion on December 29, 2010, more than two years after the MEA applied for leave to appeal.

[11] *Petersen v Magna Corp*, 484 Mich 300, 314; 773 NW2d 564 (2009).

[12] *Robinson v Detroit*, 462 Mich 439; 613 NW2d 307 (2000).

[13] *Id.* at 464.

[14] *Petersen*, 484 Mich at 314.

remaining three factors balance the need to correct error against the desire for stability and reliability in the law. Specifically, the Court observed that 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."[15] When a case is considered on rehearing, none of the *Robinson* factors outweighs the need to issue a legally correct opinion. No reasonable legal reliance can be placed on an opinion that has not yet ended its procedural course, however extended, in our Court. The opinion at issue was only days old when the composition of the Court changed. The rehearing motion, timely filed, necessarily required adjudication by the newly composed Court. As a justice of the Court who had not before considered the merits of the underlying claim, it is my constitutional duty to address the legal merits of the issues presented. Simply put, I would be derelict in my duty if I were to give deference to legal reasoning with which I find fault. On rehearing, this case rises or falls on the merits of the legal claim. Blind allegiance to the notion of stare decisis is not appropriate and is a wholly unpersuasive rationale for allowing a days-old decision to stand.

In sum, rehearing was warranted in this case because, in my view, the MCFA plainly requires holding that the public school district's administration of the payroll deduction plan is both an "expenditure" and a "contribution" that violates the act and the issue was both properly before the Court for rehearing and a matter of substantial jurisprudential significance to our state.

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[15] *Robinson*, 462 Mich at 464 (citation omitted).

ZAHRA, J., concurred with MARY BETH KELLY, J.

CAVANAGH, J. (*dissenting*). I disagree with the current majority's decision to grant respondent's motion for rehearing and vacate this Court's December 29, 2010, majority opinion. *Mich Ed Ass'n v Secretary of State*, 488 Mich 18; 793 NW2d 568 (2010).[1] Furthermore, I disagree with the current majority's substantive analysis in this case because, in my view, the school district's administration of the payroll deduction plan at issue is neither a "contribution" nor an "expenditure" as defined in the Michigan Campaign Finance Act (MCFA); therefore, the school district's administration of the plan is not prohibited by MCL 169.257(1). Accordingly, I respectfully dissent.

I. STANDARD OF REVIEW

The proper interpretation of a statute is a legal question that this Court reviews de novo. *Herman v Berrien Co*, 481 Mich 352, 358; 750 NW2d 570 (2008).

II. ANALYSIS

The MCFA's general rule regarding prohibited "contributions" and "expenditures" is provided in MCL 169.254(1), which states in relevant part:

> Except with respect to the exceptions and conditions in . . . [MCL 169.255], and to loans made in the ordinary

[1] As I explained in my dissenting statement in *Anglers of the AuSable, Inc v Dep't of Environmental Quality*, 489 Mich 884, 891 n 1 (2011), the court rules and this Court's internal operating procedures imply that MCR 2.119(F)(3) should factor into this Court's consideration of motions for rehearing. Accordingly, because respondent presents no new arguments in support of her motion for rehearing and the previous majority opinion reached the right result for the reasons discussed in this opinion, I would deny respondent's motion for rehearing.

> course of business, a corporation, joint stock company, domestic dependent sovereign, or labor organization shall not make a contribution or expenditure . . . .

Thus, according to the plain language of MCL 169.254(1), MCL 169.255 is an exception to the general rule in MCL 169.254(1). That exception states, in relevant part:

> A corporation organized on a for profit or nonprofit basis, a joint stock company, a domestic dependent sovereign, or a labor organization formed under the laws of this or another state or foreign country may make an expenditure for the establishment and administration and solicitation of contributions to a separate segregated fund to be used for political purposes. A separate segregated fund established under this section shall be limited to making contributions to, and expenditures on behalf of, candidate committees, ballot question committees, political party committees, political committees, and independent committees. [MCL 169.255(1).]

Finally, MCL 169.257(1) specifically addresses how the MCFA applies to "public bodies," which includes school districts,[2] when it states:

> A public body or an individual acting for a public body shall not use or authorize the use of funds, personnel, office space, computer hardware or software, property, stationery, postage, vehicles, equipment, supplies, or other public resources to make a contribution or expenditure . . . .

Thus, under MCL 169.254(1) and MCL 169.257(1), private entities and "public bodies" are barred from making "contributions" and "expenditures" unless an exception applies. The MCFA provides detailed definitions of "contribution" and "expenditure"; therefore, in order to properly apply the relevant portions of the MCFA to the facts of this case, it is necessary to closely

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[2] MCL 169.211(6)(c).

consider those statutory definitions to fully understand what constitutes a prohibited "contribution" and "expenditure" as defined in the MCFA.

A. "CONTRIBUTION"

The MCFA defines "contribution" in MCL 169.204(1), which states:

> "Contribution" means a payment, gift, subscription, assessment, expenditure, contract, payment for services, dues, advance, forbearance, loan, or donation of money or anything of ascertainable monetary value, or a transfer of anything of ascertainable monetary value to a person, made for the purpose of influencing the nomination or election of a candidate, or for the qualification, passage, or defeat of a ballot question.[3]

This statutory definition can be divided into two portions: (1) a list of actions that could constitute a "contribution," i.e., "a payment, gift, subscription, assessment, expenditure, contract, payment for services, dues, advance, forbearance, loan, or donation of money or anything of ascertainable monetary value, or a transfer of anything of ascertainable monetary value to a person," and (2) the purpose for which the actions must be taken in order to constitute a "contribution," i.e., "for the purpose of influencing the nomination or election of a candidate, or for the qualification, passage, or defeat of a ballot question." Stated another way, the statutory definition requires a court to determine (1) whether a party's conduct falls within the list of actions provided and, if so, (2) the purpose for that action.

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[3] The MCFA also provides a list of exclusions from its definition of "contribution." See MCL 169.204(3)(a) through (c). It is not necessary to consider those exclusions in this case, however, because the plain language of the statutory definition of "contribution" does not encompass the school district's administration of the payroll deduction plan at issue here.

As the majority insists, the list of actions provided in the first portion of the definition of "contribution" arguably could include the school district's administration of the payroll deduction plan. But even accepting arguendo the majority's conclusion that the administration of the plan represents "a transfer of [something] of ascertainable monetary value" to the MEA's political action committee (MEA-PAC), the question remains whether the school district administers the plan "for the purpose of influencing the nomination or election of a candidate, or for the qualification, passage, or defeat of a ballot question."

As the previous majority opinion in this case explained,

> a public school's administration of a payroll deduction system is not an impermissible contribution under the MCFA because the system is not administered "for the purpose of influencing the nomination or election of a candidate, or for the qualification, passage, or defeat of a ballot question." When a public body administers a payroll deduction plan, it does not do so in an attempt to influence a political race or a ballot question. Rather, administering the plan is one step removed: it merely allows *someone else* to make a contribution for the purpose of influencing a political issue. The public body administers the plan simply because it is required to do so as part of a labor contract between the public body and its employees. Consequently, because a public school's administration of a payroll deduction system is not done for the purpose of influencing a political issue, the administration of the system is not a contribution under the MCFA. [*Mich Ed Ass'n v Secretary of State*, 488 Mich at 37-38 (citation omitted).]

The majority attempts to counter the previous majority's explanation of the plain meaning of the MCFA's definition of "contribution" by first claiming that the school district makes a "contribution" because, by administering the payroll deduction plan, it "provid[es]

valuable services to the MEA-PAC in aid and furtherance of its political activities." *Ante* at 209 n 12. This analysis, however, impermissibly strays from the statutory language because it focuses on the arguable *result* of the school district's administration of the plan rather than the school district's *purpose* in administering the plan, as the statute requires. The fact that, at some remote time in the future, the school district's administration of the payroll deduction plan eventually *results* in the furtherance of the MEA's political activities does not necessarily make the school district's actions a "contribution" as defined in MCL 169.204(1). Rather, the administration of the payroll deduction plan is only a "contribution" if, at the time the school district performs the service, it does so "for the purpose" of influencing an election.

Second, the majority argues that, in considering the school district's administration of the payroll deduction plan under MCL 169.204(1), the focus should not be on whether the school district is attempting to influence a political race, but whether the payment that it provides is intended for that purpose. While the majority is correct to focus on the "payment," the majority confuses the two payments at issue in this case: the MEA member's "payment" in the form of money deducted from his or her paycheck and the school district's arguable "payment" in the form of administering the payroll deduction plan that transfers the employee's donation to the MEA-PAC.[4] While the employee's dona-

[4] The majority further confuses the two payments at issue with its discussion of the definition of the word "make." Contrary to the majority's claims, when the school district administers the payroll deduction plan, it does not " 'cause[] to exist or happen' 'contributions' from MEA members . . . ." *Ante* at 205. Rather, *the MEA member* "causes to exist or happen" the "contribution" when the MEA member voluntarily chooses to donate to the MEA-PAC. The school district merely transfers money

tion to the MEA-PAC is likely a "contribution" because it is made "for the purpose" of influencing a political race, the majority erroneously imputes the employee's purpose in making the contribution to the school district. It is not the purpose behind the employee's donation that is the focus of the relevant inquiry; rather, it is the purpose behind the school district's decision to administer the payroll deduction plan, which merely transfers donations from the employee to the MEA-PAC, that must be considered. Similarly, the majority erroneously imputes *the MEA's* purpose in collecting contributions to the school district's administration of the payroll deduction plan. See *ante* at 208 (claiming that the school district's administration of the payroll deduction plan is a "contribution" because "the purpose of the MEA-PAC is to facilitate and coordinate the involvement of the MEA in partisan politics"). What the majority fails to grasp is that, when properly applied to this case, MCL 169.204(1) is focused solely on *the school district's* purpose in acting in a specific fashion.

In order to determine the school district's "purpose," one must first define the word and then apply that definition to the facts of this case. The MCFA does not define "purpose"; therefore, it is proper to consult a dictionary to assist the Court in determining the word's common meaning. *McCormick v Carrier*, 487 Mich 180, 195; 795 NW2d 517 (2010); see, also, MCL 8.3a. "Purpose" is defined as "[a] result or effect that is *intended* or desired; *intention*." *The American Heritage Dictionary*, *Second College Edition* (1982), def 2 (emphasis

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from one place to another. Just as a bank, acting in response to a check written by a customer, does not "make" a payment when it transfers money from the customer's account to the party identified on the check, the school district does not "make" a contribution when it transfers money from an MEA member's paycheck to the MEA-PAC at the MEA member's direction.

added). Thus, in order to determine the school district's purpose for administering the payroll deduction plan, one must consider the school district's *intent*. "Intent," in turn, is defined as "[t]he state of mind operative at the time of an action" and "[h]aving the mind fastened upon some purpose." *Id*., defs 2 and 3. Similarly, "intention" is defined as "[a] plan of action; design" and "[a]n aim that guides action . . . ." *Id.*, defs 1 and 2. In light of these definitions, in order to determine the school district's purpose as it relates to the statutory definition of "contribution," one must determine the school district's "aim that guides [its] action" and the "state of mind operative" when the school district administers the payroll deduction plan.

As the majority notes, the school district and the MEA entered into a collective-bargaining agreement, part of which required the school district to administer the payroll deduction plan at issue in this case. Because the school district is required by contract to administer the payroll deduction plan, the school district's purpose in administering the plan is to satisfy its bargained-for contractual duties. The school district's purpose was *not* to "influenc[e] the nomination or election of a candidate" or "the qualification, passage, or defeat of a ballot question." MCL 169.204(1). Therefore, although the school district's administration of the payroll deduction plan may, in some tangential or remote sense, eventually influence an election, that was not the school district's purpose. Consequently, the school district's administration of the payroll deduction plan is not a "contribution" as defined by the MCFA.

The majority also attempts to support its "contribution" analysis with a quotation from MCL 169.270.[5] *Ante* at 222. But, in my view, that statute is intended to

[5] MCL 169.270 states:

prevent an entity from circumventing the contribution limits in MCL 169.252 and MCL 169.252a by transferring money to other entities and then directing those entities to make "contributions" or directing another entity to use its own resources to make a "contribution." Indeed, the statute expressly states that it applies "for purposes of expenditure and contribution *limits*." MCL 169.270. Thus, contrary to the majority's interpretation, the statute is focused on enforcing contribution limits, not determining whether a particular act is a "contribution" or "expenditure" as defined in MCL 169.204 and MCL 169.206. Notably, because an MEA member is not seeking to circumvent the MCFA's contribution limits by making a contribution through the payroll deduction plan, MCL 169.270 is not applicable to the school district in this case. The MEA member does not "control" a "contribution" made by the school district or "direct" the school district to make a contribution from the school district's own funds. Rather, the MEA member makes a contribution out of his or her own funds, and the school district merely transfers those funds. Throughout the entire transaction, the contribution is always attributable to the MEA member.

Furthermore, by claiming that the school district exceeds its inferential contribution limit of zero when it administers the payroll deduction plan, the majority once again improperly imputes to the school district the MEA member's purpose for making the contribution.

A contribution or expenditure which is controlled by, or made at the direction of, another person, including a parent organization, subsidiary, division, committee, department, branch, or local unit of a person, shall be reported by the person making the expenditure or contribution, and shall be regarded as an expenditure or contribution attributable to both persons for purposes of expenditure or contribution limits.

As this opinion explains, an act is not a "contribution" as defined in MCL 169.204(1) unless the act is performed for the specific purpose of "influencing the nomination or election of a candidate, or for the qualification, passage, or defeat of a ballot question." Because the school district's administration of the payroll deduction plan is not performed for that purpose, the school district does not make a "contribution" and, thus, does not exceed any arguably applicable contribution limit.[6]

Finally, the majority questions the school district's authority to administer the payroll deduction plan at issue in this case. However, this concern is misplaced because school districts, by statute, have the authority to enter into collective-bargaining agreements, MCL 423.209,[7] and school districts may administer a payroll deduction plan as part of a collective-bargaining agreement pursuant to the wages and fringe benefits act, specifically MCL 408.477(1). Thus, in the abstract, the

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[6] The majority also argues that, under MCL 169.209(3), the school district's administration of the payroll deduction plan is an "in-kind contribution" because the administration of the plan is a "contribution . . . other than money." But, as the majority seems to accept, under the plain language of MCL 169.209(3), the school district's administration of the payroll deduction plan cannot be an "in-kind contribution" unless it is a "contribution" as defined in MCL 169.204(1). Thus, because I believe that the school district's administration of the payroll deduction plan is not a "contribution" for the reasons previously provided, it is also not an "in-kind contribution."

[7] MCL 423.209 states:

> It shall be lawful for public employees to organize together or to form, join or assist in labor organizations, to engage in lawful concerted activities for the purpose of collective negotiation or bargaining or other mutual aid and protection, or to negotiate or bargain collectively with their public employers through representatives of their own free choice.

See, also, MCL 423.217(1) (protecting collective-bargaining agreements of public school employees).

majority's argument that the wages and fringe benefits act does not directly grant school districts the authority to administer a payroll deduction plan is correct, but the majority errs when it concludes that the wages and fringe benefits act is irrelevant to this case. Rather, when that act is considered in tandem with MCL 423.209, the statutes "expressly or impliedly grant" school districts the authority to enter collective-bargaining agreements that require a school district to administer a payroll deduction plan. *Jacox v Van Buren Consol Sch Dist Bd of Ed*, 293 Mich 126, 128; 291 NW 247 (1940). Because the school district's administration of the payroll deduction plan is neither a "contribution" nor an "expenditure" for the reasons discussed in this dissent, administration of the plan does not violate MCL 169.257 and, thus, is lawful.

B. "EXPENDITURE"

Although the school district's administration of the payroll deduction plan is not a prohibited "contribution," it could nevertheless be barred under MCL 169.257 if it meets the statutory definition of "expenditure." Therefore, that definition must also be examined in the context of this case. The MCFA defines "expenditure" in MCL 169.206(1), which states, in relevant part:

> "Expenditure" means a payment, donation, loan, or promise of payment of money or anything of ascertainable monetary value for goods, materials, services, or facilities in assistance of, or in opposition to, the nomination or election of a candidate, or the qualification, passage, or defeat of a ballot question. Expenditure includes, but is not limited to, any of the following:
>
> (a) A contribution or a transfer of anything of ascertainable monetary value for purposes of influencing the nomi-

> nation or election of a candidate or the qualification, passage, or defeat of a ballot question.

The MCFA, however, also expressly excludes some conduct that would otherwise meet its general definition of "expenditure." Notably, MCL 169.206(2) states, in relevant part:

> Expenditure does not include any of the following:
>
> * * *
>
> (c) An expenditure for the establishment, administration, or solicitation of contributions to a separate segregated fund or independent committee.

The majority argues that the school district's administration of the payroll deduction plan is barred by the MCFA because it is an "expenditure" under the general definition in MCL 169.206(1) and the exclusion in MCL 169.206(2)(c) does not apply to public bodies. The majority concludes that the "exclusion is clearly designed to apply only to corporations and labor organizations that possess the authority to create, establish, administer, or fund separate segregated funds in the first place." *Ante* at 211. Furthermore, the majority claims that MCL 169.257 and MCL 169.254 apply to public bodies and private entities respectively the same general rule barring "expenditures," but, because MCL 169.257 does not refer to the exception in MCL 169.255 permitting some types of "expenditures," MCL 169.257 represents an "absolute prohibition" against expenditures by public bodies. I disagree with the majority's analysis.

To begin with, contrary to the majority's suggestion, neither the general definition of "expenditure" in MCL 169.206(1) nor the exclusion from the general definition in MCL 169.206(2)(c) indicates that the exclusion only

applies to private entities. Thus, there is simply no basis in the statutory language to support the majority's position.

Likewise, nothing in MCL 169.257 supports the majority's conclusion that the exclusion in MCL 169.206(2)(c) from the definition of "expenditure" does not apply to public bodies. While the majority is correct that the exceptions in MCL 169.255 do not apply to public bodies, that fact does not support the majority's conclusion that the exclusion in MCL 169.206(2)(c) also does not apply with equal force to public bodies. In fact, the majority's claim that this exclusion is "plainly directed toward elaborating on [MCL 169.255] by making clear that no expenditures authorized by [MCL 169.255] for the establishment of a separate segregated fund will be treated as a prohibited expenditure," *ante* at 212 n 13, leaves no distinction between the two statutes. Therefore, if the majority were correct that MCL 169.206(2)(c) does not apply to public bodies, MCL 169.206(2)(c) would be completely unnecessary because, under the majority's interpretation, it says the exact same thing as MCL 169.255. The majority's efforts to read these two statutes "harmonious[ly]" are strained and render MCL 169.206(2)(c) superfluous. I decline to adopt such an interpretation because the result is impermissible under the rules of statutory interpretation. *People v McGraw*, 484 Mich 120, 126; 771 NW2d 655 (2009) ("In interpreting a statute, we avoid a construction that would render part of the statute surplusage or nugatory.").

Rather, I believe that MCL 169.257 explains that public bodies are not to make "expenditures" as defined in MCL 169.206(1), but if the school district's administration of the payroll deduction plan satisfies the exclusion from the definition of "expenditure" found in MCL

169.206(2)(c), administration of the plan is not an "expenditure" and the plan does not violate MCL 169.257. Thus, in a sense, the majority is correct that MCL 169.257 creates an "absolute prohibition" against expenditures by public bodies, but the majority misses the boat when it concludes that this "absolute prohibition" bars the school district's administration of the payroll deduction plan at issue in this case. Because the school district's administration of the plan is excluded from the definition of "expenditure," there is simply no "expenditure" to prohibit.[8]

The majority's erroneous analysis further results from its insistence that the exclusion in MCL 169.206(2)(c) only applies to expenditures for the establishment or administration *of a separate segregated fund*. This interpretation of MCL 169.206(2)(c) is misguided because the statutory exclusion focuses on expenditures associated with *contributions* to a separate segregated fund, not expenditures associated with the *creation* or *management* of a separate segregated fund.

Specifically, MCL 169.206(2)(c) provides that an "expenditure" does not include "[a]n expenditure for the establishment, administration, or solicitation *of contributions to a separate segregated fund* . . . ." The majority errs because it replaces "to" with "of" and ignores

[8] Contrary to the majority's claims, my interpretation does not permit political action committees to "commandeer[]" government resources. *Ante* at 213 n 13. Obviously, a public body is always free to decline the MEA's or any other organization's request to engage in a plan like the one at issue in this case. Indeed, the school district in this case freely agreed to administer the payroll deduction plan as part of the arm's-length negotiations with the MEA that culminated in a collective-bargaining agreement. Thus, the MEA did not "commandeer" anything. Furthermore, my interpretation would not "always" lead to the same result. *Ante* at 213 n 13. Rather, a public body would only be permitted to engage in the limited conduct excluded from the definition of "expenditure" when the specific requirements of MCL 169.206(2)(c) are met.

the word "contributions" when considering "establishment" and "administration" as used in MCL 169.206(2)(c). Stated another way, the majority's analysis rewrites the statute as follows: " '[e]xpenditure' does not include . . . [a]n expenditure for the establishment *or* administration *of a separate segregated fund* or solicitation of contributions to a separate segregated fund . . . ." Therefore, the majority's interpretation impermissibly adds words to the statute. See *Hiltz v Phil's Quality Market*, 417 Mich 335, 347; 337 NW2d 237 (1983). Indeed, the majority opinion expressly states that "the school district is not making an 'expenditure' for the administration *of a separate segregated fund* . . . because . . . the school district is simply administering the payroll deduction plan . . . ." *Ante* at 215 (emphasis altered); see, also, *ante* at 216 (claiming that MCL 169.206[2][c] supports the majority's conclusion that "the only administrative costs that are excluded under this exclusion are those associated with administering a 'separate segregated fund or independent committee' "). By its own words, the majority displays its need to impermissibly change the language of the statute in order to support its holding.[9]

Thus, although I agree with the majority that the school district is not making an "expenditure" for the administration of a separate segregated fund, that point is irrelevant because that is not what the statutory exclusion requires. Rather, by administering *contributions to* a separate segregated fund, the school district's

[9] Indeed, the majority expressly states, without explanation and contrary to the plain language of the statute, that MCL 169.206(2)(c) "does not exclude from the definition of 'expenditure' an 'expenditure' for the 'administration of contributions'; rather it excludes an 'expenditure' for the administration of a 'separate segregated fund or independent committee' . . . ." *Ante* at 216 n 15.

conduct falls squarely within the statutory exclusion from the general definition of "expenditure."[10]

C. PURPOSE OF MCL 169.257

Finally, the majority supports its interpretation of the MCFA by claiming that the purpose of MCL 169.257 "is to mandate the separation of the government from politics in order to maintain governmental neutrality in elections, preserve fair democratic processes, and prevent taxpayer funds from being used to subsidize partisan political activities," *ante* at 202-203, and that only its analysis is consistent with that purpose. To begin with, the majority's soaring rhetoric could easily be classified as nothing more than an impassioned plea in support of the policy that the majority wishes to impose, see, e.g., *ante* at 229-230, but more importantly, the majority goes well beyond the statutory language in a misguided effort to determine this provision's purpose.

Focusing instead on the statutory language alone, it is clear that the purpose of MCL 169.257 is simply to prevent a public body from using its resources "to make a contribution or expenditure" as those words are

[10] The school district's involvement in the payroll deduction plan can properly be described as "[a]n expenditure for the . . . administration . . . of contributions . . . ." MCL 169.206(2)(c). "Administration" is defined as, among other things, "[t]he management of affairs" and "[t]he dispensing, applying, or tendering of something . . . ." *The American Heritage Dictionary*, *Second College Edition* (1982), defs 1 and 7. In this case, the school district's involvement in the payroll deduction plan involves the management and dispensing of employees' contributions to the MEA-PAC. Thus, the common meaning of the words used in the exclusion from the definition of "expenditure" found in MCL 169.206(2)(c) further support the conclusion that the exclusion applies in this case. The majority appears to agree when it states that the school district's administration of the payroll deduction plan only facilitates contributions to the MEA-PAC. See *ante* at 217.

defined in MCL 169.204 and MCL 169.206, respectively. The majority fails to realize that my interpretation of the MCFA is consistent with the true purpose of MCL 169.257 as determined from the language of that provision because the school district's administration of the payroll deduction plan at issue in this case is neither a "contribution" nor an "expenditure."

III. CONCLUSION

In my view, the school district's administration of the payroll deduction plan does not violate the MCFA because it is neither a "contribution" nor an "expenditure" under the statutory definitions of those terms. Because the majority's substantive analysis in this case is the product of its erroneous interpretation of the statutory provisions at issue, I respectfully dissent.

MARILYN KELLY, J., concurred with CAVANAGH, J.

HATHAWAY, J. (*dissenting*). I dissent from the majority's decision to vacate this Court's December 29, 2010, opinion because nothing in the plain language of MCL 169.257(1) prohibits a school district from administering a payroll deduction system that allows Michigan Education Association (MEA) members to automatically send contributions to the MEA's political action committee (MEA-PAC).[1] Instead of preserving precedent, this newly comprised majority reverses this Court's previously issued opinion and issues its own opinion for no reason other than that it disagrees with the outcome of the prior opinion. Moreover, members of the current majority conspicuously fail to explain how this action differs from actions that they vehemently

[1] The MEA-PAC is a segregated fund under MCL 169.255.

criticized just two short years ago.[2] I would preserve this Court's December 29, 2010, opinion, which followed the language of the law, because a public school's administration of a payroll deduction system that remits funds to a segregated fund is not precluded by MCL 169.257(1) and is therefore permitted.

I. ANALYSIS

At issue is whether § 57 of the Michigan Campaign Finance Act (MCFA), MCL 169.257(1),[3] prohibits a public school from administering a payroll deduction system that remits funds to the MEA-PAC. To interpret the MCFA, we must follow the established rules of statutory construction. "Assuming that the Legislature has acted within its constitutional authority, the purpose of statutory construction is to discern and give effect to the intent of the Legislature."[4] Accordingly, a Court must interpret the language of a statute in a manner that is consistent with the legislative intent.[5] In determining the legislative intent, the actual language

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[2] Recall the words of now Chief Justice YOUNG just two years ago:

> The facts have not changed. The text of the statute at issue has not changed. The parties' arguments have not changed. And the rationale advanced in the opinions of this Court has not changed. Yet, within a matter of months, a decision of this Court, thoughtfully briefed, argued, and considered by seven justices, is no longer worth the paper it was written on. Even the casual observer, however, does not really need to ask why. The reason is obvious: . . . the composition of this Court changed. [*United States Fidelity & Guaranty Co v Mich Catastrophic Claims Ass'n (On Rehearing)*, 484 Mich 1, 27; 795 NW2d 101 (2009) (YOUNG, J., dissenting).]

[3] The MCFA is found at MCL 169.201 *et seq*.

[4] *Potter v McLeary*, 484 Mich 397, 410; 774 NW2d 1 (2009), citing *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999).

[5] *Potter*, 484 Mich at 411.

of the statute must first be examined.[6] "As far as possible, effect should be given to every phrase, clause, and word in the statute."[7] When considering the correct interpretation, a statute must be read as a whole.[8] Individual words and phrases, while important, should be read in the context of the entire legislative scheme.[9] In defining particular words within a statute, a court "must 'consider both the plain meaning of the critical word or phrase as well as "its placement and purpose in the statutory scheme." ' "[10] When a statute explicitly defines a term, the statutory definition controls.[11]

Section 57 of the MCFA provides in pertinent part:

> A public body or an individual acting for a public body shall not use or authorize the use of funds, personnel, office space, computer hardware or software, property, stationery, postage, vehicles, equipment, supplies, or other public resources *to make a contribution or expenditure or provide volunteer personal services* that are excluded from the definition of contribution under [MCL 169.204(3)(a)]. [MCL 169.257(1) (emphasis added).]

The clear language of § 57(1) specifically prohibits a public body from using, or authorizing the use of, public resources to do three things: (1) make an expenditure, (2) make a contribution, or (3) provide volunteer services that are excluded from the definition of "contribution" under MCL 169.204(3)(a). The plain language of the statute does not prohibit any other activity.

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[6] *Id*. at 410.

[7] *Sun Valley*, 460 Mich at 237.

[8] See *id*.

[9] *Herman v Berrien Co*, 481 Mich 352, 366; 750 NW2d 570 (2008).

[10] *Id*., quoting *Sun Valley*, 460 Mich at 237, quoting *Bailey v United States*, 516 US 137, 145; 116 S Ct 501; 133 L Ed 2d 472 (1995).

[11] *Tryc v Mich Veterans' Facility*, 451 Mich 129, 136; 545 NW2d 642 (1996).

Therefore, if the administration of the payroll deduction system is not tantamount to doing one of these three things, the administration of the system is permissible under Michigan law.

A. EXPENDITURE

The first issue is whether a public school's administration of a payroll deduction system that remits funds to the MEA-PAC is an impermissible "expenditure" under § 57. "Expenditure" is specifically defined in the MCFA. The definition of "expenditure" is set forth in MCL 169.206, which provides in pertinent part:

> (1) "Expenditure" means a payment, donation, loan, or promise of payment of money or anything of ascertainable monetary value for goods, materials, services, or facilities in assistance of, or in opposition to, the nomination or election of a candidate, or the qualification, passage, or defeat of a ballot question. Expenditure includes, but is not limited to, any of the following:
>
> (a) A contribution or a transfer of anything of ascertainable monetary value for purposes of influencing the nomination or election of a candidate or the qualification, passage, or defeat of a ballot question.
>
> * * *
>
> (2) *Expenditure does not include any of the following:*
>
> (a) An expenditure for communication by a person with the person's paid members or shareholders and those individuals who can be solicited for contributions to a separate segregated fund under [MCL 169.255].
>
> * * *
>
> (c) *An expenditure for the establishment, administration, or solicitation of contributions to a separate segregated fund or independent committee.* [MCL 169.206 (emphasis added).]

The definition of "expenditure" is expansive. It includes a payment, donation, loan, or promise of payment of money or anything of ascertainable monetary value for goods, materials, services, or facilities in assistance of, or in opposition to, the nomination or election of a candidate, or the qualification, passage, or defeat of a ballot question. The definition also includes a contribution or a transfer of anything of ascertainable monetary value for purposes of influencing the nomination or election of a candidate or the qualification, passage, or defeat of a ballot question. However, MCL 169.206(2) also expressly excludes items from being classified as expenditures even though they may qualify under the general definition outlined in MCL 169.206(1). Notably, any "expenditure for the establishment, administration, or solicitation of contributions to *a separate segregated fund or independent committee*" is specifically *excluded* from the definition of "expenditure" by MCL 169.206(2)(c).

Turning to the facts of this case, the administration of a payroll deduction system does arguably provide services to the MEA and the MEA-PAC in facilitating payroll deductions from members by providing personnel and computer services. The system allows MEA members to authorize the school to automatically deduct money from their paychecks and remit the funds to the MEA-PAC. The MEA-PAC is a separate segregated fund under MCL 169.255 because it has been established by the MEA, a labor organization, to make contributions to and expenditures on behalf of candidate committees, ballot question committees, political party committees, political committees, and independent committees.[12] Thus, the payroll deduction system

[12] MCL 169.255(1) provides, in pertinent part:

> A corporation organized on a for profit or nonprofit basis, a joint stock company, a domestic dependent sovereign, or a labor

administers member contributions to a separate segregated fund. Although this process falls within the general definition of "expenditure" under MCL 169.206(1), the administration of such a system is explicitly excluded from the statutory definition under MCL 169.206(2)(c), which provides that an "expenditure for the establishment, administration, or solicitation of contributions to a separate segregated fund or independent committee" is not an "expenditure."[13] A public school's administration of a payroll deduction system falls squarely within the statutory exception. The system is set up to facilitate MEA member contributions to their separate segregated fund, the MEA-PAC. Therefore, the administration of the system is *not* an expenditure under the MCFA.

The majority erroneously asserts that the school district's administration of a payroll deduction system is not an "administration . . . of contributions to a separate segregated fund or independent committee"[14] because the district is not administering a fund; rather, the district is only administering the payroll deduction system that remits funds to the MEA-PAC. This argument is unfounded and contrary to the plain language of the statute. The plain language of the statute applies to the administration of *contributions* to a separate segregated fund; the statute does not specify who has to make the contributions. The MEA members' contribu-

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organization formed under the laws of this or another state or foreign country may make an expenditure for the establishment and administration and solicitation of contributions to a separate segregated fund to be used for political purposes. A separate segregated fund established under this section shall be limited to making contributions to, and expenditures on behalf of, candidate committees, ballot question committees, political party committees, political committees, and independent committees.

[13] MCL 169.206(2)(c).

[14] *Id*.

tions to the MEA-PAC are administered through the payroll deduction system. Thus, the district, by administering the payroll deduction system, is administering contributions to the MEA-PAC, an action that is explicitly allowed according to the plain language of the statute.

In sum, administration of a payroll deduction system is an "expenditure for the establishment, administration, or solicitation of contributions to a separate segregated fund or independent committee" and thus falls within an enumerated exception to the statutory definition of "expenditure." Therefore, the administration of the payroll deduction system is not an "expenditure" as defined by the MCFA and is not prohibited by § 57 on that ground.

B. CONTRIBUTION

The next issue is whether administration of the payroll deduction system is an impermissible "contribution" under the MCFA. "Contribution," like "expenditure," is specifically defined by the MCFA. The definition of "contribution" under the MCFA is set forth in MCL 169.204, which provides:

> (1) "Contribution" means a payment, gift, subscription, assessment, *expenditure*, contract, payment for services, dues, advance, forbearance, loan, or donation of money or anything of ascertainable monetary value, *or a transfer of anything of ascertainable monetary value* to a person, *made for the purpose of influencing the nomination or election of a candidate, or for the qualification, passage, or defeat of a ballot question*.
>
> (2) Contribution includes the *full purchase price* of tickets or payment of an attendance fee for events such as dinners, luncheons, rallies, testimonials, and other fundraising events; an individual's own money or property other than the individual's homestead used on behalf of

that individual's candidacy; the granting of discounts or rebates not available to the general public; or the granting of discounts or rebates by broadcast media and newspapers not extended on an equal basis to all candidates for the same office; and the endorsing or guaranteeing of a loan for the amount the endorser or guarantor is liable.

(3) *Contribution does not include any of the following*:

(a) Volunteer personal services provided without compensation, or payments of costs incurred of less than $500.00 in a calendar year by an individual for personal travel expenses if the costs are voluntarily incurred without any understanding or agreement that the costs shall be, directly or indirectly, repaid.

(b) Food and beverages, not to exceed $100.00 in value during a calendar year, which are donated by an individual and for which reimbursement is not given.

(c) *An offer or tender of a contribution if expressly and unconditionally rejected, returned, or refunded in whole or in part within 30 business days after receipt.* [Emphasis added.]

The definition of "contribution" includes the term "expenditure." Because "expenditure" is explicitly defined by the MCFA, the statutory definition controls.[15] As explained earlier, the administration of a payroll deduction system is not an "expenditure" under the MCFA and thus cannot be a contribution on that basis. The only other way that the administration of the system could be a "contribution" under the MCFA would be if administering the system resulted in a "transfer of anything of ascertainable monetary value . . . made for the purpose of influencing the nomination or election of a candidate, or for the qualification, passage, or defeat of a ballot question."

The majority argues that the actual and intangible costs associated with the administration of a payroll

[15] *Tryc*, 451 Mich at 136.

deduction system constitute a contribution because there is a transfer of something of ascertainable monetary value from the school district to the MEA-PAC and the transfer, although made pursuant to a collective bargaining agreement, is made for the purpose of influencing the nomination or election of a candidate or for the qualification, passage, or defeat of a ballot question. The majority asserts that the resources expended to administer the payroll deduction system have an ascertainable monetary value, and the fact that they are expended for the benefit of the MEA-PAC conveys value to the MEA-PAC. The majority further argues that prepayment for the services does not negate the transfer because MEA-PAC still receives the benefit of the services.

I disagree with this interpretation of the word "transfer" in the statute. Because "transfer" is a nontechnical word that is not defined within the statute, the proper course of action is to first look to the plain meaning of the term to ascertain what the Legislature intended by using "transfer" to define a "contribution."[16] "Transfer" is defined as "to convey or remove from one place, person, etc., to another."[17] In order for there to be a contribution, "anything of ascertainable monetary value" must be conveyed from one entity to another.

There are two possible interpretations of the word "transfer" in the statute. The first interpretation would require that any conveyance of value for services provided to a campaign, regardless of whether the services are paid for, would constitute a contribution. The second would require a net conveyance of value in order to

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[16] MCL 8.3a; *Oakland Co Bd of Rd Comm'rs v Mich Prop & Cas Guaranty Ass'n*, 456 Mich 590, 604; 575 NW2d 751 (1998).

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

be a "transfer of anything of ascertainable monetary value." I believe that the latter is the only logical interpretation. Any other interpretation of "contribution" would lead to an absurd result, and statutes must be construed to prevent absurd results.[18] For example, under the majority's interpretation, a print shop that sells signage to a campaign in the normal course of business would be making a contribution to the campaign because it has transferred something of monetary value to the campaign, even though the shop has been compensated for the cost of providing the signage. Such an interpretation of "contribution" defies common sense, and I do not read the statute in this manner. Instead, I conclude that the statute requires a net conveyance of "anything of monetary value" in order for there to be a campaign contribution. If costs for administering the payroll deduction system are paid in advance, there is no net conveyance of anything of monetary value, and there is no contribution.

Furthermore, my conclusion that a "contribution" under MCL 169.204(1) requires a net transfer of value comports with the remainder of that section, which specifically *excludes* from the statutory definition of "contribution" any "contribution if expressly and unconditionally rejected, returned, or refunded in whole or in part within 30 business days after receipt." MCL 169.204(3)(c). In other words, if the contribution is rejected, returned, or refunded, it is no longer a "contribution" under the MCFA. Moreover, MCL 169.204(2) explains that a "contribution" includes "the granting of discounts or rebates not available to the general public . . . ." This implies that when an entity provides products or services at full price, the entity is not

[18] *McAuley v Gen Motors Corp*, 457 Mich 513, 518; 578 NW2d 282 (1998).

making a contribution. Thus, the statute clearly requires that there be a net transfer of value in order for there to be a contribution under the MCFA.

The majority erroneously asserts that the payroll deduction system constitutes something of "ascertainable monetary value" because there is inherent value to the MEA-PAC in having payroll deductions automatically taken from members' wages as opposed to requiring individual solicitations by the MEA-PAC. This argument ignores the plain definition of the term "ascertainable." "Ascertainable" is also a nontechnical word that is not defined within the statute, so we must look to the ordinary meaning of the word to discern what the Legislature intended. "Ascertain" is defined as "to find out definitely; learn with certainty or assurance."[19] Thus, the phrase "ascertainable monetary value" in the statute requires that the monetary value conferred be determined definitely, with certainty and assurance. The majority hypothetically opines that the intangible benefits the union receives because of the payroll deduction system confers something of ascertainable monetary value. The majority reasons that ascertainable monetary value is self-evident from the fact that the defendant has bargained for the payroll deduction system in its contract with the school district and has appealed the right to enforce the provision in this Court. However, these actions do not definitely identify with certainty the amount of monetary value that the payroll deduction system confers to the MEA. Therefore, according to the terms of the statute, the intangible benefits conferred to the MEA by the administration of a payroll deduction system do not constitute a "contribution."

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

In this instance, the MEA plans to prepay the school district for all ascertainable costs—those which are definitely and certainly identified—associated with the administration of a payroll deduction system, and in fact asked the Secretary of State for a declaratory ruling regarding the costs to be prepaid. Thus, the administration of the payroll deduction system will not result in a net transfer of anything of ascertainable monetary value as all costs will be ascertained and prepaid.

The majority also erroneously asserts that the payroll deduction system constitutes an "in-kind contribution" under MCL 169.209(3) as a "contribution . . . other than money." Again, the majority identifies the hypothetical intangible benefits that the administration of a payroll deduction system confers on the MEA as the impermissible contributions. However, this argument ignores that an in-kind contribution must still be a "contribution" as defined by the statute. The hypothetical intangible benefits are not contributions because, as discussed, they do not have an ascertainable monetary value. The MEA contemplates prepaying all costs associated with the administration of the deduction system that can be ascertained. Accordingly, there is no contribution under the MCFA, and a public school's administration of a payroll deduction system is not prohibited by § 57 on that ground.

C. VOLUNTEER PERSONAL SERVICES

The final issue is whether the administration of the system in question impermissibly "provide[s] volunteer personal services that are excluded from the definition of contribution under section 4(3)(a)" of the MCFA. As noted earlier, § 4(3) provides:

> Contribution does not include any of the following:

> (a) Volunteer personal services provided without compensation, or payments of costs incurred of less than $500.00 in a calendar year by an individual for personal travel expenses if the costs are voluntarily incurred without any understanding or agreement that the costs shall be, directly or indirectly, repaid. [MCL 169.204(3).]

Although such services are thus not considered a contribution for purposes of the rest of the MCFA, § 57 specifically indicates that public bodies cannot use public resources to provide volunteer services that are not compensated. However, the administration of the payroll deduction system at issue does not involve volunteer services by public employees because the MEA intends to prepay for all services rendered. Because volunteer services are not defined by the statute, again the proper course of action is to look to the plain meaning of the terms to discern the legislative intent. "Volunteer" is defined as "a person who performs a service willingly and without pay."[20] Willingness to perform an activity is not enough to fall within the scope of this subsection; the activity must also be performed without pay. In this case, the MEA fully anticipates payment and plans to prepay for any administration costs. As a result, a public school's administration of a payroll deduction system does not "provide volunteer personal services that are excluded from the definition of contribution under section 4(3)(a)" of the MCFA and is not prohibited by § 57 on this final ground. Therefore, the administration of a payroll deduction system by a public school is permitted under the MCFA.

II. CONCLUSION

I dissent from the majority's decision to vacate this Court's December 29, 2010, opinion. A public school

[20] *Random House Webster's College Dictionary* (1997), def 2.

may administer payroll deductions for its employees who remit funds to the MEA-PAC because MCL 169.257(1) only prohibits a public body from using public resources to do three things: (1) make an expenditure, (2) make a contribution, and (3) provide volunteer personal services that are excluded from the definition of "contribution" under MCL 169.204(3)(a). The administration of the system at issue does not meet any of those criteria. Thus, the administration of the payroll deduction system is permitted under the MCFA, and the Court of Appeals erred by concluding that it is not. Accordingly, I dissent.

LAWRENCE M CLARKE, INC v RICHCO CONSTRUCTION, INC

Docket No. 140683. Argued on application for leave to appeal January 20, 2011. Decided June 30, 2011.

Lawrence M. Clarke, Inc., brought an action in the Monroe Circuit Court against Richco Construction, Inc., Ronald J. Richards, Jr., and Thomas Richards, alleging breach of contract and fraud. Plaintiff had orally hired Richco as a subcontractor for a residential construction project in Monroe County. The parties' dispute arose out of that contractual relationship. Plaintiff filed its initial complaint in July 2006 and attempted to serve the complaint at the address Richco, and Ronald and Thomas as Richco's corporate officers, had registered with the Michigan Department of Labor and Economic Growth (now the Department of Licensing and Regulatory Affairs). However, plaintiff's process server discovered that Richco had vacated the listed address and not left a forwarding address. In October 2006, plaintiff's complaint was dismissed without prejudice because plaintiff could not effectuate service. In January 2007, plaintiff refiled its complaint along with a motion to allow alternative service. The court, Joseph A. Costello, Jr., J., granted the motion and allowed alternative service by posting the documents at Richco's registered address, mailing the documents to the same registered address, and publishing the order in a Monroe County newspaper. The court clerk entered a default against all three defendants in April 2007. In September 2007, plaintiff moved for entry of a default judgment. The court granted the motion. Plaintiff located the defendants after the default judgment was entered and began collection proceedings, including the seizure of Ronald's and Thomas's personal vehicles in April 2008, at which point defendants became aware of the complaint and the default judgment for the first time. Four days after the seizure, defendants filed an emergency motion to set aside the default judgment. The court denied the motion, and the Court of Appeals denied defendants' application for leave to appeal. The Supreme Court, in lieu of granting leave to appeal, remanded the case to the Court of Appeals for consideration as on leave granted. 481 Mich 939 (2008). On remand, the Court of Appeals, K. F. KELLY, P.J., and JANSEN and FITZGERALD, JJ., affirmed the trial court's decision in an unpublished opinion per curiam, issued

November 17, 2009 (Docket No. 285567). The Supreme Court ordered and heard oral argument on whether to grant defendant's application for leave to appeal or take other peremptory action. 486 Mich 1071 (2010).

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

The trial court abused its discretion when it concluded that defendants were personally notified of the default judgment. Defendants were entitled to relief from the judgment under MCR 2.612(B).

1. A trial court may grant relief from a judgment under MCR 2.612(B) if (1) personal jurisdiction over the defendant was necessary and acquired, (2) the defendant in fact had no knowledge of the pending action, (3) the defendant entered an appearance within one year after the final judgment, (4) the defendant shows a reason justifying relief from the judgment, and (5) granting the defendant relief from the judgment will not prejudice innocent third persons. Defendants met these requirements in this case.

2. Because defendants were parties to this action, personal jurisdiction over them was required to satisfy the due process requirement that a defendant be informed of an action by the best means available under the circumstances. The trial court's acquisition of personal jurisdiction over defendants could be assumed for the purpose of the appeal because the Court concluded that defendants were entitled to relief under MCR 2.612(B) and does not decide cases on constitutional grounds when doing so can be avoided.

3. MCR 2.612(B) permits a defendant to seek relief from a default judgment as long as the defendant did not have actual knowledge of the pending action. Defendants did not have actual knowledge because they were never personally served; the method of substituted service employed in this case, while perhaps adequate to provide defendants with sufficient constructive knowledge to satisfy MCR 2.105(I)(1), was unlikely to provide them with actual knowledge; and they only became aware of the action when Ronald's and Thomas's vehicles were seized.

4. Defendants entered an appearance well within one year after the default judgment, which was a final judgment for purposes of MCR 2.612(B).

5. A defendant need not show mistake, inadvertence, surprise, excusable neglect, newly discovered evidence, fraud, misrepresentation, or other misconduct of an adverse party to justify relief

under MCR 2.612(B). It was satisfactory that these defendants showed that they did not have actual notice of the action and had a meritorious defense. Defendants asserted a meritorious defense to plaintiff's breach of contract claim given that the documentary evidence plaintiff presented was insufficient to allow calculation of the damages with reasonable certainty. Defendants asserted a meritorious defense to plaintiff's fraud claim given that plaintiff may not have stated its fraud claim with sufficient particularity; that the fraud allegations only referred to the conduct of the individual defendants, providing no basis for a fraud claim against Richco; that plaintiff's fraud claim may have been a mislabeled contract claim; and that defendants may have properly filed a construction lien against plaintiffs in accordance with applicable laws.

6. Because this case involved a contract dispute and all the parties to the contract were also parties to this action and there was no evidence that any third parties had an interest in the case, defendants established that no innocent third persons would be prejudiced if the default judgment were to be set aside.

Reversed and remanded.

Justice MARILYN KELLY, concurring fully with the majority opinion, stated that she would further instruct trial courts that substituted service should not be permitted in cases such as this absent a showing that counsel made reasonable use of Internet search tools to locate the defendants and that she would amend MCR 2.105(I) to add such a requirement.

Justice HATHAWAY, concurring, stated that she agreed with the majority that the trial court abused its discretion by failing to set aside the default judgment because defendants were entitled to relief from the judgment under MCR 2.612(B). She wrote separately because she did not believe that a court could properly determine whether defendants were entitled to relief under MCR 2.612(B) without first establishing that personal jurisdiction was in fact acquired over them. She would have held that personal jurisdiction was in fact acquired over defendants and that nothing in the record indicated that defendants were not afforded due process.

JUDGMENT — DEFAULT JUDGMENTS — RELIEF FROM JUDGMENT.

A trial court may grant relief from a judgment if (1) personal jurisdiction over the defendant was necessary and acquired, (2) the defendant in fact had no knowledge of the action pending, (3) the defendant entered an appearance within one year after the final judgment, (4) the defendant shows a reason justifying relief from

the judgment, i.e., the defendant shows that it did not have actual notice of the action and had a meritorious defense, and (5) granting the defendant relief from the judgment will not prejudice innocent third persons (MCR 2.612[B]).

Myers & Myers, PLLC (by *Roger L. Myers* and *Christopher G. Bovid*), for plaintiff.

Hafeli Staran Hallahan & Christ, P.C. (by *John D. Staran*), for defendants.

CAVANAGH, J. The issue in this case is whether the trial court abused its discretion when it concluded that defendants were personally notified of the default judgment against them and denied defendants' motion to set aside the judgment. We hold that the trial court abused its discretion and that defendants are entitled to relief from the judgment under MCR 2.612(B) because (1) personal jurisdiction over defendants was necessary and apparently acquired,[1] (2) defendants had no knowledge of the action pending against them, (3) defendants entered an appearance within one year after the final judgment, (4) defendants have presented facts and arguments showing meritorious defenses to plaintiff's breach of contract and fraud claims, and (5) granting defendants relief from the judgment will not prejudice any innocent third persons. Accordingly, we reverse and remand the case to the trial court for further proceedings consistent with this opinion.

I. FACTS AND PROCEEDINGS

The lawsuit at issue in this case arose out of a contractual relationship between plaintiff and defen-

[1] Although defendants contest the trial court's personal jurisdiction over them, we will assume arguendo that the trial court acquired personal jurisdiction for purposes of applying MCR 2.612(B) in this opinion for the reasons discussed in part III(A) of this opinion.

dant Richco Construction, Inc. In 2003 and 2004, plaintiff was working on a residential subdivision construction project in Monroe County. In the summer of 2003, plaintiff hired Richco as a subcontractor to work on the sewer system for the project. There was no written contract.

It is undisputed that Richco's corporate filings with the state of Michigan's Department of Labor and Economic Growth (DLEG) (now the Department of Licensing and Regulatory Affairs) indicated that defendant Ronald Richards, Jr., was the corporation's president and treasurer and that Thomas Richards[2] was the corporation's secretary and vice president. Further, the corporate filings identified Ronald as Richco's resident agent and the corporation's registered office address as 27734 Ecorse Road in Romulus, Michigan. Finally, the address shown for Ronald and Thomas as corporate officers was also 27734 Ecorse Road in Romulus.

Richco's work on the sewer system did not satisfy the governing municipality, and after Richco's efforts to repair the work were not satisfactory, plaintiff contracted with another party to finish the work, delaying the project according to plaintiff. Defendants claim that Richco was never fully paid and, at some point, Richco recorded a construction lien, which plaintiff claims caused further problems.

Plaintiff filed a breach of contract and fraud complaint on July 19, 2006, in the Monroe Circuit Court, but plaintiff was not able to serve any of the defendants. Plaintiff's process server attempted to serve the com-

[2] After this Court heard oral arguments on defendants' application for leave to appeal, plaintiff and Thomas agreed to a settlement, and Thomas withdrew his application for leave to appeal. Thus, Thomas is no longer a party to this case, and this opinion has no effect between plaintiff and Thomas.

plaint at Richco's business address on file with DLEG, but no one was at that address. The process server discovered that Richco had vacated the listed address and had not left a forwarding address. A motor home was parked in the parking lot at the Ecorse Road address, and another tenant in the area told the process server that it might belong to one of the individual defendants. Plaintiff's counsel used the license plate on the motor home to obtain a phone number, but the person who answered denied that the motor home was connected to either individual defendant. In October 2006, the process server investigated a lead about a Ronald Richards in Waterford, Michigan, but that person was not the defendant in this case. Plaintiff's complaint was dismissed without prejudice on October 30, 2006, because plaintiff could not effect service.

After the complaint was dismissed, plaintiff continued its efforts to locate defendants by contacting the Secretary of State and again searching DLEG's files. These efforts were unsuccessful, however, and plaintiff refiled the same complaint on January 7, 2007, along with a motion to allow alternative service. Plaintiff explained its previous efforts to locate defendants and noted that service was attempted at Richco's registered office without success. The trial court allowed alternative service by (1) posting the documents at Richco's registered address, (2) mailing the documents to the registered address for Thomas, (3) mailing the documents to the registered address for Ronald, and (4) publishing a copy of the order in a Monroe County newspaper pursuant to MCR 2.106. After there was no response to the notice, the court clerk entered a default against all three defendants on April 5, 2007. Notice of the default was sent by regular and certified mail to Richco, Thomas, and Ronald at the Ecorse Road address and was published in a Monroe County newspaper.

On September 28, 2007, plaintiff moved for entry of a default judgment, claiming approximately $244,000 in damages, plus the cost of a bond, "contractual interest," $8,000 in attorney fees, and more than $15,000 in prejudgment interest. After a hearing on October 10, 2007, the trial court granted plaintiff's motion and signed a default judgment ordering that Richco, Ronald, and Thomas were jointly liable for a total of $371,598.37.

Plaintiff located defendants after the default judgment was entered and, on April 12, 2008, Ronald's and Thomas's personal vehicles were seized from their homes in Wayne County. According to defendants, this was how they first became aware of plaintiff's complaint and the default judgment.

Four days later, on April 16, 2008, defendants filed an emergency motion to set aside the default judgment, and defense counsel made a special appearance. The motion was not accompanied by an affidavit, but defense counsel attempted to provide signed affidavits from Thomas and Ronald at the hearing on the motion held on April 22, 2008. The trial court refused to consider the affidavits and denied defendants' motion to set aside the default judgment, noting that defendants had not filed an affidavit of factual and meritorious defense as required by MCR 2.603(D)(1). Defendants moved for reconsideration and included more detailed supporting affidavits from Thomas and Ronald, but the trial court denied reconsideration without a hearing.

The Court of Appeals denied defendants' application for leave to appeal, but this Court remanded for consideration as on leave granted. *Lawrence M Clarke, Inc v Richco Constr, Inc*, 481 Mich 939 (2008). On remand, the Court of Appeals affirmed the trial court's decision

to deny the motion to set aside the default judgment. *Lawrence M Clarke, Inc v Richco Constr, Inc*, unpublished opinion per curiam of the Court of Appeals, issued November 17, 2009 (Docket No. 285567). The Court of Appeals reasoned that defendants' motion to set aside the default judgment was properly denied because defendants had failed to file a timely affidavit in support of their motion. Defendants sought leave to appeal in this Court, and this Court ordered oral argument on whether to grant the application or take other peremptory action. *Lawrence M Clarke, Inc v Richco Constr, Inc*, 486 Mich 1071 (2010).

II. STANDARD OF REVIEW

A trial court's decision regarding a motion to set aside a default judgment is reviewed for an abuse of discretion. *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 227; 600 NW2d 638 (1999). When construing a court rule, this Court employs the legal principles governing the application and construction of statutes. *Grievance Administrator v Underwood*, 462 Mich 188, 193-194; 612 NW2d 116 (2000).

III. ANALYSIS

A trial court may grant relief from a judgment if the defendant was not personally notified of an action pending against the defendant and several additional requirements are satisfied. Specifically, MCR 2.612(B) states:

> A defendant over whom personal jurisdiction was necessary and acquired, but who did not in fact have knowledge of the pendency of the action, may enter an appearance within 1 year after final judgment, and if the defendant shows reason justifying relief from the judgment and innocent third persons will not be prejudiced, the court

> may relieve the defendant from the judgment, order, or proceedings for which personal jurisdiction was necessary, on payment of costs or on conditions the court deems just.

Thus, defendants may be entitled to relief from the default judgment if (1) personal jurisdiction over defendants was necessary and acquired, (2) defendants in fact had no knowledge of the action pending against them, (3) defendants entered an appearance within one year after the final judgment, (4) defendants show a reason justifying relief from the judgment, and (5) granting defendants relief from the judgment will not prejudice innocent third persons.

As a preliminary matter, we acknowledge that defendants did not offer their affidavits of meritorious defense simultaneously with their motion to set aside the default judgment and that this arguable misstep was the foundation of the lower courts' decisions. The lower courts, however, applied MCR 2.603(D)(1) in reaching their decisions. That rule permits a court to grant relief from a default judgment when, along with the fulfillment of other requirements, "an affidavit of facts showing a meritorious defense is filed." We conclude that the lower courts' reasoning is inapplicable to our analysis of MCR 2.612(B) because, unlike MCR 2.603(D)(1), MCR 2.612(B) does not expressly state that a defendant must provide an affidavit of meritorious defense. Therefore, we conclude that defendants may seek relief under MCR 2.612(B), and we do not opine about whether MCR 2.603(D)(1) requires that an affidavit of meritorious defense be filed simultaneously with a motion to set aside a default judgment.[3]

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[3] To the extent that defendants' failure to offer their affidavits simultaneously with their motion creates any doubt that defendants are entitled to relief from the default judgment, our holding is consistent not only with the plain language of MCR 2.612(B), but also with the general

A. PERSONAL JURISDICTION

A court "cannot adjudicate [an in personam] controversy without first having obtained jurisdiction [over the] defendant by service of process . . . ." *Eisner v Williams*, 298 Mich 215, 220; 298 NW 507 (1941). A court must obtain personal jurisdiction over a defendant in order to "satisfy the due process requirement that a defendant be informed of an action by the best means available under the circumstances." MCR 2.105(J)(1). "The fundamental requisite of due process of law is the opportunity to be heard. . . . This right to be heard has little reality or worth unless one is informed that the matter is pending . . . ." *Mullane v Central Hanover Bank & Trust Co*, 339 US 306, 314; 70 S Ct 652; 94 L Ed 865 (1950) (quotation marks and citation omitted). Personal notice, however, is not necessary to satisfy due process requirements in all cases. *Jacob v Roberts*, 223 US 261, 265; 32 S Ct 303; 56 L Ed 429 (1912). Rather, under MCR 2.105(I)(1), "[o]n a showing that service of process cannot reasonably be made as provided by [MCR 2.105], the court may by order permit service of process to be made in any other manner reasonably calculated to give the defendant actual notice of the proceedings and an opportunity to be heard." As MCR 2.105(J)(1) explains, the provisions of the court rules related to service of process are "intended to satisfy the due process requirement that a defendant be informed of an action by the best means available under the circumstances." See, also, *Krueger v Williams*, 410 Mich 144, 156; 300 NW2d 910 (1981) (explaining that "[s]ervice may be made personally on a defendant or, if this is not possible, constructive service

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principle that "[d]efaults are not favored and doubts generally should be resolved in favor of the defaulting party." *Wood v DAIIE*, 413 Mich 573, 586; 321 NW2d 653 (1982).

is permitted"), and *Mullane*, 339 US at 314 (explaining that notice that is "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections" is sufficient to satisfy due process). But while personal service is not always required, "[t]he requirement of notice so as to afford an opportunity to be heard is clearly the heart" of Michigan's substituted-service court rule. *Krueger*, 410 Mich at 158.[4]

Because defendants were parties to the action in this case, personal jurisdiction over them was required to satisfy due process. Defendants argue that the trial court failed to acquire personal jurisdiction over them because plaintiff's efforts to provide them with notice were so lacking that they were deprived of notice and an opportunity to be heard. Nevertheless, for the purpose of this appeal, we assume arguendo that the trial court acquired personal jurisdiction over defendants because we conclude that defendants are entitled to relief under MCR 2.612(B) and this Court does not decide cases on constitutional grounds when doing so can be avoided. *People v Quider*, 172 Mich 280, 288-289; 137 NW 546 (1912).

B. DEFENDANTS' KNOWLEDGE OF THE ACTION

As previously stated, defendants must also show that they did not "in fact have knowledge of the pendency of the action" in order to be entitled to relief under MCR 2.612(B). This Court has not considered what is required for a party to have knowledge in fact under MCR 2.612(B), but this Court has generally taken care to

[4] In *Krueger*, we considered the predecessor of MCR 2.105(I), GCR 1963, 105.8, which was substantively similar to MCR 2.105(I)(1).

acknowledge that a difference in specificity exists between the phrase "actual knowledge" and mere "knowledge." See, e.g., *Travis v Dreis & Krump Mfg Co*, 453 Mich 149, 173; 551 NW2d 132 (1996) (opinion by BOYLE, J.) (explaining that when "the Legislature [is] careful to use the term 'actual knowledge,' and not the less specific word 'knowledge,' we determine that the Legislature meant that constructive, implied, or imputed knowledge is not enough").

But MCR 2.612(B) does not simply use the word "knowledge"; rather, it states that a defendant may be relieved of a judgment if the defendant "did not *in fact have knowledge* of the pendency of the action . . . ." (Emphasis added.) "In fact" is defined as "[a]ctual or real; resulting from the acts of parties rather than by operation of law." Black's Law Dictionary (9th ed). This definition further distinguishes actual knowledge from constructive or implied knowledge of the pending action. Thus, we conclude that the plain language of MCR 2.612(B) permits a defendant to seek relief from a default judgment as long as the defendant did not have *actual* knowledge of the pending action.

Our conclusion is supported by the available caselaw and supplemental authority. In *Nat'l Car Rental v S & D Leasing, Inc*, 89 Mich App 364, 368; 280 NW2d 529 (1979), the Court of Appeals concluded that lack of actual notice was sufficient to satisfy the knowledge-in-fact requirement.[5] In support of its conclusion that

[5] In *Nat'l Car*, the Court of Appeals applied GCR 1963, 528.2, the predecessor of MCR 2.612(B). The language used in MCR 2.612(B) and GCR 1963, 528.2 is nearly identical. GCR 1963, 528.2 stated:

> Any defendant over whom personal jurisdiction was necessary and acquired but who did not in fact have knowledge of the pendency of the action may, at any time within 1 year after final judgment, enter his appearance, and if he shows reason justifying relief from the judgment and innocent third persons will not be

knowledge in fact is synonymous with actual knowledge, the Court of Appeals in *Nat'l Car* cited 3 Honigman & Hawkins, Michigan Court Rules Annotated (2d ed), p 180, which explained that "[t]he intent of [GCR 1963, 528.2] is that failure to receive *actual notice* is itself sufficient ground for relief from default judgment . . . ." (Emphasis added.) Notably, more recent supplemental authority also explains that failure to receive actual notice is sufficient to satisfy the knowledge-in-fact requirement of MCR 2.612(B). See 3 Longhofer, Michigan Court Rules Practice (5th ed), § 2612.8, p 505.

In this case, defendants did not have actual knowledge, or knowledge in fact, of the action pending against them because defendants were never personally served with a summons and complaint and stated in their affidavits[6] that they only became aware of the action

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prejudiced, the court may relieve him from the judgment, order, or proceedings as to which personal jurisdiction was necessary, on payment of such costs thereon or such creditors as the court deems just.

[6] Despite the trial court's refusal to consider defendants' affidavits as part of defendants' motion to set aside the default judgment under MCR 2.603(D)(1), it is proper for this Court to consider the affidavits as part of our analysis of MCR 2.612(B). To begin with, there is no requirement that an affidavit of meritorious defense be filed at all, let alone that it must be filed simultaneously with the motion for relief from judgment under MCR 2.612(B). Also, MCR 2.119(C)(1) permits a court to modify the period for service of affidavits "for good cause." In this case, good cause existed because defendants did not unreasonably delay production of the affidavits: the motion to set aside the judgment was filed in an emergency fashion only 4 days after defendants first learned of the judgment against them, and defendants provided affidavits at the hearing on their motion to set aside the judgment, which was held 10 days after the motion was filed. Moreover, Thomas was out of the state for work during the period between defendants' first notice of the judgment and the filing of the motion. Finally, defendants also provided more detailed affidavits with their motion for reconsideration of the trial court's order denying the motion to set aside the default judgment.

against them when personal property was seized from Thomas's and Ronald's homes on April 12, 2008. Also, during oral argument before this Court, plaintiff's counsel impliedly conceded that defendants did not have actual notice of plaintiff's action against defendants when he argued that constructive notice is sufficient to bar relief under MCR 2.612(B).

Finally, plaintiff's attempts to serve defendants were unlikely to provide defendants with actual knowledge of the action against them, even under the court rules permitting substituted service. Under MCR 2.105(I)(2), a motion requesting substituted service

> must set forth sufficient facts to show that process cannot be served under this rule and must state the defendant's address or last known address, or that no address of the defendant is known. If the name or present address of the defendant is unknown, the moving party must set forth facts showing diligent inquiry to ascertain it.

"A truly diligent search for an absentee defendant is absolutely necessary to supply a fair foundation for and legitimacy to the ordering of substituted service," *Krueger*, 410 Mich at 168, and substituted service "is not an automatic right," *id.* at 159. Further, even if a motion for substituted service is granted, MCR 2.105(I)(1) requires that the substituted service be "reasonably calculated to give the defendant actual notice of the proceedings and an opportunity to be heard." Thus, substituted service must be " 'reasonably certain to inform those affected,' " and "the means employed to notify interested parties must be more than a mere gesture; they must be means that one who actually desires to inform the interested parties might reasonably employ to accomplish actual notice." *Sidun v*

Therefore, we conclude that defendants' affidavits of meritorious defense may be considered as part of our application of MCR 2.612(B).

Wayne Co Treasurer, 481 Mich 503, 509-510; 751 NW2d 453 (2008), quoting *Mullane*, 339 US at 315.

In this case, even assuming that plaintiff's attempt to personally serve defendants satisfied the diligent-inquiry requirement for seeking substituted service, the method of substituted service used was inadequate to provide defendants with *actual* knowledge of the action against them. Three of the trial court's four requirements involved mailing service to the address that the trial court and plaintiff already knew was no longer a current address for defendants. And the trial court's fourth requirement, publishing a copy of the order in a Monroe County newspaper, was also unlikely to succeed given the significant limitations of publication alone as a successful form of providing any notice, let alone actual notice. See *Dow v Michigan*, 396 Mich 192, 207, 210; 240 NW2d 450 (1976) (stating that publication is unlikely to provide notice), and *Mullane*, 339 US at 315-317 (stating that publication alone is not a reliable means of providing notice). On the other hand, we have previously concluded that when "the specific whereabouts of a person is unknown, service of process by publication may be the most practicable and adequate method of service available." *Krueger*, 410 Mich at 166; see, also, *Sidun*, 481 Mich at 510-512 (discussing *Mullane*, 339 US 306, and *Jones v Flowers*, 547 US 220; 126 S Ct 1708; 164 L Ed 2d 415 [2006], and noting that, depending on any "unique information" about the intended recipient and the specific circumstances and conditions of the case, service by publication may be constitutionally sufficient with regard to parties whose addresses are unknown). Thus, it cannot be said with certainty that plaintiff's efforts were insufficient to provide constructive knowledge that passed constitutional muster. But in this case, publication in a Monroe County newspaper was particularly unlikely to provide

defendants with *actual* knowledge of the action against them, given that defendants resided in Wayne County and performed the work in Monroe County in 2004 at the latest and that the advertised notice was not published in the newspaper until 2007.[7]

Thus, although plaintiff's efforts may have been adequate to satisfy the requirements for granting a motion for substituted service and the subsequent substituted service may have been enough to provide defendants with sufficient *constructive* knowledge of the action against them to satisfy MCR 2.105(I)(1), we conclude that plaintiff's efforts were inadequate to provide defendants with *actual* knowledge as required by MCR 2.612(B). Thus, we conclude that defendants satisfied this requirement for relief from the default judgment under MCR 2.612(B).

C. APPEARANCE WITHIN ONE YEAR AFTER FINAL JUDGMENT

Next, under MCR 2.612(B), defendants must have entered an appearance within one year after the final judgment. A default judgment is a final judgment. *Allied Electric Supply Co, Inc v Tenaglia*, 461 Mich 285, 288; 602 NW2d 572 (1999).[8] In this case, the default judgment against the defendants was entered on Octo-

[7] Although MCR 2.106(D)(1) requires that notice be published in a newspaper in the county where the defendant resides, publication in the Monroe County newspaper arguably satisfied that requirement with respect to Richco despite the fact that Richco was registered in Wayne County because when a corporation does not maintain its registered office, the corporation is "deemed to have a place of residence in the county where it exercises its corporate powers and transacts its business." *Flewelling v Prima Oil Co*, 291 Mich 281, 285; 289 NW 160 (1939). But because Ronald and Thomas are not corporations, and both lived in Wayne County, it is unlikely that publication in Monroe County was sufficient to provide actual notice to the individual defendants.

[8] Although the two dissenting justices in *Allied Electric*, 461 Mich at 291-292 (MARILYN KELLY, J., dissenting), continue to adhere to their

ber 10, 2007, when the trial court granted plaintiff's motion and signed the default judgment. On April 16, 2008, defense counsel made a special appearance and filed an emergency motion to set aside the default judgment. On April 22, 2008, the trial court held a hearing on defendants' motion. Thus, defendants made an appearance well within one year after the default judgment.

D. REASON JUSTIFYING RELIEF FROM THE JUDGMENT

Defendants also must show "reason justifying relief from the judgment . . . ." MCR 2.612(B). This Court has not previously considered what is required to justify relief in the context of this court rule. However, it is clear that a defendant seeking relief under MCR 2.612(B) need not show mistake, inadvertence, surprise, excusable neglect, newly discovered evidence, fraud, misrepresentation, or other misconduct of an adverse party because MCR 2.612(C) provides for relief from a judgment on those grounds. Indeed, MCR 2.612(C)(3) expressly states that subrule (C) "does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding; [or] to grant relief to a defendant not actually personally notified as provided in subrule (B) . . . ."

In one of the few published opinions applying either MCR 2.612(B) or its predecessor, GCR 1963, 528.2, the Court of Appeals in *Nat'l Car*, 89 Mich App at 368-369, relied on Honigman & Hawkins, p 180, to provide further clarification of the requirement of a "reason justifying relief" and concluded that a defendant must only show that it did not have actual notice of the action and that a meritorious defense to the action exists.

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position in that case, the disagreement between the majority and dissenting positions in *Allied Electric* is of no moment in this case.

Nat'l Car's conclusion is further supported by Longhofer, § 2612.8, p 505, which explains that

> [t]he requirement of showing "reason justifying relief" was intended substantially to restate the requirement of "showing a meritorious defense" applied in connection with setting aside default judgments. . . . [F]ailure to receive actual notice is itself sufficient ground for relief of default judgment, if the defendant can show that he or she has a meritorious defense . . . .

This interpretation of what is required to satisfy MCR 2.612(B) is consistent with the other court rules addressing relief from a default judgment. Under MCR 2.603(D)(1), a party seeking to set aside a default judgment must satisfy two separate and distinct requirements: (1) good cause for the failure to respond to the complaint and (2) a meritorious defense. *Alken-Ziegler*, 461 Mich at 229. However, MCR 2.603(D) states twice that MCR 2.612 provides an exception to its requirements for setting aside a default judgment. MCR 2.603(D)(2) ("Except as provided in MCR 2.612 . . . ."); MCR 2.603(D)(3) ("In addition, the court may set aside a default and a default judgment in accordance with MCR 2.612."). Thus, we conclude that a defendant may satisfy the requirement of a "reason justifying relief from the judgment" by showing that he or she (1) did not have actual notice of the action and (2) has a meritorious defense.

In this case, as previously explained, defendants did not have actual notice of the action. See part III(B). Defendants have also presented facts and arguments showing meritorious defenses to plaintiff's breach of contract and fraud claims sufficient to justify relief from the default judgment.

By forcefully contesting the damages awarded to plaintiff, defendants have presented facts showing a

meritorious defense to plaintiff's contract claim sufficient to justify relief from the judgment under MCR 2.612(B). "In actions for breach of contract, . . . in order to recover substantial damages the plaintiff must offer evidence from which the loss can be computed with reasonable certainty." *Vandenberg v Slagh*, 150 Mich 225, 229; 114 NW 72 (1907). In this case, the only support for the contract damages award of more than $370,000 was the testimony of a single witness who was employed by plaintiff. According to the record, that hearing was conducted over the course of six minutes, and no documentary evidence supporting the witness's testimony regarding the contract damages was introduced. Furthermore, the witness provided no support for the award of contractual interest, prejudgment interest, attorney fees, or costs. Rather, the only support for those damages was the statements of plaintiff's counsel on the record. Indeed, plaintiff's counsel conceded at oral argument before this Court that "[t]here was no documentary evidence presented to the trial court . . . ." In fact, the only explanation plaintiff's counsel offered to support plaintiff's claim for contractal interest in this oral contract case was that it was his "understanding . . . that the contract interest was basically agreed upon by the parties . . . ." The documentary evidence in the record supporting the damages award is insufficient to allow calculation of the damages with reasonable certainty and, thus, the individual and corporate defendants in this case have a meritorious defense to plaintiff's breach of contract claim.

Defendants have also noted several fundamental deficiencies in plaintiff's fraud claim that constitute a meritorious defense to those claims. Generally, in order to establish an actionable fraud claim, a plaintiff must show

> (1) [t]hat defendant made a material representation; (2) that it was false; (3) that when he made it he knew it was false, or made it recklessly, without any knowledge of its truth and as a positive assertion; (4) that he made it with the intention that it should be acted upon by plaintiff; (5) that plaintiff acted in reliance upon it; and (6) that he thereby suffered injury. [*Scott v Harper Recreation, Inc*, 444 Mich 441, 446 n 3; 506 NW2d 857 (1993) (quotation marks and citations omitted).]

Furthermore, fraud requires a misrepresentation about the past or present. *Hi-Way Motor Co v Int'l Harvester*, 398 Mich 330, 336, 339; 247 NW2d 813 (1976). Finally, MCR 2.112(B)(1) requires that fraud allegations be stated with particularity.

We conclude that defendants have presented sufficient facts showing a meritorious defense against plaintiff's fraud allegations given that plaintiff may not have stated its fraud claim with particularity under MCR 2.112(B)(1) because plaintiff did not allege in its complaint that defendants made a misrepresentation about the past or the present. Instead, the support for plaintiff's fraud allegation addressed only what defendants "would" do in the future. Furthermore, plaintiff's complaint only referred to Thomas's and Ronald's conduct; therefore, it appears that there may be no basis for a fraud claim against defendant Richco. In addition, defendants' argument that plaintiff's fraud allegations are merely mislabeled contract claims also represents a meritorious defense to the fraud claim because a plaintiff generally cannot maintain an action in tort for nonperformance of a contract. *Ferrett v Gen Motors Corp*, 438 Mich 235, 242; 475 NW2d 243 (1991). Finally, defendants have presented an argument representing a meritorious defense to plaintiff's claim that defendants fraudulently filed a construction lien on plain-

tiff's property. Defendants argue that they filed the lien in accordance with the applicable laws only after plaintiff refused to pay them for the work that defendants had performed. Therefore, we conclude that defendants have presented facts and arguments representing meritorious defenses sufficient to satisfy the requirement of MCR 2.612(B) that the defendant show a reason justifying relief from the judgment.

E. PREJUDICE TO THIRD PARTIES

Finally, defendants must show that "innocent third persons will not be prejudiced" if the default judgment is set aside. MCR 2.612(B). Because this case involves a contract dispute and all the parties to the contract were also parties to this action, it appears that no third parties would be prejudiced if the default judgment were to be set aside. Also, there is no evidence in the record that any third parties have an interest in this case. Thus, we conclude that this requirement is met.

IV. CONCLUSION

We hold that the trial court abused its discretion when it concluded that defendants were personally notified of the default judgment against them. We also hold that defendants are entitled to relief from the default judgment under MCR 2.612(B) because defendants satisfied each of the five elements within that court rule. Thus, we reverse and remand the case to the trial court for further proceedings consistent with this opinion.

YOUNG, C.J., and MARILYN KELLY, MARKMAN, MARY BETH KELLY, and ZAHRA, JJ., concurred with CAVANAGH, J.

MARILYN KELLY, J. (*concurring*). I concur fully with the majority opinion. I would explicitly instruct trial courts

that substituted service should not be permitted in cases like this one absent a showing that counsel made reasonable use of Internet search tools. I would add such a requirement by amending MCR 2.105(I).

In 2011, electronic technology has greatly improved the likelihood of locating a defendant. How can someone establish that he or she has made a diligent but unsuccessful effort to locate another party unless, at a minimum, a cursory Internet search can be demonstrated?

This case provides an apt illustration. In part by executing an Internet search, plaintiff was able to locate defendants in relatively short order after the default judgment was entered. Defendants demonstrated that a five-minute Google search for the individual defendants, even with the limited information available to plaintiff, would have led to their longtime home addresses.

With these observations, I join the majority's opinion.

HATHAWAY, J. (*concurring*). I agree with the majority that the trial court abused its discretion by failing to set aside the default judgment because defendants were entitled to relief from the judgment under MCR 2.612(B). The majority opinion "assume[s] arguendo" that personal jurisdiction was acquired over defendants.[1] I write separately because I do not believe that a court can properly determine whether defendants are entitled to relief under MCR 2.612(B) without first establishing that personal jurisdiction was in fact acquired over the defendants.

MCR 2.612(B) provides:

> *A defendant over whom personal jurisdiction was necessary and acquired*, but who did not in fact have knowledge

[1] *Ante* at 275.

> of the pendency of the action, may enter an appearance within 1 year after final judgment, and if the defendant shows reason justifying relief from the judgment and innocent third persons will not be prejudiced, *the court may relieve the defendant from the judgment, order, or proceedings for which personal jurisdiction was necessary*, on payment of costs or on conditions the court deems just. [Emphasis added.]

The language of the rule is clear. In order to afford relief under MCR 2.612(B), the first issue that must be decided is whether personal jurisdiction was acquired over the defendant. If a court determines that personal jurisdiction was necessary and acquired, the court may provide relief, assuming the additional requirements of the rule are met. If the court determines that personal jurisdiction was not acquired, a party is not entitled to relief under MCR 2.612(B); rather, the judgment is void and the party may seek relief under MCR 2.612(C)(1)(d). The treatise Michigan Court Rules Practice explains:

> MCR 2.612(B) does not apply to cases in which the court lacked personal jurisdiction over the defendant, but such jurisdiction was required for entry of a valid judgment. In those cases the judgment is void and relief may be obtained at any time under MCR 2.612(C)(1)(d). [3 Longhofer, Michigan Court Rules Practice (5th ed), § 2612.8, p 505.]

In this case, the facts as set forth in the majority opinion demonstrate that plaintiff made diligent efforts to locate and serve defendants. When plaintiff was unable to effectuate service, it properly applied to the trial court for substituted service, which the trial court appropriately allowed.[2] The trial court's order allowing for substituted service was in accordance with the well-established procedures set forth in the court rules.[3]

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[2] MCR 2.105(I).

[3] *Id.*; MCR 2.106.

Thus, substituted service on defendants was effectuated in accordance with the court rules.

Due process requires that service of process be reasonably calculated under the circumstances to provide the defendant with notice of the lawsuit.[4] However, due process does not require that actual notice be given in every case; instead, constructive notice is permitted.[5] The Court of Appeals correctly noted that because "the court rules pertaining to service of process are intended to satisfy due process requirements, a party who serves process consistently with those rules will, generally, comport with due process requirements. See MCR 2.105(J)."[6] There is nothing in the record to indicate that these defendants were not afforded due process. Accordingly, I would specifically hold that personal jurisdiction was in fact acquired over defendants, thus allowing the trial court to consider providing relief under MCR 2.612(B).

In this case, all the requirements of MCR 2.612(B) had been met. Defendants' motion was filed within one year of the judgment, defendants did not in fact have knowledge of the pendency of the action, defendants have shown reasons justifying relief from the judgment, and no innocent third persons will be prejudiced. Thus, the trial court abused its discretion by failing to set aside the default judgment, and defendants are entitled to relief. Therefore, I agree with the majority that this matter should be remanded to the trial court for further proceedings.

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[4] See *Krueger v Williams*, 410 Mich 144, 156; 300 NW2d 910 (1981).

[5] *Id*.

[6] *Lawrence M Clarke, Inc v Richco Constr, Inc*, unpublished opinion per curiam of the Court of Appeals, issued November 17, 2009 (Docket No. 285567), p 3.

PEOPLE v LEE

Docket No. 141570. Argued April 5, 2011 (Calendar No. 2). Decided June 30, 2011.

Kent A. Lee pleaded no contest in the Allegan Circuit Court to a charge of third-degree child abuse following an incident in which he flicked the penis of a child in his care with his finger to get the child's attention. At sentencing, the prosecution requested that defendant be required to register as a sex offender under the Sex Offenders Registration Act (SORA), MCL 28.721 *et seq*., specifically, the catchall provision of MCL 28.722(e)(*xi*), which requires registration for sexual offenses not expressly listed in SORA. In support of the request, the prosecutor stated that defendant had committed additional acts against the victim that were not referred to in the record. The court, Harry A. Beach, J., concluded that registration was not required on the basis of the facts in the record, but left open the possibility that the prosecution could set the matter for an evidentiary hearing to determine whether defendant should be required to register under SORA. Twenty months after the sentencing, the prosecution moved to require defendant to register. By the time of the hearing, Judge Beach had retired. At the evidentiary hearing, defendant admitted that he was frustrated when the child refused to put his pajamas on following a bath, and he acknowledged that he flicked the child's penis to get him to cooperate. The prosecution did not present any evidence supporting its previous assertion that defendant had also rubbed the child's penis and given him candy after the flicking incident. The court, William A. Baillargeon, J., ordered defendant to register as a sex offender. The Court of Appeals denied defendant's application for leave to appeal in an unpublished order, entered April 18, 2008 (Docket No. 283778). In lieu of granting defendant's application for leave to appeal, the Supreme Court remanded the case to the Court of Appeals for consideration as on leave granted. 485 Mich 914 (2009). On remand, the Court of Appeals, OWENS, P.J., and O'CONNELL and TALBOT, JJ., affirmed. 288 Mich App 739 (2010). The Supreme Court granted defendant's application for leave to appeal. 488 Mich 953 (2010).

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

A trial court must satisfy the requirements under MCL 28.724(5) and, for crimes falling within the catchall provision, MCL 769.1(13) before imposing sentence in order to properly require a defendant to register under the Sex Offenders Registration Act.

1. SORA specifies listed offenses for which a defendant must register as a sex offender. Also included as a listed offense under MCL 28.722(e)(*xi*) is a crime that by its nature constitutes a sexual offense against an individual less than 18 years of age. The trial court must make that determination on the record under MCL 769.1(13).

2. For convictions of listed offenses after October 1, 1995, MCL 28.724(5) requires the following with regard to registration procedures: (1) the defendant must register before sentencing, (2) the probation officer or the family division of the circuit court must give the defendant the registration form after the defendant is convicted and must explain the defendant's duties under SORA, and (3) the court must not impose sentence until it determines that the defendant's registration was forwarded to the state police as required under MCL 28.726. Additionally, under MCL 769.1(13), for listed offenses falling within the catchall provision, the court must include the determination that the crime is a listed offense, for which registration was therefore required, in the judgment of sentence. The trial court failed to comply with these requirements.

3. The Court of Appeals erred when it concluded that the trial court did not commit procedural errors. No authority supported the Court of Appeals' reasoning that because defendant remained on probation, the trial court retained jurisdiction over defendant and could order him to register under SORA 20 months after sentencing. A postsentencing hearing to determine whether registration is required violates the statutory registration procedures. To the extent that *People v Meyers*, 250 Mich App 637 (2002), suggested that a trial court may require registration under SORA after sentencing, it is overruled. Because the trial court in this case failed to comply with the statutory requirements for registration under SORA, its decision mandating registration was erroneous.

4. As a result of the trial court's procedural errors, defendant's sentence may have been invalid. However, even if the prosecution's motion to require registration under SORA was a motion under MCR 6.429(A) to correct an invalid sentence, the motion was untimely under MCR 6.429(B)(3), and the trial court should have denied it.

5. Judge Baillargeon's conclusion that the information used to support defendant's plea was sufficient to require registration under SORA directly conflicted with Judge Beach's previous determination that the information used to support the plea did not support the prosecution's request for registration. Judge Baillargeon thus improperly overruled Judge Beach's previous decision. Judge Beach's findings should have been afforded substantial deference in accordance with the general rule favoring sentencing by the judge who accepts the plea.

Court of Appeals judgment reversed and trial court order requiring registration vacated.

CRIMINAL LAW — SEX OFFENDERS REGISTRATION ACT — REGISTRATION PROCEDURES.

The Sex Offenders Registration Act (SORA) requires the following with regard to registration of defendants convicted of listed offenses after October 1, 1995: (1) the defendant must register before sentencing, (2) the probation officer or the family division of the circuit court must give the defendant the registration form after the defendant is convicted and must explain the defendant's duties under SORA, (3) the court must not impose sentence until it determines that the defendant's registration was properly forwarded to the state police, and (4) for a crime that the court determines on the record is by its nature a sexual offense against an individual less than 18 years of age and therefore is a listed offense under the SORA catchall provision, the court must include that determination in the judgment of sentence (MCL 28.722[e][*xi*], MCL 28.724[5], MCL 28.726, MCL 769.1[13]).

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Frederick Anderson*, Prosecuting Attorney, *Judy Hughes Astle*, Assistant Prosecuting Attorney, and *Aaron J. Mead*, Special Assistant Prosecuting Attorney, for the people.

Cunningham Dalman, P.C. (by *David M. Zessin*), for defendant.

CAVANAGH, J. In this case, we hold that the trial court erred when it required defendant to register as a sex offender under the Sex Offenders Registration Act (SORA) 20 months after defendant had been sen-

tenced.[1] Accordingly, we reverse the judgment of the Court of Appeals, which had affirmed the trial court's decision to require defendant to register under SORA.

I. FACTS AND PROCEDURAL HISTORY

On August 6, 2005, defendant and his wife agreed to babysit their neighbors' two boys. Defendant prepared the children for bedtime by bathing them. Defendant's son and the older neighbor boy went to another room after getting dressed for bed. The younger neighbor boy, three-year-old JW, was uncooperative as defendant attempted to diaper and dress him. According to defendant, he used his finger to flick JW's penis in an effort to get his attention. Defendant flicked JW's penis twice because JW did not respond to the first flick. JW cried after the second flick.

Defendant was charged with second-degree criminal sexual conduct and second-degree child abuse with sentence enhancement as a fourth-offense habitual offender.[2] On January 27, 2006, defendant pleaded *nolo contendere* to third-degree child abuse as a second-offense habitual offender. MCL 750.136b(5); MCL 769.10. The parties agreed that the trial court could use the police report as the factual basis for the plea, and, at the plea hearing, the trial court quoted briefly from the police report.

At sentencing on March 17, 2006, the prosecution requested that defendant be required to register as a

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[1] We acknowledge that the Legislature amended various provisions of SORA effective July 1, 2011. 2011 PA 17. Because the trial court decided the relevant issues before July 1, 2011, we analyze this case under the statutory provisions in effect when the case was decided by the trial court.

[2] None of defendant's prior convictions involved criminal sexual conduct.

sex offender under SORA's catchall provision, MCL 28.722(e)(*xi*). In support of the registration request, the prosecution recited statements from the victim advocate that defendant had rubbed JW's penis and given him candy after the flicking incident. Defendant objected, and Allegan Circuit Court Judge Harry A. Beach noted that the prosecution's supporting information was not included in the record. Furthermore, Judge Beach stated that defendant's crime was "a rather abusive assault" but not a "sex act" and concluded that registration under SORA was not appropriate in light of the facts in the record. Thus, Judge Beach did not require defendant to register under SORA, but left the question open, subject to the prosecution's setting a hearing to take testimony regarding whether defendant's conduct required registration. Judge Beach stated that the court was retaining jurisdiction for that purpose but issued a judgment of sentence that did not require registration.

Approximately 20 months after the sentencing hearing, the prosecution moved for entry of an order requiring defendant to register under SORA. Defendant objected, arguing that the procedure was improper. A hearing on the prosecution's motion was scheduled before Judge William A. Baillargeon because Judge Beach had retired. At the December 13, 2007, hearing, JW's father testified that he had had three conversations with defendant and that defendant had stated that he had been "bullying" JW, but had not explained what he meant by "bullying." Defendant testified that he was deeply sorry for his conduct and that he had flicked JW's penis in a reaction to JW's uncooperativeness. He explained that he used the term "bullying" to describe a grown man inflicting pain on a small boy. Defendant testified that he had not been disciplining JW in the sense that he had warned him that his penis

would be flicked if he did not behave and further denied that his actions were intended to injure or humiliate JW. Finally, defendant stated that he had been frustrated when the incident occurred but not angry. No testimony or evidence was presented in support of the prosecution's prior assertions at sentencing that defendant had rubbed JW's penis and given JW candy after the flicking.

Judge Baillargeon ruled that defendant must register under SORA, stating that there was no procedural bar to granting the prosecution's motion because Judge Beach had reserved a decision on the SORA issue. Also, Judge Baillargeon stated that the information used to support the plea was sufficient to show that defendant's act was "certainly something that would be envisioned by the law and I think that by itself would constitute the registration that the People seek." Finally, Judge Baillargeon concluded that the testimony from the evidentiary hearing supported his decision to require registration under SORA because the discussion about "bullying" rather than disciplining "underlies and bolsters" the registration requirement.

The Court of Appeals denied defendant's application for leave to appeal, but this Court remanded the case to the Court of Appeals for consideration as on leave granted. *People v Lee*, 485 Mich 914 (2009). On remand, the Court of Appeals affirmed Judge Baillargeon's decision to require registration under SORA. *People v Lee*, 288 Mich App 739; 794 NW2d 862 (2010). The Court of Appeals determined that there was no procedural bar to requiring registration, in part because registration may be imposed at any time while the trial court has jurisdiction over a defendant. The Court of Appeals concluded that because defendant was still on probation, the trial court retained jurisdiction, and, thus,

Judge Baillargeon's decision to require registration under SORA was proper. *Id*. at 744-745. This Court granted defendant's application for leave to appeal. *People v Lee*, 488 Mich 953 (2010).

II. STANDARD OF REVIEW

This Court reviews de novo lower courts' interpretations and applications of statutes and court rules. *Estes v Titus*, 481 Mich 573, 578-579; 751 NW2d 493 (2008); *Pellegrino v AMPCO Sys Parking*, 486 Mich 330, 338; 785 NW2d 45 (2010).

III. ANALYSIS

Under MCL 28.723(1)(a), a defendant must register as a sex offender if the defendant is convicted of a specified "listed offense" as defined in MCL 28.722(e)(*i*) through (*x*) and (*xii*) through (*xiv*). Defendant's crime in this case, third-degree child abuse, is not a specified listed offense. Therefore, if defendant is to be required to register, it must be under SORA's catchall provision, MCL 28.722(e)(*xi*), which requires registration for a "violation of a law of this state or a local ordinance of a municipality that by its nature constitutes a sexual offense against an individual who is less than 18 years of age." With regard to applying the catchall provision, MCL 769.1(13) explains that

> [i]f the defendant is sentenced for an offense other than a listed offense as defined in section 2(d)(*i*) to (*ix*) and (*xi*) to (*xiii*)[3] of the sex offenders registration act, 1994 PA 295,

[3] "[S]ection 2" refers to MCL 28.722. MCL 28.722 was amended by 2002 PA 542, effective October 1, 2002, but the cross-reference in MCL 769.1(13) was not updated to reflect the fact that the applicable provisions in MCL 28.722 were relettered as subdivision (e), rather than subdivision (d), and that the catchall provision was renumbered as subparagraph (*xi*), rather than subparagraph (*x*).

> MCL 28.722, the court shall determine if the offense is a violation of a law of this state or a local ordinance of a municipality of this state that by its nature constitutes a sexual offense against an individual who is less than 18 years of age. If so, the conviction is for a listed offense as defined in section 2(d)(*x*) of the sex offenders registration act, 1994 PA 295, MCL 28.722, and the court shall include the basis for that determination on the record and include the determination in the judgment of sentence.

Thus, if a defendant's crime falls under the catchall provision, MCL 28.722(e)(*xi*), under MCL 769.1(13), the crime is a listed offense, requiring registration under SORA.[4] In turn, for convictions of listed offenses after October 1, 1995, MCL 28.724(5) provides the following with regard to SORA's registration procedures: (1) the defendant "shall register before sentencing," (2) "[t]he probation officer or the family division of circuit court shall give the individual the registration form after the individual is convicted" and explain the individual's duties under SORA, and (3) "[t]he court shall not impose sentence . . . until it determines that the individual's registration was forwarded to the department [of state police] as required under [MCL 28.726]." Finally, for crimes falling under the catchall provision, MCL 769.1(13) adds additional procedural requirements regarding registration under SORA, including that the court must include the determination that the crime is a listed offense under the catchall provision, for which registration was therefore required, "in the judgment of sentence."

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[4] Because we conclude later in this opinion that the trial court improperly imposed the registration requirement after sentencing and, thus, erred when it granted the prosecution's postsentencing motion requesting that the trial court require defendant to register, we need not determine whether, on the facts of this particular case, defendant's crime "by its nature constitutes a sexual offense" sufficient to satisfy SORA's catchall provision. MCL 28.722(e)(*xi*). As a result, this opinion should not be interpreted to hold that defendant's conduct in this case was or was not a sexual offense.

In this case, the only issue we reach is the effect of the trial court's failure to include a definitive determination of defendant's registration status in the judgment of sentence and the subsequent 20-month delay between sentencing and the determination that defendant must register. We hold that the trial court's decision mandating registration was erroneous because the court failed to comply with the statutory requirements.

To begin with, we reject the Court of Appeals' conclusion that the trial court "did not commit procedural error" when it ordered defendant to register under SORA 20 months after sentencing. The Court of Appeals reasoned that the trial court retained jurisdiction over defendant because defendant remained on probation. *Lee*, 288 Mich App at 744-745. However, the Court of Appeals cited no authority in support of its conclusion and, indeed, none exists.

Furthermore, it is clear that the trial court committed multiple procedural errors in this case. First, the trial court did not require defendant to register under SORA "before sentencing" as required by MCL 28.724(5). Second, because the trial court did not impose the registration requirement until long after sentencing had occurred, the trial court did not ensure completion of the second requirement of MCL 28.724(5), and, thus, both the probation officer and the family division of the circuit court failed to "give [defendant] the registration form after [defendant was] convicted" and explain his duties under SORA. Third, when the trial court imposed defendant's sentence without a final SORA determination, it ignored the clear directive of MCL 28.724(5) that it "*shall not* impose sentence . . . until it determines that the individual's registration was forwarded to the department

[of state police] as required under [MCL 28.726]." (Emphasis added.) Finally, if defendant's conviction fell under the catchall provision, the trial court also failed to comply with MCL 769.1(13) when it entered the judgment of sentence without including in the judgment its determination that the crime was a listed offense for which registration was required. Although the trial court indicated in the judgment of sentence that a hearing was to be set regarding defendant's possible registration as a sex offender, that is not a determination regarding registration. Furthermore, there is no support in SORA for permitting a postsentencing hearing to make a determination regarding registration. Indeed, such a hearing is a clear violation of the registration procedures established by MCL 28.724(5).[5]

As a result of these procedural errors by the trial court, the sentence imposed in the March 20, 2006, judgment of sentence may have been invalid. See *People v Whalen*, 412 Mich 166, 170; 312 NW2d 638 (1981) (recognizing that sentences that "do not comply with essential procedural requirements" are invalid). Thus, the prosecution could have sought to correct the sentence because, under MCR 6.429(A), "[a] motion to correct an invalid sentence may be filed by either party."[6]

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[5] To the extent that *People v Meyers*, 250 Mich App 637, 640; 649 NW2d 123 (2002), implicitly endorsed such a delay when it affirmed the trial court's decision to require registration under SORA 23 days after sentencing, it is overruled.

[6] Because third-degree child abuse is not a specified listed offense requiring registration under SORA, and Judge Beach determined that, on the record available at sentencing, defendant's crime did not require registration because the facts did not satisfy the catchall provision, arguably the sentence imposed in the judgment of sentence, without a registration requirement, was valid. And, notably, MCR 6.429(A) states that a "court may *not* modify a valid sentence after it

In this case, however, the time limits to bring a motion to correct an invalid sentence were long past. MCR 6.429(B) sets the time limits for a motion to correct an invalid sentence, and that court rule applies to prosecutors and defendants alike because the statute governing appeals by the prosecution, MCL 770.12, does not indicate that the prosecution is entitled to seek relief beyond the time provided in the court rules. Because defendant entered a plea in this case, he could only appeal by leave of the Court of Appeals. See MCR 6.302(B)(5). Therefore, in this case, MCR 6.429(B)(3) required that a motion to correct the sentence be brought "within 6 months of entry of the judgment of conviction and sentence." But the prosecution's motion to require registration was filed *20 months* after the judgment of sentence entered. Thus, even if the sentence imposed in the March 20, 2006, judgment of sentence was invalid because of the procedural errors relating to registration under SORA, the prosecution's motion was untimely under MCR 6.429(B)(3), and the trial court should have denied it.

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has been imposed except as provided by law." (Emphasis added.) See, also, *People v Barfield*, 411 Mich 700, 703; 311 NW2d 724 (1981) (stating that "a trial court cannot set aside a valid sentence and impose a new and different one, after the defendant has been remanded to jail to await the execution of the sentence") (quotation marks and citation omitted); *People v Miles*, 454 Mich 90, 96; 559 NW2d 299 (1997) ("[T]he authority of the court over a defendant typically ends when a valid sentence is pronounced . . . ."); and *People v Holder*, 483 Mich 168, 177; 767 NW2d 423 (2009) ("[I]f the original judgment of sentence was valid when entered, MCR 6.429[A] controls . . . ."). Therefore, arguably, the trial court should have rejected the prosecution's postsentencing motion to require defendant to register under SORA because the sentence imposed was valid and modification of a valid sentence is not permitted under MCR 6.429(A). But because we conclude that the prosecution was not entitled to have its postconviction motion considered even if the sentence imposed was invalid, we will assume, for purposes of this case, that the sentence was invalid.

Finally, it is notable that Judge Beach determined that registration under the catchall provision, MCL 28.722(e)(*xi*), was not proper on the record before the trial court at sentencing. Although Judge Beach erroneously permitted the prosecution to bring additional evidence at a postsentencing hearing, see MCL 28.724(5) and MCL 769.1(13), the prosecution failed to provide any new evidence at that hearing in support of its previous claim that defendant had rubbed JW's penis and given JW candy after the flicking incident. Thus, Judge Baillargeon's conclusion that the information used to support the plea alone was sufficient to require registration under SORA's catchall provision was in direct conflict with Judge Beach's previous determination that the information used to support the plea *did not* support the prosecution's request for registration. In accordance with the essence of the general rule favoring sentencing by the judge who accepts a plea,[7] Judge Beach's findings should have been afforded substantial deference. Indeed, in a case procedurally similar to this one, this Court stated that for a successor trial judge "[t]o sentence a prisoner to the penitentiary . . . when the [previous] trial judge has distinctly said he ought not to be so sentenced, is not supplying his omissions, but is overruling his decision." *Weaver v People*, 33 Mich 296, 298 (1876). Just as the successor judge in *Weaver* erred by overruling the predecessor judge's determination rather than merely

[7] See, e.g., *People v Pierce*, 158 Mich App 113, 115; 404 NW2d 230 (1987), citing *People v Clemons*, 407 Mich 939 (1979). This general rule recognizes that the judge who accepts a defendant's plea is in the best position to ensure that a defendant's sentence is "based upon the circumstances established at the time of the plea," *Pierce*, 158 Mich App at 115-116, so that, consistently with the "modern view of sentencing," the sentence imposed is "tailored to the particular circumstances of the case and the offender," *People v McFarlin*, 389 Mich 557, 574; 208 NW2d 504 (1973).

correcting an omission, Judge Baillargeon's determination regarding registration under SORA improperly overruled Judge Beach's previous decision in light of the prosecution's failure to provide any new evidence or support for its previous claim that defendant had rubbed JW's penis and given JW candy after the flicking incident.

IV. CONCLUSION

Under MCL 769.1(13) and MCL 28.724(5), a trial court must, before imposing a sentence, satisfy multiple requirements in order to properly require a defendant to register as a sex offender. Because the trial court in this case failed to satisfy those statutory requirements, its subsequent decision at a postsentencing hearing held 20 months after the sentence was entered to require registration was erroneous. Furthermore, the prosecution failed to bring a motion to correct the arguably invalid sentence within the time limit provided in MCR 6.429(B)(3). Accordingly, we reverse the judgment of the Court of Appeals and vacate the trial court's order requiring defendant to register under SORA.

YOUNG, C.J., and MARILYN KELLY, MARKMAN, HATHAWAY, MARY BETH KELLY, and ZAHRA, JJ., concurred with CAVANAGH, J.

PEOPLE v SLAUGHTER

Docket No. 141009. Argued January 20, 2011 (Calendar No. 8). Decided July 1, 2011.

Mark Slaughter was charged with manufacturing marijuana with the intent to deliver it, MCL 333.7401(2)(d)(*ii*), after a firefighter responding to a 911 call from defendant's townhouse complex entered defendant's basement and discovered several dozen marijuana plants in plain view. The 44th District Court, Daniel Sawicki, J., bound defendant over as charged, despite defendant's claim that the firefighter's warrantless entry had violated his Fourth Amendment right to be free from unreasonable searches. Defendant moved to suppress this evidence in the Oakland Circuit Court, and, after a hearing, the circuit court, Rae Lee Chabot, J., granted the motion. The Court of Appeals, BORRELLO and SHAPIRO, JJ. (METER, P.J., dissenting), affirmed the circuit court's ruling in an unpublished opinion per curiam, issued March 16, 2010 (Docket No. 287459), holding that although the exception to the Fourth Amendment's warrant requirement for police officers who are performing community-caretaking rather than investigative functions can apply to searches performed by firefighters to abate possible fire hazards, the circuit court had properly granted the motion to suppress the evidence because it was unclear whether the firefighter had acted reasonably by entering when he did. The Supreme Court granted the prosecution's application for leave to appeal. 486 Mich 1069 (2010).

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

The community-caretaking exception to the warrant requirement of the Fourth Amendment applies when a firefighter responding to an emergency call involving a threat to life or property enters a private residence to abate what he or she reasonably believes to be an imminent threat of fire inside and the entry is reasonable.

1. The Fourth Amendment of the United States Constitution and Const 1963, art 1, § 11, which provides protection coextensive with the Fourth Amendment, guarantee every person's right to be

free from unreasonable searches and seizures. Although the Fourth Amendment generally requires that a warrant be obtained before a residence can be entered, some types of warrantless searches are reasonable, including searches undertaken when police officers are acting out of concern for the safety of the general public and not to investigate a crime. The defining characteristic of these community-caretaking functions is that they are totally unrelated to an officer's criminal investigation duties. To determine whether a particular intrusion to perform a community-caretaking function was reasonable, a court must consider the reasons it was undertaken and the level of intrusion made while performing it.

2. The United States Supreme Court has held that the Fourth Amendment extends beyond the entry into a private dwelling by a law enforcement officer in search of evidence of a crime and that there is no diminution in a person's reasonable expectation of privacy or in the protection of the Fourth Amendment when the official conducting the search is a firefighter rather than a police officer. It follows that if police officers can avail themselves of an exception to the warrant requirement, firefighters can likewise avail themselves of an exception if the circumstances permit.

3. While official entries to investigate the cause of a fire generally must adhere to the warrant procedures of the Fourth Amendment, firefighters need not secure a warrant or consent before entering a burning structure to put out the fire. Once in a building for this purpose, firefighters may seize evidence of arson that is in plain view. To determine whether the community-caretaking exception applies to a firefighter's warrantless entry into a private residence, courts must analyze the reasonableness of the initial intrusion in light of the scope of the intrusion and the firefighter's purpose in entering the residence. If the purpose of a firefighter's initial entry is to abate an imminent threat of fire, then a warrantless entry is lawful under the Fourth Amendment as long as it is reasonable. Contrarily, if the purpose of a firefighter's entry is solely to investigate a crime, then a warrant is required unless a different exception to the warrant requirement applies.

4. Application of the community-caretaking exception does not provide firefighters with a blank check to enter private residences; rather, it only authorizes reasonable intrusions. Because community-caretaking functions are varied and performed for different reasons, reviewing courts must tailor their analysis to the specifics of a particular intrusion before determining whether it was reasonable. The privacy of the home stands at the very core of the Fourth Amendment's protections, and the threshold of reasonableness is at

its apex when a dwelling is entered to perform community-caretaking functions. To determine whether firefighters acted reasonably in entering an individual's home, a reviewing court must first consider the firefighters' basis for making the intrusion: whether, acting in good faith, they possessed specific and articulable facts that led them to the conclusion that their actions were necessary to abate an imminent threat of fire inside the private residence. Their belief in the necessity of their intrusion need not be ironclad, only reasonable. Courts must not engage in a hindsight determination that an entry was unreasonable simply because no imminent hazard actually existed; rather, courts must determine whether an entry was reasonable in light of the circumstances known to the firefighters at the time of entry. Next, courts should consider the scope of the entry, which must have been limited to the justification therefor and must not have extended beyond what was reasonably necessary to determine whether the imminent threat of fire existed inside the private residence. If that threat did exist, firefighters could remain in the building for a reasonable time to abate the hazard and to investigate its cause in order to prevent its recurrence. The fact that firefighters could have abated the fire hazard by less intrusive means does not, by itself, render the search unreasonable. Reviewing courts must consider whether the means and scope of entry were reasonable under the circumstances, not whether they were perfect.

5. In this case, the firefighter acted in good faith. There was no indication that his entry into defendant's residence was pretextual, and only upon entering defendant's basement to shut off the water did the firefighter see what appeared to be contraband in plain view. The report of water flowing into the basement from the other side of defendant's wall, which contained an electrical panel, constituted specific and articulable facts leading the firefighter to the conclusion that imminent action was necessary to abate the threat to persons or property inside the residence. The scope of the entry was also limited to the justification for it, that is, the extent of the entry and search was limited to the area that, given the available information, was the location of the hazard. It was there that the firefighter found, in plain view, the plants he believed to be contraband. Analyzing post hoc whether there were less intrusive means of abating the hazard would be inconsistent with the principles for assessing the reasonableness of an entry.

Reversed and remanded to the circuit court for entry of an order denying defendant's motion to suppress and further proceedings.

Justice MARILYN KELLY, joined by Justice CAVANAGH, dissenting, would have affirmed the judgment, but not the reasoning, of the

Court of Appeals and hold that the community-caretaking exception cannot justify a warrantless entry into a private residence and, thus, that firefighters and police officers may enter a private residence only pursuant to the emergency and emergency-aid exceptions to the warrant requirement of the Fourth Amendment. Because the prosecution in this case failed to establish that the firefighters reasonably believed that immediate entry into defendant's townhouse was necessary to address an emergency situation, she would hold that the circuit court properly granted defendant's motion to suppress.

1. SEARCHES AND SEIZURES — WARRANTLESS SEARCHES — COMMUNITY-CARETAKING EXCEPTION — FIREFIGHTERS.

The community-caretaking exception to the Fourth Amendment's warrant requirement applies when a firefighter responding to an emergency call involving a threat to life or property enters a private residence to abate what he or she reasonably believes to be an imminent threat of fire inside and not to perform an investigative function and the entry is reasonable (US Const, Am IV; Const 1963, art 1, § 11).

2. SEARCHES AND SEIZURES — WARRANTLESS SEARCHES — COMMUNITY-CARETAKING EXCEPTION — FIREFIGHTERS — REASONABLENESS OF SEARCH.

To determine whether firefighters acted reasonably in entering an individual's home pursuant to the community-caretaking exception to the Fourth Amendment's warrant requirement, a reviewing court must first consider whether, acting in good faith, the firefighters possessed specific and articulable facts at the time of entry that led them to the reasonable belief that their actions were necessary to abate an imminent threat of fire inside the private residence, and the court must not engage in a hindsight determination that an entry was unreasonable simply because no imminent hazard actually existed; next, the court should consider the scope of the entry, which must have been limited to the justification therefor and must not have extended beyond what was reasonably necessary to determine whether the imminent threat of fire existed inside the private residence; if the threat did exist, the firefighters could remain in the building for a reasonable time to abate the hazard and to investigate its cause in order to prevent its recurrence; the fact that the firefighters could have abated the fire hazard by less intrusive means does not itself render entry into a private residence unreasonable; rather, the court must consider whether the means and scope of entry were reasonable under the circumstances, not whether they were perfect (US Const, Am IV; Const 1963, art 1, § 11).

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Jessica R. Cooper*, Prosecuting Attorney, *John S. Pallas*, Chief, Appellate Division, and *Thomas R. Grden* and *Rae Ann Ruddy*, Assistant Prosecuting Attorneys, for the people.

Randall P. Upshaw for defendant.

Amicus Curiae:

Ron Schafer, *Kym L. Worthy*, and *Timothy A. Baughman* for the Prosecuting Attorneys Association of Michigan.

YOUNG, C.J. In this case, we are called upon to determine whether the community caretaking exception to the Fourth Amendment's requirement that a warrant be obtained before a residence can be entered applies to a first-response firefighter answering a 911 call and, if so, whether the firefighter's entry into defendant's residence was reasonable in the instant case. We conclude that the community caretaking exception applies to firefighters no less than to police officers when they are responding to emergency situations that threaten life or property. We also conclude that the firefighter's actions in this case were reasonable, thus satisfying the community caretaking exception to the warrant requirement. Accordingly, we reverse the decision of the circuit court and the Court of Appeals' judgment and remand this case to the circuit court for further proceedings consistent with this opinion.

I. FACTS AND PROCEDURAL HISTORY

Defendant, Mark Slaughter, resided in a townhouse in Royal Oak, Michigan.[1] In May 2007, defendant's

[1] Although one of the issues at defendant's preliminary examination concerned whether defendant actually resided at the Royal Oak town-

neighbor, Kathleen Tunner, saw water running down her basement wall and over her electrical box. She also heard water flowing behind that wall, which adjoined defendant's townhouse.[2] Tunner attempted to locate defendant by knocking on his door, but he was not home. She then called her townhouse management company in a further attempt to locate defendant. After this attempt failed, Tunner dialed 911. The city of Royal Oak dispatched several firefighters to the townhouse, including Lieutenant Michael Schunck. After consulting with Tunner about her emergency call, Schunck entered defendant's residence. When he went to the basement to shut off defendant's water and to assess whether any additional measures needed to be taken to prevent a fire, Schunck observed, in plain view, grow lights and several dozen plants that appeared to be marijuana. He then reported what he saw to the Royal Oak police.

The Royal Oak Police Department dispatched an officer to secure defendant's townhouse while another officer procured a search warrant. After entering defendant's townhouse, officers seized 48 marijuana plants, grow lights, a watering system, defendant's state identification card, books on marijuana horticulture, packaging material, and other drug paraphernalia.

Defendant was charged with manufacturing with the intent to deliver more than 20 but fewer than 200 marijuana plants.[3] The district court bound defendant over as charged, notwithstanding defendant's claims

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house, defendant admitted during his testimony at the suppression hearing that he had lived at the townhouse for "a year or two" before his arrest.

[2] Defendant's and Tunner's townhouses are adjoining units in a single structure containing approximately 12 individual units.

[3] MCL 333.7401(2)(d)(*ii*).

that the firefighter's entry into the townhouse violated his Fourth Amendment rights and that he did not exercise dominion and control over the seized marijuana plants.

Although defendant did not appeal the bindover decision, he subsequently filed a pretrial motion to suppress in the circuit court. After hearing testimony and oral argument, the court granted the motion in a written opinion and order. The circuit court concluded that Lieutenant Schunck "did not attempt to hear or see for himself what was causing the problem [that led Tunner to dial 911], nor did he attempt to verify the existence of running water in the wall prior to entering the defendant's home." The circuit court also observed that Schunck had indicated that "he would have entered the apartment even if he had shut off the water and/or electrical from the outside" because "he has to investigate the [911] calls to the fullest extent possible . . . ."

The circuit court applied this Court's decision in *People v Tyler*[4] and the United States Supreme Court's decision in *Camara v Muni Court of City & Co of San Francisco*[5] in concluding that firefighters are required to procure a warrant before entering a building "to prevent a fire from occurring . . . ." Furthermore, it relied on the fact that this Court's decision in *People v Davis*,[6] which articulated the community caretaking exception to the Fourth Amendment's warrant requirement, did not contain "anything related to the investigation of a possible fire hazard." Accordingly, the court ruled that the firefighters could not avail themselves of the community caretaking exception.

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[4] *People v Tyler*, 399 Mich 564; 250 NW2d 467 (1977), aff'd sub nom *Michigan v Tyler*, 436 US 499 (1978).

[5] *Camara v Muni Court of City & Co of San Francisco*, 387 US 523; 87 S Ct 1727; 18 L Ed 2d 930 (1967).

[6] *People v Davis*, 442 Mich 1; 497 NW2d 910 (1993).

The Court of Appeals affirmed the circuit court's ruling in a split, unpublished decision, albeit on alternative grounds.[7] First, the majority determined, contrary to the circuit court's decision, that the community caretaking exception can apply to searches performed by first-response firefighters to abate a possible fire hazard. However, the majority explained that "the record permits the conclusion that the firefighters were simply too quick to enter into defendant's unit and failed to investigate the complaint" before entering defendant's residence.[8] Thus, the majority concluded that "there are too many outstanding questions to conclude whether the firefighters acted reasonably" and, therefore, that the circuit court had properly granted the motion to suppress.[9]

The dissenting judge agreed with the majority that first-response firefighters can avail themselves of the community caretaking exception to the Fourth Amendment's warrant requirement. The dissenting judge, however, concluded that the firefighters had acted reasonably in the instant case, indicating that "[t]he firefighters were faced with a possible emergency situation and they needed to make quick judgments about what to do in order to avoid a potential fire."[10]

This Court granted the prosecutor's application for leave to appeal and ordered the parties to brief whether

> (1) the actions of firefighters may fall under the "community caretaker" exception to probable cause requirements; (2) the "emergency aid" aspect of the community caretaker exception applies in this case; and (3) the Court of Appeals

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[7] *People v Slaughter*, unpublished opinion per curiam of the Court of Appeals, issued March 16, 2010 (Docket No. 287459).

[8] *Id.* at 5.

[9] *Id.* at 6.

[10] *Id.* at 2-3 (METER, J., dissenting).

> erred when it held that the firefighters were first obligated to attempt to remedy the condition for which a neighbor called by using means that did not involve entry into the defendant's home.[11]

II. STANDARD OF REVIEW

A court's factual findings at a suppression hearing are reviewed for clear error, but the application of the underlying law—the Fourth Amendment of the United States Constitution and article 1, § 11 of the Michigan Constitution—is reviewed de novo.[12]

III. ANALYSIS

A. FOURTH AMENDMENT PRINCIPLES

The Fourth Amendment of the United States Constitution guarantees every person's right to be free from unreasonable searches and seizures and provides, in its entirety:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[13]

Similarly, article 1, § 11 of the Michigan Constitution provides, in relevant part:

> The person, houses, papers and possessions of every person shall be secure from unreasonable searches and seizures. No warrant to search any place or to seize any

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[11] *People v Slaughter*, 486 Mich 1069 (2010).

[12] *People v Williams*, 472 Mich 308, 313; 696 NW2d 636 (2005).

[13] The Fourth Amendment was incorporated to the states in *Mapp v Ohio*, 367 US 643; 81 S Ct 1684; 6 L Ed 2d 1081 (1961).

> person or things shall issue without describing them, nor without probable cause, supported by oath or affirmation.

This Court has ruled that the Michigan Constitution "is to be construed to provide the same protection as that secured by the Fourth Amendment, absent 'compelling reason' to impose a different interpretation."[14]

Although the entry into defendant's residence was warrantless, "[u]nder the common law and agreeably to the Constitution search may in many cases be legally made without a warrant. The Constitution does not forbid search, as some parties contend, but it does forbid unreasonable search."[15] While many warrantless searches are unreasonable pursuant to the warrant requirement,[16] the United States Supreme Court has articulated several instances in which warrantless searches are reasonable. These include searches of automobiles,[17] searches incident to contemporaneous lawful arrests,[18] inventory searches conducted according to established procedure,[19] searches conducted dur-

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[14] *People v Collins*, 438 Mich 8, 25; 475 NW2d 684 (1991), citing *People v Perlos*, 436 Mich 305; 462 NW2d 310 (1990), *People v Chapman*, 425 Mich 245; 387 NW2d 835 (1986), *People v Catania*, 427 Mich 447; 398 NW2d 343 (1986), *People v Smith*, 420 Mich 1, 23 n 16; 360 NW2d 841 (1984), and *People v Nash*, 418 Mich 196; 341 NW2d 439 (1983).

[15] *Carroll v United States*, 267 US 132, 146; 45 S Ct 280; 69 L Ed 543 (1925).

[16] See *Katz v United States*, 389 US 347, 357; 88 S Ct 507; 19 L Ed 2d 576 (1967).

[17] See *California v Carney*, 471 US 386; 105 S Ct 2066; 85 L Ed 2d 406 (1985).

[18] See *Chimel v California*, 395 US 752; 89 S Ct 2034; 23 L Ed 2d 685 (1969); *Maryland v Buie*, 494 US 325; 110 S Ct 1093; 108 L Ed 2d 276 (1990).

[19] See *South Dakota v Opperman*, 428 US 364; 96 S Ct 3092; 49 L Ed 2d 1000 (1976).

ing exigent circumstances,[20] and searches the police undertake as part of their "community caretaking" function.[21]

The instant case involves only the last circumstance listed—searches undertaken as part of a community caretaking function—and requires this Court to determine the scope of that community caretaking exception to the Fourth Amendment's warrant requirement. Because it is uncontested that the initial search of defendant's residence was warrantless, we must determine whether the community caretaking exception to the warrant requirement applies.

B. THE COMMUNITY CARETAKING EXCEPTION

The United States Supreme Court first recognized the community caretaking exception to the warrant requirement in *Cady v Dombrowski*, which involved the constitutionality of the search of the trunk of an out-of-town police officer's automobile.[22] The police officer was hospitalized after a serious automobile accident, and local police officers arriving on the scene of the accident directed that the injured officer's vehicle be towed to a private garage. Because the private garage was unsecured, local police sought to locate and safeguard the injured officer's service revolver. After failing to find the revolver on the officer's person or in the glove compartment of the vehicle, officers searched the

[20] See *Minnesota v Olson*, 495 US 91; 110 S Ct 1684; 109 L Ed 2d 85 (1990). The exigent circumstances exception to the warrant requirement is inapplicable to this case. "When the police act pursuant to the exigent circumstances exception, they are searching for evidence or perpetrators of a crime." *Davis*, 442 Mich at 24.

[21] See *Cady v Dombrowski*, 413 US 433; 93 S Ct 2523; 37 L Ed 2d 706 (1973).

[22] *Id*. at 435-437.

vehicle's trunk and discovered the revolver, along with evidence of a murder.[23]

Before addressing the legality of the search, the Court explained that police officers often perform certain duties independent of their duty to investigate crimes:

> Local police officers . . . frequently investigate vehicle accidents in which there is no claim of criminal liability and engage in what, for want of a better term, may be described as community caretaking functions, totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute.[24]

In considering the case before it, the *Cady* Court determined that the officers had acted not to investigate a crime, but out of "concern for the safety of the general public who might be endangered if an intruder removed a revolver from the trunk of the vehicle."[25] The Court concluded that searches conducted to further these community caretaking functions do not necessarily require a warrant in order to be reasonable. Once it had determined that the search was not conducted pursuant to an investigation, the Court analyzed the reasonableness of the search *within the scope of the officers' community caretaking functions*: the officers "were simply reacting to the effect of an accident—one of the recurring practical situations that results from the operation of motor vehicles and with which local police officers must deal every day."[26] In the end, the Court held that the warrantless search was a reasonable exercise of the officers' community caretaking

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[23] *Id.*

[24] *Id.* at 441.

[25] *Id.* at 447.

[26] *Id.* at 446.

functions and concluded that their search of the vehicle did not violate the Fourth Amendment:

> Where, as here, the trunk of an automobile, which the officer reasonably believed to contain a gun, was vulnerable to intrusion by vandals, we hold that the search was not "unreasonable" within the meaning of the Fourth and Fourteenth Amendments.[27]

This Court has recognized the community caretaking exception as applicable under Michigan law. In *People v Davis*, we explained:

> The police perform a variety of functions that are separate from their duties to investigate and solve crimes. These duties are sometimes categorized under the heading of "community caretaking" or "police caretaking" functions. When police, while performing one of these functions, enter into a protected area and discover evidence of a crime, this evidence is often admissible. . . .
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> [A]ccording to the United States Supreme Court, the defining characteristic of community caretaking functions is that they are totally unrelated to the criminal investigation duties of the police.
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> Federal and state courts have included a variety of police activities under the heading of community caretaking functions. Courts have held that impoundment of automobiles and inventory searches of them, as in *Cady*, responding to missing vehicle complaints, investigating noise complaints, and searching an unconscious person for identification are community caretaking functions.[28]

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[27] *Id.* at 448.

[28] *Davis*, 442 Mich at 20-23. Part of an officer's community caretaking function is the rendering of emergency aid to injured persons. This Court

Davis further explained that, because "[c]ommunity caretaking activities are varied and are performed for different reasons,"[29] not all conduct that falls within the police's community caretaking functions can be judged equally. Indeed, shortly after issuing the *Davis* decision, this Court listed several additional types of intrusions that courts have justified pursuant to the exercise of community caretaking functions:

> [C]ourts have included a multiplicity of police functions within the meaning of the community caretaking function, including entering an apartment to remove a former girlfriend following a domestic dispute, removing an intoxicated person from the street, entering an abandoned boat to ascertain ownership and the safety of the mariners, responding to a missing vehicle complaint, searching an unconscious person for identification, and responding to persons likely to be in need of emergency aid.[30]

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has concluded that, in entering a dwelling to render emergency aid to a person inside, "[an] officer must be motivated primarily by the 'perceived need to render aid or assistance' " and "may not do more than is reasonably necessary to determine whether a person is in need of assistance, and to provide that assistance." *City of Troy v Ohlinger*, 438 Mich 477, 484; 475 NW2d 54 (1991), quoting *State v Prober*, 98 Wis 2d 345, 365; 297 NW2d 1 (1980). This Court has further required entering officers to "possess specific and articulable facts that lead them to" the conclusion that someone inside "is in need of immediate aid." *Davis*, 442 Mich at 25-26. Proof of someone's needing assistance need not be "ironclad," only "reasonable." *Michigan v Fisher*, 558 US 45, ___; 130 S Ct 546, 549; 175 L Ed 2d 410, 414 (2009). While there is no evidence that the firefighters who entered defendant's residence possessed specific and articulable facts that led them to the conclusion that *someone inside* was in need of immediate aid, these principles are instructive in determining whether they believed imminent action was necessary to prevent a threat that placed persons and property in danger.

[29] *Davis*, 442 Mich at 25.

[30] *In re Forfeiture of $176,598*, 443 Mich 261, 273-274; 505 NW2d 201 (1993) (citations omitted). In that case, this Court "decline[d] to employ the community caretaking exception" because "[b]oth of the officers who entered the home testified that the purposes of the entry were to search for intruders and to secure the premises in an effort to thwart an

Accordingly, courts must consider the reasons that officers are undertaking their community caretaking functions, as well as "the level[] of intrusion the police make while performing these functions," when determining whether a particular intrusion to perform a community caretaking function is reasonable.[31] For instance, "a police inventory of a car is much less intrusive than a police entry into a dwelling."[32] This is because the privacy of the home stands " '[a]t the very core' "[33] of the Fourth Amendment and because "[i]n [no setting] is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home . . . ."[34] Thus, the threshold of reasonableness is at its apex when police enter a dwelling pursuant to their community caretaking functions.

C. FIREFIGHTERS AND THE COMMUNITY CARETAKING EXCEPTION

This Court asked the parties to brief whether the community caretaking exception to the warrant requirement applies to firefighters' actions. We conclude that the community caretaking exception to the warrant requirement applies when a firefighter, responding

attempted escape," not to undertake any of the listed community caretaking functions. *Id.* at 274-275. The case's discussion of community caretaking functions, while dicta, nevertheless illustrates that, contrary to the dissent's suggestion that the community caretaking exception applies on its face to only a narrow and undefined subcategory of cases involving police community caretaking functions, this Court has considered several different—and unrelated—community caretaking *functions* when determining whether a warrantless search is reasonable.

[31] *Davis*, 442 Mich at 25.

[32] *Id.*

[33] *Payton v New York*, 445 US 573, 589-590; 100 S Ct 1371; 63 L Ed 2d 639 (1980), quoting *Silverman v United States*, 365 US 505, 511; 81 S Ct 679; 5 L Ed 2d 734 (1961).

[34] *Payton*, 445 US at 589.

to an emergency call involving a threat to life or property, reasonably enters a private residence in order to abate what is reasonably believed to be an imminent threat of fire inside. Therefore, once it is determined that a firefighter's entry into a private residence was an exercise of community caretaking functions, and not an exercise of investigative functions, we must consider the reasonableness of the entry within the context of that community caretaking purpose.

United States Supreme Court caselaw specifically pertaining to firefighters supports this conclusion. In *Michigan v Tyler*, the Court concluded that "the Fourth Amendment extends beyond the paradigmatic entry into a private dwelling by a law enforcement officer in search of the fruits or instrumentalities of crime."[35] Indeed, "there is no diminution in a person's reasonable expectation of privacy nor in the protection of the Fourth Amendment simply because the official conducting the search wears the uniform of a firefighter rather than a policeman . . . ."[36]

The principle most relevant to this case from those decisions applying the Fourth Amendment's warrant requirement to firefighters is that the Fourth Amendment applies equally to police officers and firefighters. It thus follows that if a police officer can avail himself of an exception to the warrant requirement, a firefighter can likewise avail himself of an exception if the circumstances permit. Indeed, *Tyler* is premised on just that principle: that the exceptions to the warrant require-

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[35] *Michigan v Tyler*, 436 US 449, 504; 98 S Ct 1942; 56 L Ed 2d 486 (1978).

[36] *Id.* at 506; see also *Camara*, 387 US at 530 ("It is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior.").

ment apply no less to firefighters than to police officers who have responded to 911 calls requiring imminent action to prevent harm to persons or property.

Like decisions applying the community caretaking exception to police officers' actions, *Tyler* distinguished a firefighter's community caretaking functions from his investigative functions.[37] As a general rule, "official entries to investigate the cause of a fire must adhere to the warrant procedures of the Fourth Amendment."[38] Nevertheless, "it would defy reason to suppose that firemen must secure a warrant or consent before entering a burning structure to put out the blaze. And once in a building for this purpose, firefighters may seize evidence of arson that is in plain view."[39] In short, under *Tyler*, the purpose of a firefighter's *initial* entry into a building is crucial in determining whether a warrant is required for that entry.

The *Tyler* Court's application of the Fourth Amendment to firefighters fits directly into the purposes of the community caretaking exception. Thus, as *Cady* and *Tyler* illustrate, we must analyze the reasonableness of the initial intrusion in light of the scope of the intrusion and the firefighter's purpose in entering the residence. If the purpose of a firefighter's initial entry into a private residence is to abate an imminent threat of fire, then a warrantless entry is lawful under the Fourth Amendment as long as it is reasonable. Contrarily, if the

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[37] Similarly, Michigan statutory law recognizes the same emergency/investigation distinction, providing firefighters in uniform and under supervision the authority to "take all necessary steps and requirements to protect persons and property until [a] dangerous condition is abated," MCL 29.7a(2), as well as the *separate* authority to "investigate causes and effects related to dangerous conditions," MCL 29.7a(3).

[38] *Tyler*, 436 US at 508.

[39] *Id.* at 509.

purpose of a firefighter's entry is solely to investigate a crime, then a warrant is required unless a different exception to the warrant requirement applies. *Tyler*'s holding and rationale lead inexorably to the conclusion that the community caretaking exception applies to firefighters. Therefore, we hold that the community caretaking exception applies to firefighters.[40]

Application of the community caretaking exception does not provide firefighters with a blank check to enter private residences; rather, it only authorizes *reasonable* intrusions. Because "[c]ommunity caretaking functions are varied and are performed for different reasons,"[41] reviewing courts must tailor their analysis to the specifics of a particular intrusion before determining whether it is reasonable. Although neither Michigan caselaw nor that of the United States Supreme Court has specifically analyzed what factors affect whether a firefighter's intrusion into a private residence is reasonable, there is ample authority within the caselaw applying specific factors in related circumstances that allows this Court to articulate the standards that both protect individuals' Fourth Amendment rights and allow firefighters to perform their duty to abate serious fire hazards.

As stated, the privacy of the home stands at the very core of the Fourth Amendment's protections, and the zone of privacy is most clearly defined "when bounded by the unambiguous physical dimensions of an individual's home."[42] In determining whether firefighters

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[40] Our decision here is expressly limited to the question whether the community caretaking exception applies to firefighters. We leave to another day the determination whether that exception may extend to other emergency first responders.

[41] *Davis*, 442 Mich at 25.

[42] *Payton*, 445 US at 589-590.

acted reasonably in entering an individual's home, a reviewing court must first consider the firefighters' basis for making the intrusion—namely, whether, acting in good faith,[43] they "possess[ed] specific and articulable facts" leading them to the conclusion that their actions were necessary to abate an imminent threat of fire inside the private residence.[44] Their belief in the necessity of their intrusion need not be "ironclad," only "reasonable."[45] Furthermore, courts must not engage in a "hindsight determination" that an entry is unreasonable simply because no imminent hazard *actually* existed.[46] Rather, courts must determine whether an entry was reasonable on the basis of the circumstances known to the firefighters at the time of entry.[47]

Next, courts should consider the scope of the entry, which "must be limited to the justification therefor"

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[43] See, e.g., *Colorado v Bertine*, 479 US 367, 374; 107 S Ct 738; 93 L Ed 2d 739 (1987) ("[R]easonable police regulations relating to inventory procedures administered in good faith satisfy the Fourth Amendment, even though courts might as a matter of hindsight be able to devise equally reasonable rules requiring a different procedure.").

[44] *Davis*, 442 Mich at 25.

[45] *Fisher*, 558 US at ___; 130 S Ct at 549; 175 L Ed 2d at 414.

[46] *Id.*

[47] See *id.* This standard is consistent with the United States Supreme Court's application of the warrant requirement to administrative searches in *Camara*. The search conducted in *Camara* was one to administer "fire, health, and housing code inspection programs . . . ." *Camara*, 387 US at 533. While the administration of fire, health, and housing code inspection programs is important to public safety, the application of the warrant requirement to the "routine systematized inspection" involved in *Camara* turned in part on the fact that "[i]t has nowhere been urged that fire, health, and housing code inspection programs could not achieve their goals within the confines of a reasonable search warrant requirement." *Id*. As stated, the application of the community caretaking exception in this case is limited to situations in which firefighters reasonably believe that their entry is necessary to abate an immediate threat to persons or property.

and may not extend beyond what "is reasonably necessary to determine" whether the imminent threat of fire exists inside the private residence.[48] If firefighters do, in fact, find such a threat inside the residence, they may "remain in [the] building for a reasonable time" to abate the hazard and to "investigate [its] cause," because investigating the cause of the hazard "may be necessary to prevent its recurrence."[49]

Finally, in determining whether a particular entry is reasonably necessary, firefighters are not constrained to follow the least intrusive means of abating the imminent threat of fire. Indeed, that firefighters could have abated the fire hazard "by 'less intrusive' means does not, by itself, render the search unreasonable."[50] Rather, reviewing courts must consider whether the means and scope of entry were themselves reasonable under the totality of circumstances, not whether they were perfect.

D. APPLICATION

Because the community caretaking exception is not a blank check for warrantless entry by firefighters, we apply the foregoing analysis to determine whether the firefighters' entry into defendant's residence was reasonable.

As stated, we must first analyze the firefighters' basis for entering defendant's private residence. The circuit court's findings of fact are relevant here and are not clearly erroneous:

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[48] See *Davis*, 442 Mich at 26.

[49] *Tyler*, 436 US at 510. Investigating a fire can reveal "continuing dangers such as faulty wiring or a defective furnace." *Id.* Accordingly, the Court determined that "officials need no warrant to *remain* in a building for a reasonable time to investigate the cause of a blaze after it has been extinguished." *Id.* (emphasis added).

[50] *Cady*, 413 US at 447.

> [Lieutenant Schunck] was called to [defendant's townhouse], in the City of Royal Oak. The call was based upon a report of a possible electrical problem with running water. Upon arrival, he spoke to a neighbor [Tunner], who indicated she suspected water was running between a common wall, which shares an electrical panel. [Schunck] attempted to make contact with the owner of the neighboring apartment, but was unsuccessful. If there was water running onto an electrical box, it presented a life hazard and structure fire situation. [Schunck] made entry into the defendant's home to see if there was water running into the electrical box. . . . [Schunck] went into the apartment to check for running water, and shut off the electricity. It was possible . . . to shut off the water to the entire complex from outside, but the general practice is to shut off the individual apartment.
>
> Upon cross-examination, [Schunck] indicated he did not see or hear any water before or after entering the apartment. In fact, he admitted he did not find any running water in the apartment. [Schunck] also admitted he did not shut off the water of the neighbor, nor did he check that apartment for water or dampness. He also admitted he did not turn off the electrical box for either apartment. [Schunck] was not sure where the meter [was] which would have permitted him to shut off the electricity without entering the apartment.
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> Upon re-direct examination, [Schunck] indicated he was not sure if he entered [Tunner's] apartment. He also indicated he would have entered [defendant's] apartment even if he had shut off the water and/or electrical from the outside. He testified he has to investigate the calls to the fullest extent possible . . . .

At no point did the circuit court indicate that it disbelieved Schunck's testimony. Schunck also testified that he shut off the water to defendant's townhouse and that he did so from the basement of defendant's townhouse.

It is clear from Schunck's testimony that he acted in good faith. There is no indication that his entry into

defendant's residence was pretextual, and only upon entering defendant's basement to shut off the water to defendant's residence did Schunck see what appeared to be contraband in plain view.

Of course, good faith alone is not sufficient to satisfy the requirements of the Fourth Amendment; firefighters must "possess specific and articulable facts" leading them to the conclusion that their imminent action is necessary to abate the threat to persons or property inside the private residence.[51] In this case, Schunck knew of the 911 call and the information it contained. Moreover, he spoke with Tunner, who reported that she saw water coming into her basement from the wall that she shared with defendant and that she heard water flowing behind that wall.[52] Schunck had no reason to disbelieve Tunner's assertion, although there was no evidence that he corroborated Tunner's statement by witnessing or hearing the water himself. Nevertheless, Tunner's report of water leakage next to her electrical box was specific and articulable evidence supporting Schunck's conclusion that his imminent action was necessary to abate a condition inside defendant's residence that he reasonably believed was a threat to persons or property.

Furthermore, the fact that the townhouse complex contained several units attached to each other elevated the imminence of the potential hazard. Schunck explained that the attached units were "real close together" and that they "share[d] electrical panels in the basement at the bottom of these [common] walls."

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[51] *Davis*, 442 Mich at 25.

[52] Contrary to the dissent's assertion, the fact that Tunner did not immediately call 911, but instead sought to reach defendant, does not negate *Schunck*'s belief in the imminence of the threat of electrical fire, nor does it make that belief objectively unreasonable.

Moreover, because a "high density" of people lived in "all [the] connected apartments," Schunck explained that "a definite life hazard and possible structur[al] fire type situation" existed. These facts further supported Schunck's decision to enter defendant's residence.

We conclude that, in assessing whether an entry was reasonable, courts must also determine whether the scope of the entry was "limited to the justification therefor" or whether it extended beyond what was "reasonably necessary" to abate the hazard inside the private residence.[53] In this case, Schunck entered defendant's townhouse by having one of his crew enter the townhouse through a window in order to let him enter through the front door. Moreover, Schunck shut off the water to defendant's townhouse from the basement, which was where Tunner believed the water was flowing and where Schunck found, in plain view, the plants he believed to be contraband.[54] Therefore, the extent of Schunck's entry and search of defendant's residence was limited to the area of the residence that the available information indicated was the location of the hazard.

The Court of Appeals panel determined that Schunck entered without considering alternative, less intrusive means of abating the hazard. This kind of post hoc analysis is inconsistent with the principles for assessing the reasonableness of entry that we announce today.

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[53] *Id*. at 26.

[54] There is no indication that the marijuana plants were hidden from plain view in the basement of defendant's residence. Accordingly, if Schunck's entry into defendant's basement was lawful, then the plain view exception to the warrant requirement allowed this evidence to provide probable cause for the subsequent search warrant, pursuant to which were seized the marijuana plants along with other related evidence found elsewhere in defendant's residence. See *Arizona v Hicks*, 480 US 321; 107 S Ct 1149; 94 L Ed 2d 347 (1987).

Although it was possible for Schunck to turn off the water from outside defendant's residence, several facts led Schunck to the conclusion that actual entry into defendant's residence was necessary. First, because defendant's residence was physically attached to several other units, Schunck sought to minimize disruption to defendant's neighbors. Schunck believed that turning off defendant's water from outside the unit would have shut off the water to the entire complex. Generally, he testified, the fire department "isolate[s] the individual problem in the apartment and shut[s] [the water] off from the inside." Second, even if he had turned off the water to defendant's residence from the outside, Schunck testified that "[t]here's no question" he would have still entered the residence because, as an agent of the city of Royal Oak, he needed to be sure the situation was "totally safe." Accordingly, there is no indication that Schunck's entry exceeded what he thought necessary to abate what he believed to be the fire hazard inside defendant's townhouse.

On the basis of all these facts, we conclude that Schunck acted reasonably in entering defendant's residence pursuant to an emergency call. The Fourth Amendment does not prevent firefighters responding to emergency calls from undertaking their duty to protect the public from imminent danger. However, we emphasize that the Fourth Amendment does not give firefighters a blank check to enter and search private residences, and we caution reviewing courts to apply these principles carefully in order to ensure the appropriate protection of private residences under the Fourth Amendment. The Fourth Amendment strikes a careful balance, as seen in the instant case, between a citizen's reasonable expectation of privacy with his similarly reasonable expectation that emergency personnel will

act swiftly to protect his residence from the threat to persons or property therein.

E. RESPONSE TO THE DISSENT

In addition to the responses made to the dissent throughout this opinion, we offer the following general discussion of the dissent's criticisms of our holding.

One of the recurring themes of the dissent is that this opinion does not address how the various community caretaking functions fit within the Fourth Amendment. The response to this criticism is simple: this case only addresses how to apply the Fourth Amendment when a firefighter enters a private residence that he believes to be under the imminent threat of fire. We leave all other variants and all other applications of the community caretaking exception for another day.

For this reason alone, the dissent's criticism of this opinion for "not wad[ing] into [the] judicial morass" of the distinctions among the community caretaking doctrine, the emergency doctrine, and the emergency aid doctrine is off the mark. Moreover, the dissent's understanding of these doctrines is needlessly complex because it characterizes them as separate and distinct exceptions to the warrant requirement, rather than as aspects of the community caretaking exception.[55] Readers can judge for themselves whether this opinion

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[55] *Post* at 334-335. Notwithstanding the dissent's protestations otherwise, today's holding is consistent with other courts' applications of the community caretaking exception. For example, the Washington Supreme Court has determined the "community caretaking function exception to encompass not only the 'search and seizure' of automobiles, but also situations involving either emergency aid or routine checks on health and safety." *State v Kinzy*, 141 Wash 2d 373, 386; 5 P3d 668 (2000). Similarly, the Illinois Supreme Court recognized that "[c]ourts use the term 'community caretaking' to uphold searches or seizures as reasonable under the fourth amendment when police are performing some function

thoroughly examined the law relevant to deciding this case. The central purpose of a state court of last resort is not merely to bemoan that "the scope of [the community caretaking] exception[] is far from clear,"[56] but to establish clear principles of law, consistent with the Constitution, that subsequent courts can apply as the facts of any particular case dictate.

By contrast, the dissent would further muddle Fourth Amendment doctrine by deriving several separate exceptions to the warrant requirement based on the exercise of community caretaking functions. But if there is anything clear from the United States Supreme Court's articulation of the community caretaking exception, it is that *actions pursuant to community caretaking functions qualitatively differ from actions pursuant to criminal investigations*. This is the central basis for today's holding.

The dissent would also hold that the community caretaking exception does not apply to entry into private residences. A central part of the dissent's rationale appears to be that because the decision identifying the community caretaking exception, *Cady v Dombrowski*, "included language that sharply distinguished automobile searches from searches of private residences," the exception *cannot* encompass searches of private residences. However, the dissent can identify no United States Supreme Court decision that rejected the application of the community caretaking exception to private residences. Indeed, the dissent admits, in its discussion of the "emergency" and "emergency aid" exceptions, that firefighters acting pursuant to their community

other than investigating the violation of a criminal statute." *People v McDonough*, 239 Ill 2d 260, 269; 940 NE2d 1100 (2010).

[56] *Post* at 334.

caretaking functions may, under certain circumstances, enter a private residence.

The dissent claims that this opinion "extinguishes the emergency and emergency-aid exceptions to the warrant requirement in Michigan . . . ."[57] Far from it. We recognize that these different aspects of the community caretaking exception apply the exception to specific circumstances. Our opinion today merely recognizes that in all these circumstances, we must apply the standard of reasonableness that governs *all* Fourth Amendment cases.[58] Thus, while different circumstances will lead to different conclusions regarding the reasonableness of a particular search,[59] we are only constitutionally required to forbid *unreasonable* searches.

The reasonableness of the instant entry turns on the fact that the responding firefighters believed that there

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[57] *Post* at 348.

[58] The United States Supreme Court has held that if no exception to the warrant requirement applies, a warrantless search is unreasonable. *Katz*, 389 US at 357. This proxy for what constitutes a reasonable search nevertheless applies the same Fourth Amendment standard: reasonableness.

[59] As the dissent points out, *post* at 349 n 62, the *Davis* Court explained that "[w]hile categorizing these different activities under the heading of 'community caretaking functions' may be useful in some respects, it does not follow that all searches resulting from such activities should be judged by the same standard." *Davis*, 442 Mich at 25. When read in its context—following an extensive (but not necessarily exhaustive) list of different community caretaking functions—it is clear that the *Davis* Court meant simply that the circumstances of each search must be taken individually to determine whether the search was reasonable. There is no indication that the *Davis* Court meant to depart from the universal application of the reasonableness standard to all Fourth Amendment inquiries; rather, it sought to apply "standards specifically applicable to emergency aid entries." *Id.* We do not disturb the standards that the *Davis* Court applied in that context. We simply articulate standards applicable to situations in which a firefighter enters a private residence to abate what he believes to be an imminent threat of fire.

existed the imminent threat of an electrical fire in defendant's residence.[60] The firefighters reasonably believed that the danger posed an imminent threat to property or life, and they acted reasonably in abating that threat.

IV. CONCLUSION

We conclude that the community caretaking exception to the Fourth Amendment's warrant requirement applies no less to firefighters than to police officers engaged in abating emergency conditions that concern the protection of life and property. Thus, first-response firefighters may avail themselves of the community caretaking exception to the Fourth Amendment's warrant requirement. In this case, the firefighter entered defendant's residence in order to abate what he reasonably believed was the imminent threat of a serious electrical fire. We conclude that he acted reasonably in doing so and that, accordingly, the circuit court and the Court of Appeals majority erroneously suppressed the evidence he discovered in plain view during this entry. We therefore reverse the circuit court's decision and the Court of Appeals judgment and remand this case to the circuit court for entry of an order denying defendant's motion to suppress and for further proceedings consistent with this opinion. We do not retain jurisdiction.

MARKMAN, HATHAWAY, MARY BETH KELLY, and ZAHRA, JJ., concurred with YOUNG, C.J.

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[60] The dissent criticizes this opinion for "fail[ing] to explain which community-caretaking functions, beyond responding to an emergency or administering emergency aid, would reasonably justify a warrantless entry into a home." *Post* at 349. However, any such articulation would be dicta, because it would incorporate circumstances not controlling in the instant case.

MARILYN KELLY, J. (*dissenting*). In my view, the majority's decision today extends the community-caretaking exception to the Fourth Amendment warrant requirement beyond discernable limitation. Therefore, I respectfully dissent.

I would affirm the Court of Appeals' judgment, which affirmed the trial court's decision to grant defendant's motion to suppress. However, I would do so based on a different analysis than that used by the Court of Appeals. Consistently with many other courts that have considered the issue, I would hold that the community-caretaking exception to the Fourth Amendment warrant requirement cannot justify a warrantless entry into a private residence. Because the majority concludes otherwise without a sufficient legal basis for doing so, I cannot join its opinion.

I. LEGAL BACKGROUND

The Fourth Amendment of the United States Constitution protects the people from unreasonable searches and seizures.[1] The Michigan Constitution contains a similar protection.[2] Both constitutional provisions require a warrant supported by probable cause for searches and seizures to be reasonable, and therefore constitutional, unless an exception to the warrant requirement applies.[3]

A person's home is entitled to the most heightened Fourth Amendment protection.[4] Thus, a warrantless

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[1] US Const, Am IV.

[2] Const 1963, art 1, § 11.

[3] See *Katz v United States*, 389 US 347, 357; 88 S Ct 507; 19 L Ed 2d 576 (1967).

[4] See *Silverman v United States*, 365 US 505, 511; 81 S Ct 679; 5 L Ed 2d 734 (1961) ("At the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from

entry into a home is presumptively unreasonable.[5] It violates the Fourth Amendment unless an exception to the warrant requirement exists.

A. EXCEPTIONS TO THE WARRANT REQUIREMENT GENERALLY

Exceptions to the warrant requirement generally relate to two important functions of law enforcement and other state actors: criminal-investigation functions and so-called "community-caretaking" functions. The exceptions for criminal-investigation functions exist because sometimes obtaining a warrant is impracticable due to the need to act expeditiously when investigating criminal activity.

Such exceptions include searches incident to lawful arrests[6] and searches conducted because of the existence of exigent circumstances, for instance, when the police are pursuing a fleeing felon.[7] Neither party to this case asserts that the warrantless entry into defendant's home occurred in the course of investigating criminal activity. Thus, none of the warrant exceptions under the criminal-investigation umbrella justify the entry.

Other exceptions to the warrant requirement further the government's interest in protecting individuals or the general public from harm. These exceptions relate to the community-caretaking functions of state actors. They are "totally divorced from the detection, investi-

unreasonable governmental intrusion."); see also *Kyllo v United States*, 533 US 27, 37; 121 S Ct 2038; 150 L Ed 2d 94 (2001) ("In the home, our cases show, *all* details are intimate details, because the entire area is held safe from prying government eyes.").

[5] See, e.g., *Welsh v Wisconsin*, 466 US 740, 750; 104 S Ct 2091; 80 L Ed 2d 732 (1984), citing *Payton v New York*, 445 US 573, 586; 100 S Ct 1371; 63 L Ed 2d 639 (1980).

[6] *Arizona v Gant*, 556 US 332; 129 S Ct 1710; 173 L Ed 2d 485 (2009).

[7] *United States v Santana*, 427 US 38, 41-43; 96 S Ct 2406; 49 L Ed 2d 300 (1976).

gation, or acquisition of evidence relating to the violation of a criminal statute."[8] For example, an official's community-caretaking functions justify the inventory exception to the warrant requirement, which allows searches conducted according to established police procedures.[9] Community-caretaking functions also include the administration of emergency aid,[10] which provides another exception to the warrant requirement.

The firefighters in this case were investigating a potential water leak and electrical problem,[11] which is "totally divorced" from any criminal investigation. However, several of the exceptions to the warrant requirement that form part of the government's community-caretaking functions are implicated under the facts of the instant case.

Yet determining that this case implicates the community-caretaking functions of governmental actors answers only the beginning of the inquiry. As previously stated, the community-caretaking function is the foundational premise for several exceptions to the warrant requirement. Three such exceptions are significant to this case and will be discussed herein: the general community-caretaking exception, the emergency exception,[12] and the emergency-aid exception.

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[8] *Cady v Dombrowski*, 413 US 433, 441; 93 S Ct 2523; 37 L Ed 2d 706 (1973).

[9] *South Dakota v Opperman*, 428 US 364, 368-372; 96 S Ct 3092; 49 L Ed 2d 1000 (1976).

[10] *People v Davis*, 442 Mich 1, 25; 497 NW2d 910 (1993).

[11] For the reasons explained in part II(C) of this opinion, the majority's characterization of the circumstances here as an "imminent threat of fire," *ante* at 317, is inapt.

[12] There is some disagreement over whether the emergency exception is justified by community-caretaking considerations or by exigent circumstances. See, e.g., *State v Deneui*, 2009 SD 99, ¶ 22; 775 NW2d 221, 232 (2009) ("Several courts have also held that the emergency aid doctrine is

In discussing these exceptions, one essential distinction is paramount. Although all the exceptions fall under the rubric of an official's community-caretaking functions, they involve different circumstances, and different standards are used in assessing their application.[13] Thus, although the exercise of community-caretaking *functions* involves many different factual circumstances, warrantless entries pursuant to the community-caretaking *exception* are justified in only a narrow subset of those circumstances.

B. THE "COMMUNITY-CARETAKING," "EMERGENCY," AND "EMERGENCY-AID" EXCEPTIONS

As the majority correctly states, one exception to the warrant requirement is the search of a vehicle conducted as part of a police officer's community-caretaking functions.[14] This exception, first established in *Cady v Dombrowski*, is commonly referred to as the community-caretaking exception to the warrant requirement.[15]

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a subcategory of the community caretaker exception, while the emergency doctrine is a subcategory of the exigent circumstances exception.").

However, in *Davis*, this Court made clear that the exigent-circumstances exception involves actions pursuant to criminal investigation. *Davis*, 442 Mich at 24. As previously noted, it is undisputed that the entry in this case did not occur in the course of an investigation of criminal activity.

[13] See *id*. at 25 ("Although administering emergency aid is referred to as one of the community caretaking functions of the police, this should not have any effect on the law governing the emergency aid exception. While categorizing these different activities under the heading of 'community caretaking functions' may be useful in some respects, it does not follow that all searches resulting from such activities should be judged by the same standard.").

[14] *Cady*, 413 US at 448.

[15] See, e.g., *United States v Sanchez*, 612 F3d 1, 4 n 2 (CA 1, 2010) (citing *Cady* for the proposition that "[t]he community caretaking

A related exception also involves the exercise of community-caretaking functions, but is grounded on the need for immediate action by police or firefighters to address emergency situations.[16] This exception is sometimes subdivided into the emergency exception and the emergency-aid exception.[17]

Unfortunately, the scope of these exceptions is far from clear. Consequently, courts across the country have rendered vastly different decisions about the proper application of the community-caretaking, emergency, and emergency-aid exceptions.[18] These anomalous results stem primarily from conflicting nomenclature regarding the exceptions.[19] The South Dakota Supreme Court recently summarized this confusion:

> A review of the caselaw reveals a breadth of decisions discussing and applying various exceptions including the

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exception to the Fourth Amendment's warrant requirement allows the police to impound a vehicle for noninvestigatory purposes when it is reasonable to do so," and giving as an example "to remove an impediment to traffic or to protect a vehicle from theft or vandalism"); *United States v Johnson*, 410 F3d 137, 143-144 (CA 4, 2005) (noting that *Cady* established the community-caretaking exception in the context of automobile searches).

[16] *Michigan v Tyler*, 436 US 499; 98 S Ct 1942; 56 L Ed 2d 486 (1978) (stating that no warrant is required for firefighters to enter a residence to fight a fire in progress); *Brigham City v Stuart*, 547 US 398, 403; 126 S Ct 1943; 164 L Ed 2d 650 (2006) (stating that no warrant is required for police to enter a residence "to assist persons who are seriously injured or threatened with such injury").

[17] See, e.g., *Deneui*, 2009 SD 99, at ¶ 28; 775 NW2d at 234.

[18] The majority overlooks the fact that virtually *all* courts and commentators recognize that a distinction exists between these exceptions, even if they sometimes confuse them when applying them. Thus, I ask the majority, does the need to "establish clear principles of law," *ante* at 327, outweigh our obligation to get those principles right?

[19] See, e.g., Decker, *Emergency circumstances, police responses, and Fourth Amendment restrictions*, 89 J Crim L & Criminology 433, 441-444 (1999) (hereinafter Decker, *Emergency circumstances*).

> emergency doctrine, the emergency aid doctrine, and the community caretaker doctrine.
>
> Some of the avowed distinctions between these three doctrines can be frail, bordering on the meaningless. Neither have they been consistently applied, thus creating contradictory and sometimes conflicting doctrines. Some courts treat these exceptions interchangeably. Others declare that the community caretaker exception applies, but then use law applicable to one of the other exceptions, such as the emergency doctrine.[20]

Pursuant to *Michigan v Tyler* and *Brigham City v Stuart*,[21] it is well settled that police and firefighters may enter a private residence without a warrant in emergency circumstances. Such circumstances include, at a minimum, responding to a fire in progress and assisting injured persons in need of medical treatment.[22] However, the law remains unclear regarding the proper application of the warrant exception to actions conducted pursuant to community-caretaking functions that are not in response to an emergency situation. The United States Supreme Court has not seen fit to extend the community-caretaking exception established in *Cady* beyond the context of automobile searches. This, in my view, should be the starting point for the Court's analysis in this case.

II. ANALYSIS

The majority does not wade into this judicial morass. Instead, it ignores it, proceeding as if the law is clear and dictates its result. In so doing, it does precisely

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[20] *Deneui*, 2009 SD 99, at ¶¶ 21-22; 775 NW2d at 232.

[21] *Tyler*, 436 US 499; *Stuart*, 547 US 398.

[22] It is undisputed that there was no fire in progress or injured person in need of medical treatment in this case.

what *State v Deneui* cautioned against: creating contradictory and conflicting doctrines using inconsistent language.[23]

For example, the majority proclaims that "the community caretaking exception applies to firefighters . . . when they are responding to emergency situations that threaten life or property."[24] This is a correct characterization of the scope of the emergency exception to the warrant requirement, not of the community-caretaking exception.

However, the majority also states that, as long as the entry was "an exercise of [the state actor's] community caretaking functions," courts need assess only the reasonableness of the entry.[25] This suggests that a firefighter's entry into a residence pursuant to a community-caretaking function absent any imminent threat would be sanctioned as long as a court determines the entry was reasonable. This standard could conceivably be characterized as a wholly independent community-caretaking exception along the lines of that created by the United States Supreme Court in *Cady*.

However, the majority lacks an adequate legal basis for extending the community-caretaking exception discussed in *Cady* to entries of residences generally and to the facts of this case specifically. The majority relies almost exclusively on the United States Supreme Court decision in *Tyler* and our decision in *People v Davis*.[26] As I will explain, the majority's reliance on those decisions is unfortunate. *Tyler* is of nominal usefulness, and

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[23] *Deneui*, 2009 SD 99, at ¶ 22; 775 NW2d at 232.

[24] *Ante* at 306; see also *ante* at 325 ("The Fourth Amendment does not prevent firefighters responding to emergency calls from undertaking their duty to protect the public from imminent danger.").

[25] *Ante* at 317.

[26] *Tyler*, 436 US 499; *Davis*, 442 Mich 1.

Davis suggests a result opposite to that reached by the majority.

A. DOES THE COMMUNITY-CARETAKING EXCEPTION JUSTIFY WARRANTLESS ENTRIES INTO PRIVATE RESIDENCES?

The majority recognizes that the privacy of the home stands at the very core of the Fourth Amendment's protection against unreasonable searches and seizures. But it assumes without analysis that warrantless entries into a private residence to engage in community-caretaking functions are permissible if reasonable.[27] I cannot agree. The majority's conclusion assumes, without deciding, what should be the threshold question.

1. *TYLER* DOES NOT SUPPORT THE MAJORITY'S HOLDING

The United States Supreme Court's decision in *Tyler* did not cite or discuss *Cady*, the seminal case that created the community-caretaking exception. Nor do the words "community caretaking" appear anywhere in *Tyler*. Rather, *Tyler* is typically viewed as involving the emergency exception to the warrant requirement.[28] Yet the majority uses *Tyler* as a central basis for its holding interpreting a warrant exception that *Tyler* never mentioned. Reliance on a case involving one exception to the warrant requirement to formulate the parameters of another exception to the warrant requirement is erroneous.[29]

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[27] See *ante* at 319.

[28] See, e.g., *Mincey v Arizona*, 437 US 385, 392; 98 S Ct 2408; 57 L Ed 2d 290 (1978) (stating that "[w]e do not question the right of the police to respond to emergency situations" by making warrantless entries and searches and citing *Tyler*); see, generally, Decker, *Emergency circumstances*, pp 441-444 (1999).

[29] The general rule is that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se*

Tyler held that "[a] burning building clearly presents an exigency of sufficient proportions to render a warrantless entry 'reasonable.' "[30] Courts construing *Tyler* have generally read this exception to the warrant requirement narrowly, confining it to situations involving an imminent need for police intervention to protect life or property.[31] Many courts have also noted that the critical

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unreasonable under the Fourth Amendment—subject only to a few *specifically established* and *well-delineated* exceptions." *Katz*, 389 US at 357 (citations omitted) (emphasis added).

[30] *Tyler*, 436 US at 509.

[31] As noted, the United States Supreme Court has recognized as emergencies entry to fight a fire in progress and to provide immediate medical treatment (also termed the "emergency aid" exception). See *Tyler*, 436 US 499, and *Stuart*, 547 US 398.

Some federal and state courts have taken a more expansive view of what constitutes an emergency. Those courts have upheld warrantless entries under this exception to locate missing persons, stop a burglary in progress, and to respond to gunshots fired. See, e.g., *People v Wharton*, 53 Cal 3d 522; 280 Cal Rptr 631; 809 P2d 290 (1991) (upholding entry of a residence to locate a missing individual); *Carroll v State*, 335 Md 723, 731-732; 646 A2d 376 (1994) (citing federal and state cases upholding warrantless entries when the police reasonably believed that a burglary was in progress or had recently been committed); *Davis*, 442 Mich at 28 (assuming without deciding that, in most cases, the sound of gunfire could justify warrantless entry into a motel room under the emergency-aid doctrine).

By contrast, the authority supporting a warrantless entry under facts similar to those presented here is both scarce and dubious. A few cases have allowed warrantless entries in cases involving water leaks. See *State v Dube*, 655 A2d 338 (Me, 1995) (holding lawful a warrantless entry to combat a plumbing emergency and stop sewage or water from leaking into apartments below); *United States v Boyd*, 407 F Supp 693, 694 (SD NY, 1976) (upholding a warrantless entry when water was leaking from the defendant's apartment into the apartment below and the officer heard water running in defendant's apartment). But see *United States v Rohrig*, 98 F3d 1506, 1520 n 6 (CA 6, 1996) (questioning *Dube*'s conclusion that the warrantless entry was not a "search" for Fourth Amendment purposes); *United States v Williams*, 354 F3d 497, 508 (CA 6, 2003) ("Unlike the situations in *Rohrig*, *Boyd*, and *Dube* where the problem the police sought to address was certain, the possible water leak in this case was only speculative.").

inquiry is "whether there is a 'true immediacy' that absolves an officer from the need to apply for a warrant and receive approval from an impartial magistrate."[32]

Thus, *Tyler* provides a basis for concluding that firefighters may enter onto property without a warrant under emergency circumstances, such as to fight a fire in progress. However, the majority reads more into *Tyler* by concluding that it "lead[s] inexorably to the conclusion that the community caretaking exception applies to firefighters."[33] This conclusion is simply wrong. It stretches *Tyler*'s holding far beyond what that opinion actually said. In fact, *Tyler* only leads "inexorably" to the conclusion that firefighters may enter a burning building in order to fight a fire in progress.

Because *Tyler* did not discuss the community-caretaking exception, much less establish rules for its application, the majority should not have placed such reliance on it. Finally, as I explain later, I do not believe that the prosecution in this case established a factual record that justified a warrantless entry under any exception to the warrant requirement.[34]

2. *DAVIS* DOES NOT SUPPORT THE MAJORITY'S DECISION

With *Tyler* properly limited to emergency situations, the majority opinion is left to relying solely on our decision in *Davis*. But *Davis* does not support it either.

Davis explicitly stated that its holding was based on the emergency-aid exception, not the community-caretaking exception.[35] Thus, its discussion of the

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[32] *United States v Washington*, 573 F3d 279, 288 (CA 6, 2009).

[33] *Ante* at 319.

[34] See part II(C) of this opinion.

[35] *Davis*, 442 Mich at 9 n 4 ("*Even though we resolve this case on the basis of the emergency aid doctrine*, the Court of Appeals assertion that

broader community-caretaking exception is dicta and is not binding on this Court. Nonetheless, to the extent that *Davis* is informative here, it points to a result the opposite of that reached by the majority.

Davis involved the warrantless entry of a hotel room by police officers after they received reports of gunshots being fired. In its discussion of community-caretaking functions, the Court was extremely careful to note the significant difference in privacy interests between a car and a dwelling.[36] The *Davis* Court ultimately held that the warrantless entry in that case could not be justified under the emergency-aid exception.[37] Once the *Davis* Court so held, it did not make an independent community-caretaking analysis to determine whether the warrantless entry could be justified on that basis.

Hence, *Davis* created a sliding scale for assessing the reasonableness of searches undertaken on the basis of community-caretaking functions. Because of the greater Fourth Amendment protections afforded to

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the community caretaker function is a subcategory of the exigent circumstances doctrine requires a more general clarification of the exceptions to the warrant requirement.") (emphasis added); *id.* at 25 ("Accordingly, we hold that when the police are investigating a situation in which they reasonably believe someone is in need of immediate aid, *their actions should be governed by the emergency aid doctrine, regardless of whether these actions can also be classified as community caretaking activities*.") (emphasis added).

[36] *Id*. at 25 ("Although, for example, inventory of a car and entry into a dwelling may both be categorized as 'caretaking functions,' it does not follow that both types of activities should be judged by the same standard. It is particularly important to note that the levels of intrusion the police make while performing these functions are different. For example, a police inventory of a car is much less intrusive than a police entry into a dwelling.").

[37] Cf. *City of Troy v Ohlinger*, 438 Mich 477, 483; 475 NW2d 54 (1991) (upholding a warrantless entry into a home after an officer observed a man inside bleeding and not moving in order "to determine if [medical] assistance was required").

residences, there are few community-caretaking functions that would justify a warrantless search of a residence under *Davis*. Only when governmental officials act to address an emergency and their actions meet the standard for the emergency or emergency-aid exceptions is a warrantless entry into a home proper.[38]

Two Michigan cases, *People v Toohey* and *People v Krezen*, have discussed the community-caretaking function of police officers in upholding automobile searches under the inventory exception to the warrant requirement.[39] The *Toohey* Court surveyed the United States Supreme Court's decisions in *Cady* and *South Dakota v Opperman*.[40] It noted that inventory searches of automobiles satisfy the Fourth Amendment's "reasonableness" requirement if they are "conducted pursuant to standardized police procedure . . . ."[41] Although *Toohey* and *Krezen* discussed the community-caretaking functions of the police in impounding automobiles, neither decision discussed an independent community-caretaking exception to the warrant requirement.

In sum, no decision from this Court has expressly defined the parameters of a community-caretaking ex-

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[38] *Davis*, 442 Mich at 25-26 ("[W]e hold that police may enter a dwelling without a warrant when they reasonably believe that a person within is in need of immediate aid. They must possess specific and articulable facts that lead them to this conclusion."); see also *State v Ryon*, 137 NM 174, 185; 108 P3d 1032 (2005) ("Since the privacy expectation is strongest in the home, only a genuine emergency will justify entering and searching a home without a warrant and without consent or knowledge.").

[39] *People v Toohey*, 438 Mich 265, 273-276; 475 NW2d 16 (1991) (citing *Cady* for the proposition that "the United States Supreme Court has determined that the impoundment and subsequent inventory search of a vehicle is constitutionally valid as part of the caretaking function performed by the police"); *People v Krezen*, 427 Mich 681, 687; 397 NW2d 803 (1986).

[40] *Toohey*, 438 Mich at 273-277, citing *Cady*, 413 US 433, and *Opperman*, 428 US 364.

[41] *Toohey*, 438 Mich at 275-276.

ception to the warrant requirement. *Krezen*, *Toohey*, *City of Troy v Ohlinger*, and *Davis* all discussed the community-caretaking *functions* of law enforcement officers.[42] But in none of those cases did the Court uphold a warrantless entry or search on the basis of the community-caretaking *exception*. Rather, the *Krezen* and *Toohey* decisions relied on the inventory exception. The *Ohlinger* and *Davis* decisions relied on, and fashioned a test for the application of, the emergency-aid exception. Therefore, this Court has no controlling authority on point.

3. SURVEY OF OTHER JURISDICTIONS

Tyler and *Davis* do not support, much less mandate, the majority's result. Because there is no controlling Michigan authority, I turn to other jurisdictions for guidance. Many courts have observed that the *Cady* decision included language that sharply distinguished automobile searches from searches of private residences.[43] Therefore, they have limited the community-caretaking exception solely to the former.[44] Recently, the United States Court

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[42] *Krezen*, 427 Mich 681; *Toohey*, 438 Mich 265; *Ohlinger*, 438 Mich 477; *Davis*, 442 Mich 1.

[43] See, e.g., *United States v Erickson*, 991 F2d 529, 532 (CA 9, 1993) ("Although it involved a community caretaking function, *Cady* clearly turned on the 'constitutional difference' between searching a house and searching an automobile.") (quotation marks and citations omitted).

[44] *United States v Pichany*, 687 F2d 204, 207-209 (CA 7, 1982); *Erickson*, 991 F2d at 532; *United States v Bute*, 43 F3d 531, 535 (CA 10, 1994); *State v Gill*, 2008 ND 152, ¶ 23; 755 NW2d 454, 459 (2008); *Ryon*, 137 NM at 185.

The United States Court of Appeals for the Eleventh Circuit similarly declined to allow an entry into a private residence pursuant to the community-caretaking exception. *United States v McGough*, 412 F3d 1232, 1239 (CA 11, 2005). However, it is unclear whether *McGough* was limited to the facts before the court or whether it established a categorical rule for searches of private residences. Several courts have cited

of Appeals for the Third Circuit joined the majority of other federal circuits and adopted this approach:

> We agree with the conclusion of the Seventh, Ninth, and Tenth Circuits on this issue, and interpret the Supreme Court's decision in *Cady* as being expressly based on the distinction between automobiles and homes for Fourth Amendment purposes. The community caretaking doctrine cannot be used to justify warrantless searches of a home. Whether that exception can ever apply outside the context of an automobile search, we need not now decide. It is enough to say that, in the context of a search of a home, it does not override the warrant requirement of the Fourth Amendment or the carefully crafted and well-recognized exceptions to that requirement.[45]

Numerous other courts have tacitly rejected extending the community-caretaking exception to warrantless entries into private residences.[46] Similarly, others have

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McGough for the proposition that the Eleventh Circuit, like the Seventh, Ninth, and Tenth Circuits, has declined to extend the community-caretaking exception to allow warrantless searches of private homes or businesses. See, e.g., *Gill*, 2008 ND 152, at ¶ 17; 755 NW2d at 459.

The United States Court of Appeals for the Sixth Circuit has applied the community-caretaking exception to allow a warrantless entry of a home in order to abate a nuisance. See *Rohrig*, 98 F3d 1506. However, the *Rohrig* court placed great emphasis on "the fact-specific nature of this holding," *Rohrig*, 98 F3d at 1525 n 11, leaving doubts about whether it was intended to be broadly applicable. Subsequent Sixth Circuit decisions have questioned whether *Rohrig* stands for the proposition that the community-caretaking exception can justify warrantless entries into private residences. See, e.g., *Williams*, 354 F3d at 508 ("[D]espite references to the doctrine in *Rohrig*, we doubt that community caretaking will generally justify warrantless entries into private homes.").

[45] *Ray v Warren Twp*, 626 F3d 170, 177 (CA 3, 2010).

[46] See, e.g., *Ortiz v State*, 24 So 3d 596, 615 (Fla App, 2009) (Orfinger, J., dissenting) ("Other than situations involving the medical emergency exception, until today, the community caretaker exception has not been applied in Florida as a separate exception to the Fourth Amendment to validate an entry into a residence.").

evaluated the warrantless entry under the emergency or emergency-aid exceptions only and, finding them inapplicable, declared the entry unconstitutional without considering a broader community-caretaking exception.[47]

Cases from jurisdictions in which the courts have ostensibly permitted warrantless entries into private residences pursuant to the community-caretaking exception are also instructive. For example, in *United States v Quezada*,[48] the Eighth Circuit upheld a warrantless entry into the defendant's apartment. The *Quezada* Court stated that "[a] police officer may enter a residence without a warrant as a community caretaker where the officer has a reasonable belief that *an emergency exists* requiring his or her attention."[49]

Thus, the warrantless entry in that case, like the entries in *Tyler* and *Mincey v Arizona*, was premised on an emergency situation, not simply that the officer was acting in a community-caretaking capacity.[50] Many other cases that purportedly allowed warrantless entries into homes under the community-caretaking exception similarly relied on the fact that an emergency situation was involved.[51]

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[47] See, e.g., *State v Ford*, 2010 VT 39, ¶¶ 11-21; 188 Vt 17, 24-29; 998 A2d 684 (2010) (recognizing the existence of both the community-caretaking and emergency-aid exceptions, but holding an officer's entry into a private residence unconstitutional because it failed to satisfy the emergency-aid exception).

[48] *United States v Quezada*, 448 F3d 1005 (CA 8, 2006).

[49] *Id.* at 1007, citing *Mincey*, 437 US at 392-393 (emphasis added).

[50] *Tyler*, 436 US 499; *Mincey*, 437 US 385; see also *Ray*, 626 F3d at 176 (stating that *Quezada* and similar cases "do not simply rely on the community caretaking doctrine established in *Cady*").

[51] See, e.g., *Deneui*, 2009 SD 99, at ¶ 80; 775 NW2d at 251-252 (Meierhenry, J., dissenting) (distinguishing cases cited by the majority as grounded in the emergency and emergency-aid exceptions, not a broader community-caretaking exception).

Cases like *Quezada* persuasively illustrate how the law pertaining to the community-caretaking exception, the emergency exception, and the emergency-aid exception are often muddled. Courts often confuse a police officer's actions pursuant to a community-caretaking *function* with the community-caretaking *exception* to the warrant requirement. Moreover, these cases also reveal the dearth of authority for a community-caretaking exception to the warrant requirement that applies to homes independently of the emergency or emergency-aid exceptions.

The majority ignores all of this and assumes, without really deciding the issue, that community-caretaking duties can justify a warrantless entry into a private residence. This assumption is precariously based, given the dearth of authority to support it. I would hold that, to the extent an independent community-caretaking exception to the warrant requirement may be recognized in Michigan, it cannot justify a warrantless entry into a private residence. Rather, such entries must be justified by another exception, such as the emergency or emergency-aid exceptions discussed in *Tyler* and *Davis*.

4. THE MAJORITY'S MISCONSTRUCTION OF FOURTH AMENDMENT PROTECTIONS

The majority's articulation of the general legal principles applicable to this case is generally accurate. For example, I do not dispute that the touchstone of Fourth Amendment analysis is reasonableness. The problem is that the majority opinion restricts itself to general legal principles. Indeed, a simple reason exists why the majority does not answer my refutation of *Tyler* and *Davis* as a basis for its holding or my discussion of the other caselaw: it cannot. Instead, it attempts to distract from this failure by dismissing my opinion as "bemoan-

[ing]" the state of the law in this area.[52] The majority also claims that my approach would "further muddle Fourth Amendment doctrine . . . ."[53] To the contrary, my analysis fully examines and evaluates the existing nuances in Fourth Amendment doctrine recognized by courts across the country, including this one. Such nuances are lost on the majority.

If, as the majority asserts, my understanding of these nuances is "needlessly complex,"[54] so too is the understanding of countless other judges and commentators. Contrary to the majority's assertion, the emergency and emergency-aid exceptions are not merely "aspects" of the community-caretaking exception.[55] As previously explained, the community-caretaking *functions* of police and other state actors provide the basis for several distinct exceptions to the warrant requirement. These exceptions include the inventory exception, the emergency exception, and the emergency-aid exception.[56]

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[52] *Ante* at 327.

[53] *Ante* at 327.

[54] *Ante* at 326.

[55] See *Deneui*, 2009 SD 99, at ¶ 80; 775 NW2d at 251-252 (Meierhenry, J., dissenting) ("[T]he community caretaking *function* of police is an aspect of the emergency exception and emergency aid exception. The community caretaker *exception*, however, is an independent and broader exception to the Fourth Amendment and has not been expansively recognized by any authority outside of the context of motor vehicles.").

[56] See *Laney v State*, 117 SW3d 854, 860-861 (Tex Crim App, 2003):

> The notion that officers act pursuant to their "community caretaker functions" serves as a basis for three separate doctrines created by the [United States] Supreme Court:
>
> 1) the emergency aid doctrine, established in *Mincey;*
>
> 2) the automobile impoundment and inventory doctrine, first conceived in *Cady*, and later expanded upon in *Opperman;* and,
>
> 3) the community caretaking doctrine, or public servant doctrine, established in *Cady*, and followed by this Court . . . .

Each exception is subject to a different standard for assessing whether a warrantless entry or search conducted pursuant to that exception was reasonable.[57]

The majority opinion falls short because it creates out of whole cloth a previously unrecognized community-caretaking exception to the warrant requirement. Its wholly unsupported decision not only to adopt that exception but to extend it to warrantless entries into private residences compounds this error. Moreover, the majority refuses to recognize that its stated standard for this new exception is the essence of the standard for the emergency exception to the warrant requirement. Implicit in this

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> The common thread in each of these three exceptions to the warrant and probable cause requirements is the officer's purpose.
>
> The emergency doctrine is not the same as the community caretaking doctrine established in *Cady*. The distinction between the emergency doctrine and the community caretaking doctrine, hereinafter referred to as the *Cady* doctrine, is a narrow, but critical one. Under the emergency doctrine, the officer has an immediate, reasonable belief that he or she must act to "protect or preserve life or avoid serious injury." On the other hand, under the *Cady* doctrine, the officer "might or might not believe there is a difficulty requiring his general assistance." Therefore, while both doctrines are based on an officer's reasonable belief in the need to act pursuant to his or her "community caretaking functions," the emergency doctrine is limited to the functions of protecting or preserving life or avoiding serious injury. Additionally, the *Cady* doctrine deals primarily with warrantless searches and seizures of automobiles (and will be limited to those circumstances except in unusual circumstances), while the emergency doctrine deals with warrantless entries of, but is not limited to, private residences. [Citations omitted.]

[57] See *Davis*, 442 Mich at 25-26 ("[P]olice may enter a dwelling without a warrant when they reasonably believe that a person within is in need of immediate aid. They must possess specific and articulable facts that lead them to this conclusion."); *Toohey*, 438 Mich at 284 ("To be constitutional, an inventory search *must* be conducted in accordance with established departmental procedures, which all police officers are required to follow, and *must not* be used as a pretext for criminal investigation.").

failure is the inevitable conclusion that, under the majority's new exception, warrantless entries into a home to perform nonemergency community-caretaking functions can be reasonable.[58]

In sum, the majority's opinion today (1) extinguishes the emergency and emergency-aid exceptions to the warrant requirement in Michigan by creating a broader community-caretaking exception with no discernable limitation,[59] (2) exposes the perils of distilling broad Fourth Amendment principles from inapposite authority and without comprehensive analysis, (3) pays only lip service to United States Supreme Court precedent emphasizing the difference between the home and a vehicle,[60] (4) ignores the United States Supreme Court's admonition that the warrant requirement is subject only to specifically established and well-delineated exceptions,[61] (5) directly contravenes *Davis* by applying a general reasonableness standard to all warrantless entries carried out to perform community-caretaking

[58] Thus, although the majority claims that it is not reaching this question, see *ante* at 326, 329 n 60, the dicta from its opinion are loud and clear.

[59] Under the majority's new exception, state actors never need rely on the aforementioned exceptions, as the new community-caretaking exception will always make their warrantless entry reasonable under such circumstances. Surely the unanimous *Davis* Court did not think it was wasting its time in carefully crafting a standard for applying the emergency-aid exception.

[60] The majority acknowledges that "the threshold of reasonableness is at its apex when police enter a dwelling pursuant to their community caretaking functions." *Ante* at 316. However, nothing else in its analysis gives any effect to this crucial distinction.

[61] *Katz*, 389 US at 357. The specifically established and well-delineated emergency-aid exception has existed in Michigan since at least 1991, see *Ohlinger*, 438 Mich 477. As previously explained, there is no Michigan authority specifically adopting a community-caretaking exception. Moreover, the community-caretaking exception established in *Cady* has not been specifically established, let alone well delineated, outside the context of automobile searches.

functions,[62] and (6) fails to explain which community-caretaking functions, beyond responding to an emergency or administering emergency aid, would reasonably justify a warrantless entry into a home.[63]

B. DOES THE COMMUNITY-CARETAKING EXCEPTION APPLY TO FIREFIGHTERS?

This portion of the majority's holding is unique.[64] No jurisdiction has extended the community-caretaking exception to the warrant requirement to firefighters.

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[62] *Davis*, 442 Mich at 25 ("While categorizing these different activities under the heading of 'community caretaking functions' may be useful in some respects, it does not follow that all searches resulting from such activities should be judged by the same standard.").

[63] I agree with the majority that there is no indication that *Davis* intended to depart from "the universal application of the reasonableness standard to all Fourth Amendment inquiries[.]" *Ante* at 328 n 59. But as the majority notes, *Davis* established a specific standard for how courts could assess reasonableness in the emergency-aid context. The majority today applies a similar standard to assess the reasonableness of entries in emergency situations, such as to abate an imminent threat of fire. However, the majority errs when it grounds its decision in the community-caretaking exception because it gives no equivalent standard applicable to warrantless entries to perform nonemergency community-caretaking functions.

The majority claims that any such standard would be dictum because the only question here is whether a firefighter may enter a home to address the threat of an imminent fire. This would be an adequate response if the majority were applying the emergency exception, but not when it creates a new community-caretaking exception. Surely we need not decide the reasonableness of every possible emergency police officers or firefighters may encounter. However, as previously noted, the majority's decision is based on a new community-caretaking exception without a standard in the event of a nonemergency. The majority leaves lower courts to guess when other, less urgent community-caretaking functions can reasonably justify warrantless entries and searches of homes. Our lower courts and the public deserve more.

[64] See *ante* at 319 ("*Tyler*'s holding and rationale lead inexorably to the conclusion that the community caretaking exception applies to firefighters.").

As previously mentioned, *Tyler* established that firefighters are entitled to enter private residences without a warrant in emergency situations, including fighting a blazing fire. *Stuart* makes clear that police may enter homes to render emergency aid to someone inside in clear need of medical treatment.[65] Both of these exceptions are subsumed within the broader rubric of community-caretaking functions.

Because I would not allow the community-caretaking exception to justify warrantless entries into private residences by any state actors, I would not reach this issue. However, under the majority's broad new community-caretaking exception, firefighters and police officers may effectively enter private residences at any time and for virtually any reason without a warrant.

C. APPLICATION TO THIS CASE

Under existing law, the firefighters in this case were permitted to enter defendant's townhouse only to combat an ongoing emergency. The thin factual record precludes the conclusion that a reasonable person could have believed that an emergency existed in defendant's townhouse. At best, the facts establish that a potential fire threat existed in the townhouse neighboring defendant's, which belonged to Kathleen Tunner.

The only facts that the firefighters responding to Tunner's phone call knew when they entered defendant's home were that (1) Tunner had observed water running over *her* electrical box and (2) she *thought* that she heard water running between the common wall her

[65] I do not dispute that firefighters, as well as police officers, could also invoke the emergency-aid exception to justify a warrantless entry into a home.

townhouse shared with defendant's townhouse. As the majority observes, Royal Oak Fire Department Lieutenant Michael Schunck testified that he did not independently confirm that water was running in Tunner's home. Hence, he did nothing to respond to the only possible emergency of which he was aware when he arrived—a potential fire hazard in Tunner's townhouse.[66]

In concluding to the contrary, the majority discounts the legal principle that a warrantless entry into a home is presumptively unreasonable.[67] The government bears the burden of proving that a " 'carefully delineated' " exception to the warrant requirement applies.[68]

Indeed, the facts justifying the entry in this case are significantly less compelling than those present in *Davis*. In *Davis*, the police had received a radio dispatch informing them that the manager at a motel had reported hearing gunshots fired in or near one of two motel rooms. The dispatcher identified two possible rooms and directed police officers to a possible witness, but did not suggest that any person was injured. With this dispatch as their only source of information, the police arrived at the motel and proceeded to one of the two rooms. Once there, they encountered an occupant who was unwilling to open the door.

Notably, the police had not themselves heard shots fired. Nor did they interview any witnesses who heard

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[66] Even Tunner did not consider the situation in her townhouse to be an imminent hazard. She first attempted to contact her next-door neighbor and the management company to address the water issue. Only when the management company told her there was nothing it could do did Tunner call the fire department.

[67] See, e.g., *Welsh*, 466 US at 750, citing *Payton*, 445 US at 586.

[68] *Welsh*, 466 US at 749-750, quoting *United States v United States Dist Court*, 407 US 297, 318; 92 S Ct 2125; 32 L Ed 2d 752 (1972).

them, not even the desk clerk, whom the dispatcher had identified as the source of the information. The initial source of information gave very little detail about the situation. The record did not indicate that the police made inquiries of the manager who approached them or that they knocked on other doors. They encountered no circumstances that suggested that shots had in fact been fired. Under these facts, the *Davis* Court unanimously refused to apply the emergency-aid exception to uphold the warrantless entry.

Thus, *Davis* involved a situation in which gunshots had been fired—a situation specifically recognized by courts as falling within the emergency exception.[69] Yet the *Davis* Court refused to apply the exception absent police corroboration of the shots independent of the phone call.

This case involves an alleged water leak and potential electrical problem—not a scenario specifically recognized as falling within the emergency exception. Just as in *Davis*, however, the warrantless entry was carried out without any independent corroboration that water was actually leaking and causing a potential electrical problem in defendant's home. If there was no water leaking, there was no electrical problem and hence no emergency or imminent threat to life or property. Therefore, there was no exception to the warrant requirement that justified the warrantless entry in this case.

The majority concludes to the contrary by establishing a broad, undefined new community-caretaking exception to the warrant requirement wholly unsupported by existing law. Indeed, the scope of the majority's newly created exception to the warrant requirement is limitless.

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[69] See Decker, *Emergency circumstances*, pp 480-484.

Finally, I question the legal significance of at least one of the facts the majority finds significant when evaluating the reasonableness of the warrantless entry. The majority contends that because the townhouse complex contained several units attached to one another, this fact "elevated the imminence of the potential hazard."[70] Not so. Certainly, the fact that the townhouse complex has numerous attached units elevated the potential *scope* of the fire threat and the number of people who potentially might have been affected. But that fact is utterly irrelevant to the imminence of a fire threat from water running over an electrical box. The question of the *imminence* of a fire might be influenced by whether someone saw sparks flying from the box or saw a large quantity of water flowing over it. But the scope of the threat and the imminence of the threat are distinctly different inquiries.

For these reasons, I agree with the Court of Appeals' conclusion that it is impossible to determine whether the firefighters acted reasonably in entering defendant's apartment. Thus, I would hold that the prosecution did not meet its burden of establishing that an exception to the Fourth Amendment warrant requirement justified the firefighters' entry.

III. CONCLUSION

I dissent from the majority's decision to extend the community-caretaking exception to the warrant requirement to allow entry into private residences. I would hold that firefighters, as well as police officers, may enter a private residence only pursuant to the emergency and emergency-aid exceptions. The prosecution failed to establish a record indicating that the

[70] *Ante* at 323.

firefighters in this case reasonably believed that immediate entry into defendant's townhouse was necessary to address an emergency situation. Therefore, I would affirm the judgment, but not the reasoning, of the Court of Appeals.

CAVANAGH, J., concurred with MARILYN KELLY, J.

MILLER-DAVIS COMPANY v AHRENS CONSTRUCTION, INC

Docket No. 139666. Argued March 8, 2011 (Calendar No. 3). Decided July 11, 2011.

Miller-Davis Company, the general contractor and construction manager for the construction of a natatorium housing an indoor pool at a YMCA complex, brought an action in the Kalamazoo Circuit Court against Ahrens Construction, Inc. (a subcontractor), and Merchants Bonding Company (a surety), alleging breach of contract as a result of faulty workmanship when installing the roofing system covering the natatorium. Ahrens moved for summary disposition on the basis that the action was barred by the statute of repose, MCL 600.5839(1). The court, William G. Schma, J., denied the motion. The Court of Appeals denied Ahrens's interlocutory application for leave to appeal in an unpublished order, entered March 6, 2006 (Docket No. 266936). Following a bench trial after Judge Schma retired, the trial court, Gary C. Giguere, Jr., J., concluded that Ahrens had breached its contract and that the breach caused a moisture problem in the natatorium. The court awarded Miller-Davis damages against Ahrens for the cost of corrective work made necessary by the breach. The court also ruled that Miller-Davis had no cause of action for contractual indemnity because no claims, suits, actions, recoveries, or demands were ever made, brought, or recovered against it within the meaning of the indemnity clause in the parties' contract. Ahrens appealed, and Miller-Davis cross-appealed. The Court of Appeals, JANSEN, P.J., and HOEKSTRA and MARKEY, JJ., reversed the decision of the trial court and remanded for entry of a judgment in favor of Ahrens, holding that Miller-Davis's claims were barred by MCL 600.5839(1). 285 Mich App 289 (2009). The Supreme Court granted Miller-Davis's application for leave to appeal. 488 Mich 875 (2010).

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

MCL 600.5839(1), which is both a statute of limitations and statute of repose applicable in actions against licensed architects, professional engineers, and contractors to recover damages for injuries to persons or property, does not apply to actions for breach

of contract. An action for breach of contract against a licensed architect, professional engineer, or contractor is governed by the general statute of limitations applicable to contract actions, MCL 600.5807(8).

1. MCL 600.5805 is the general tort statute of limitations. MCL 600.5805(14) states that the period of limitations for an action against a licensed architect, professional engineer, land surveyor, or contractor is that provided in MCL 600.5839. In contrast, MCL 600.5807, the statute that sets forth the limitations periods for suits seeking damages for breach of contract, does not refer to MCL 600.5839. Moreover, MCL 600.5839(1) itself refers to actions for injuries to property or for wrongful injury or death, which is language describing tort actions. Thus, MCL 600.5805 and MCL 600.5839 apply to tort actions, and MCL 600.5807 applies to contract actions.

2. The nature and origin of a cause of action determine which limitations period applies. MCL 600.5839(1) does not apply if the nature and origin of a cause of action against a licensed architect, professional engineer, or contractor is the breach of a contract.

3. *Mich Millers Mut Ins Co v West Detroit Bldg Co*, 196 Mich App 367 (1992), and *Travelers Ins Co v Guardian Alarm Co of Mich*, 231 Mich App 473 (1998), erroneously expanded the scope of MCL 600.5839(1) to contract actions and must be overruled as inconsistent with the statute.

4. Miller-Davis's complaint alleged that Ahrens breached the contract by installing a roof that did not conform to agreed-upon specifications and also sought indemnity for the corrective work that Miller-Davis had to perform. Neither claim fits within the language of MCL 600.5839(1). Miller-Davis relied not on a duty implied in law, but solely on the terms of the contract, and the statute of limitations for contract actions, MCL 600.5807(8), applied. The Court of Appeals erred by concluding that Miller-Davis's contract action was barred by MCL 600.5839(1).

Reversed and remanded to the Court of Appeals for further proceedings.

LIMITATION OF ACTIONS — ARCHITECTS, PROFESSIONAL ENGINEERS, AND CONTRACTORS — BREACHES OF CONTRACT.

The statute of limitations and repose applicable in actions to recover damages for injuries to persons or property brought against licensed architects, professional engineers, and contractors does not apply to actions for breach of contract; an action for breach of contract against a licensed architect, professional engineer, or

contractor is governed by the general statute of limitations applicable to contract actions (MCL 600.5807[8]; MCL 600.5839[1]).

Gemrich Law PLC (by *Alfred J. Gemrich*) and *Scott Graham PLLC* (by *Scott Graham*) for Miller-Davis Company.

Field & Field, P.C. (by *Samuel T. Field*), for Ahrens Construction, Inc.

Amici Curiae:

Clark Hill PLC (by *Kevin S. Hendrick*, *Thomas M. Keranen*, and *Brian P. Lick*) for the Associated General Contractors of Michigan.

Thrun Law Firm, P.C. (by *Christopher J. Iamarino* and *Kirk C. Herald*), for the Michigan Association of School Boards and Michigan School Business Officials.

MARILYN KELLY, J. This case involves a dispute over a construction contract. At issue is whether the limitations period in MCL 600.5839(1) applies to an action for breach of contract. The Court of Appeals held that it does and that the statute's six-year limitations period expired before plaintiff filed its complaint, barring the suit. Accordingly, the Court of Appeals reversed the judgment of the trial court, which had awarded plaintiff damages for breach of contract, and remanded the case for entry of a judgment in favor of defendant.[1]

Plaintiff alleges that the general statute of limitations for breach of contract actions, MCL 600.5807(8), controls its action and that it filed suit within six years of the date its action accrued. Defendant alleges that

[1] "Defendant," as used in this opinion, refers to Ahrens Construction, Inc. Plaintiff also sued Merchants Bonding Company, the surety that issued the performance bond covering the work to be performed. However, Merchants settled with plaintiff and is not a party to this appeal.

the contractor statute of repose, MCL 600.5839(1), controls plaintiff's action and that plaintiff filed it more than six years after the occupancy, use, or acceptance of the roof defendant built.[2] If defendant is correct, the suit is time-barred; if plaintiff is correct, the suit may not be time-barred.

We agree with plaintiff that MCL 600.5839(1) does not apply to actions for breach of contract. MCL 600.5807(8) is the applicable statute. The limitations period in both statutes is six years. But unlike the period in MCL 600.5839(1), which runs from "the time of occupancy of the completed improvement, use, or acceptance of the improvement," the limitations period in MCL 600.5807(8) runs from the date the "claim first accrued . . . ."

Accordingly, we reverse the judgment of the Court of Appeals. Because there is a question about the date plaintiff's action accrued, we remand the case to the Court of Appeals to resolve this issue, as well as other issues not yet considered.

THE FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Plaintiff, Miller-Davis Company, was the general contractor hired to improve and construct various buildings for the YMCA Camping and Retreat Services of Battle Creek and Kalamazoo. The project included construction of a natatorium. Plaintiff contracted with defendant Ahrens Construction, Inc., to install the natatorium's roof.

A temporary certificate of occupancy was issued for the entire project on June 11, 1999. The roof was

[2] MCL 600.5839 is both a statute of repose and a statute of limitations. *Ostroth v Warren Regency, GP, LLC*, 474 Mich 36, 38-39; 709 NW2d 589 (2006).

installed before that date. Soon after its installation, the YMCA noticed excessive condensation in the natatorium, so severe at times that it appeared to be "raining" in the pool area. The parties refer to this condition as the "natatorium moisture problem" (NMP).

The temperature and air pressure in the pool were adjusted. Also, defendant performed corrective work on the roof. But the NMP continued into 2003, when plaintiff's architect recommended removing the roof as the only means to determine whether defendant's improper installation caused the NMP. The architect, who eventually testified as plaintiff's expert witness, opined that rips in and missing sections of the vapor barrier and improper installation of the insulation had caused the NMP.

Defendant insisted that the NMP was the result of design defects rather than poor workmanship. After all defendant's efforts to correct the problem were unsuccessful, plaintiff declared a default. Plaintiff eventually performed the corrective work itself in the fall of 2003.

In May 2005, plaintiff sued defendant, alleging that it had breached its contract by installing a roof that did not conform to the plan's specifications. Plaintiff sought indemnification for the necessary corrective work. Its complaint did not allege that defendant's work created a defective and unsafe condition, that defendant caused the NMP, or that plaintiff's damages arose from a defective and unsafe condition. Nor did it refer to defendant's express one-year guarantee or allege a breach of warranty.

Defendant sought summary disposition under MCR 2.116(C)(7), claiming that plaintiff had filed suit after expiration of the six-year period specified in the statute of repose contained in MCL 600.5839(1). The trial court

denied defendant's motion without addressing the applicability of MCL 600.5839(1).[3]

The case proceeded to a bench trial. Plaintiff's theory was that defendant had constructed a defective roof and that the nature of the defect became apparent only when the roof was removed. It asserted that the NMP did not reappear after the roof was reconstructed. Defendant's defense was that design defects caused the NMP. For example, defendant claimed that the NMP arose because the roof's design allowed the vapor barrier to come into contact with cold outside air. Defendant's expert testified that once the defectively designed roof had been removed, the NMP was corrected because trapped moisture was allowed to escape. Alternatively, defendant argued that the alleged defects in the roof were caused when plaintiff removed it. In closing argument, defendant again raised the statute of repose.

The trial court ruled in favor of plaintiff. It determined that defendant was in material breach of its contract for having performed nonconforming and defective work on the roof, which required corrective measures. This resulted in damages of $348,851.50. On the indemnity claim, the court ruled in favor of defendant because no suits had been filed against plaintiff. Hence, no indemnification was required. The court did not address the statute of repose issue.

Defendant appealed as of right, raising the statute of repose, among other defenses. Plaintiff cross-appealed the denial of its indemnity claim. The Court of Appeals agreed with defendant on the statute-of-repose issue

[3] Defendant sought interlocutory leave to appeal in the Court of Appeals, which the Court denied in an unpublished order, entered March 6, 2006 (Docket No. 266936). There was no appeal in this Court.

and reversed the judgment of the trial court.[4] Because that resolution rendered moot the other issues, including the cross-appeal, the Court of Appeals declined to consider them and remanded the case for entry of a judgment for defendant.[5]

We granted plaintiff's application for leave to appeal.[6]

THE STATUTES INVOLVED

The issue in this case is whether the statute of repose contained in MCL 600.5839(1) or the statute of limitations contained in MCL 600.5807(8) applies to plaintiff's civil action. This case also involves the interpretation and application of MCL 600.5805. The issue presents a question of law that we review de novo.[7]

MCL 600.5805 sets forth various periods of limitations for civil actions. It provides, in pertinent part:

> (1) A person shall not bring or maintain an action to recover damages for injuries to persons or property unless, after the claim first accrued to the plaintiff or someone through whom the plaintiff claims, the action is commenced within the periods of time prescribed by this section.
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> (10) The period of limitations is 3 years after the time of the death or injury for all other actions to recover damages for the death of a person, or for injury to a person or property.
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[4] *Miller-Davis Co v Ahrens Constr, Inc*, 285 Mich App 289, 292; 777 NW2d 437 (2009).

[5] *Id.*

[6] *Miller-Davis Co v Ahrens Constr, Inc*, 488 Mich 875 (2010).

[7] *Boyle v Gen Motors Corp*, 468 Mich 226, 229-230; 661 NW2d 557 (2003).

> (14) The period of limitations for an action against a state licensed architect, professional engineer, land surveyor, or contractor based on an improvement to real property shall be as provided in [MCL 600.5839].

MCL 600.5839 provides:

> (1) No person may maintain any action to recover damages for any injury to property, real or personal, or for bodily injury or wrongful death, arising out of the defective and unsafe condition of an improvement to real property, nor any action for contribution or indemnity for damages sustained as a result of such injury, against any state licensed architect or professional engineer performing or furnishing the design or supervision of construction of the improvement, or against any contractor making the improvement, more than 6 years after the time of occupancy of the completed improvement, use, or acceptance of the improvement, or 1 year after the defect is discovered or should have been discovered, provided that the defect constitutes the proximate cause of the injury or damage for which the action is brought and is the result of gross negligence on the part of the contractor or licensed architect or professional engineer. However, no such action shall be maintained more than 10 years after the time of occupancy of the completed improvement, use, or acceptance of the improvement.
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> (4) As used in this section, "contractor" means an individual, corporation, partnership, or other business entity which makes an improvement to real property.

Plaintiff asserts that MCL 600.5839(1) does not apply to its action. Rather, it claims that the general statute of limitation for contract actions, MCL 600.5807(8), applies. It provides: "The period of limitations is 6 years for all other actions to recover damages or sums due for breach of contract."

THE SCOPE AND APPLICATION OF MCL 600.5839(1)

In order to determine the scope of MCL 600.5839(1), we consider first the overall statutory scheme involving periods of limitations for tort and contract actions contained in the Revised Judicature Act.[8] MCL 600.5805 is entitled "Injuries to persons or property."[9] It is commonly known as the general tort statute of limitations because it is " 'a compilation of the limitations on the *general tort remedies*.' "[10]

Section 5805(1) requires that all actions for injury to persons or property be brought within the time periods set forth in the section. There follow 14 subsections, 12 of which clearly refer to various types of tort suits.[11] Aside from subsection (15), which defines "dating relationship," the only subsection that might be interpreted as not limited to torts is subsection (14), pertaining to architects, engineers, land surveyors, and contractors.

Subsection (14), through reference to MCL 600.5839, uses language similar to that found throughout the remainder of § 5805, referring to "injury to prop-

[8] See MCL 600.5805 and MCL 600.5807.

[9] This title was editorially supplied. See Michigan Compiled Laws Annotated, Preface, p III (West, 2000); MCLA 600.5805.

[10] *Sam v Balardo*, 411 Mich 405, 433; 308 NW2d 142 (1981), quoting the comment of the drafters of the Revised Judicature Act, the Joint Committee on Michigan Procedural Revision, November 15, 1959, reprinted as MCLS 600.5805, Committee Comment.

[11] Subsections (2), (3), (4), (11), and (12) set forth the periods of limitations for actions involving assault, battery, and false imprisonment. Subsection (5) deals with malicious prosecution. Subsections (6), (7), and (8) deal with malpractice, misconduct by a sheriff, and negligence by a constable. Subsection (9) applies to claims charging libel or slander. Subsection (13) involves products liability actions. And subsection (10) sets the period of limitations for "all other actions to recover damages for the death of a person, or for injury to a person or property." It is commonly known as the residual tort statute. See, e.g., *Local 1064, RWDSU AFL-CIO v Ernst & Young*, 449 Mich 322, 325; 535 NW2d 187 (1995).

erty" and "bodily injury."[12] In fact, to describe the types of injuries to which they apply, MCL 600.5805 and MCL 600.5839(1) use variations of the phrase "injuries to persons or property." That language describes tort actions.[13] Thus, all subsections of § 5805 are geared toward tort actions.

In contrast to MCL 600.5805, the next section in the code, MCL 600.5807, sets forth the limitations periods for suits seeking damages for breaches of contract. Unlike MCL 600.5805, MCL 600.5807 contains no reference to MCL 600.5839. And no subsection of MCL 600.5807 refers to injuries to persons or property. Thus, MCL 600.5805 and MCL 600.5839 apply to tort actions, and MCL 600.5807 applies to contract actions.

The Michigan Supreme Court's decision 34 years ago in *Huhtala v Travelers Ins Co*[14] reinforces this conclusion. *Huhtala* addressed how to determine whether a claim is subject to MCL 600.5805 or MCL 600.5807. It clarified that the nature and origin of a cause of action determine which limitations period applies. MCL 600.5805, it held, is applicable to actions to recover damages for injuries to person or property, whereas MCL 600.5807 is applicable to actions to recover damages for breach of contract.[15]

Under *Huhtala*, if an action is founded on a "consensual" duty or obligation or the breach of an "express promise," the action is not for personal injury. It is an

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[12] MCL 600.5805(14); MCL 600.5839(1).

[13] See *Huhtala v Travelers Ins Co*, 401 Mich 118; 257 NW2d 640 (1977); see also *Fries v Holland Hitch Co*, 12 Mich App 178, 183; 162 NW2d 672 (1968) ("[MCL 600.5805 and MCL 600.5807] are generally thought of as 'tort' and 'contract' provisions respectively . . . .").

[14] *Huhtala*, 401 Mich 118.

[15] *Id.* at 124-127.

action to recover damages for breach of contract and is governed by the six-year statute of limitations in MCL 600.5807. By contrast, when an action is founded on a "non-consensual" duty or one "imposed by law," the action is generally governed by the three-year statute of limitations in MCL 600.5805.[16]

In distinguishing between tort actions and contract actions in the context of §§ 5805 and 5807, *Huhtala* concluded that any "action to recover damages for injury to persons or property" is a tort action.[17] However, it did not specifically address the language of MCL 600.5839(1).

The United States Court of Appeals for the Sixth Circuit did apply the reasoning of *Huhtala* to MCL 600.5839(1) in *Garden City Osteopathic Hosp v HBE Corp*,[18] a diversity action governed by Michigan law. It held that MCL 600.5839(1) is not applicable to a claim against an engineer or contractor if the nature and origin of the claim is the breach of a contract.

In that case, a hospital contracted with a builder and an architect for the construction of a building addition. The hospital discovered a defect in the work and sued the builder and architect for breach of contract. The federal district court granted the defendants' motion for summary disposition. It found that MCL 600.5839(1) barred the hospital's claims.[19]

The Sixth Circuit reversed that decision. It surveyed Michigan caselaw and found that the distinction outlined in *Huhtala* supplied the proper analysis for deter-

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[16] *Id.* at 130-132.

[17] *Id.* at 126-127.

[18] *Garden City Osteopathic Hosp v HBE Corp*, 55 F3d 1126 (CA 6, 1995).

[19] *Id.* at 1129.

mining whether MCL 600.5839(1) applied to the hospital's breach of contract claim.[20] It pointed out that limitations periods differ depending on the type of damages sought.[21] The court then concluded that the hospital's claim was subject to the six-year statute of limitations applicable to actions to recover damages for breach of contract, MCL 600.5807(8).[22]

In arriving at this conclusion, it noted that the nature and origin of the claim was "that the defendants failed to perform the express promise to construct the improvement in conformity with the governing contract documents."[23] The court also noted that the claim did not involve a duty implied by law, but was dependent on the existence of a contract and contract principles.[24] We find the rationale in *Garden City Osteopathic Hosp* persuasive.

In this case, the Court of Appeals relied on *Michigan Millers Mut Ins Co v West Detroit Bldg Co*[25] for the proposition that MCL 600.5839(1) applies to contract actions.[26] In *Michigan Millers*, a contractor built a restaurant for the owner.[27] When the roof collapsed

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[20] *Id.* at 1131-1133.

[21] For example, MCL 600.5807 governs actions to recover damages for "breach of contract." MCL 600.5805 governs actions to recover damages for "injuries to persons or property." And MCL 600.5839(1) governs actions to recover damages for "injury to property, real or personal, or for bodily injury or wrongful death arising out of the defective and unsafe condition of an improvement to real property . . . ."

[22] *Garden City Osteopathic Hosp*, 55 F3d at 1133-1136.

[23] *Id.* at 1133.

[24] *Id.*

[25] *Mich Millers Mut Ins Co v West Detroit Bldg Co*, 196 Mich App 367; 494 NW2d 1 (1992).

[26] *Miller-Davis*, 285 Mich App at 305.

[27] *Mich Millers*, 196 Mich App at 369.

because of allegedly defective roof trusses, the owner and the insurer sued the contractor for negligence and breach of contract.[28]

Without supporting analysis, the Court of Appeals found it "clear" that the limitations period in MCL 600.5839(1) did not pertain solely to tort actions given that the statute used the language " '*any* action to recover damages for any injury to property . . . .' "[29] The Court did not address the view that the language it cited means "any tort action" because the liability for an injury to property arises from a tort; it is distinct from the liability that arises from the breach of a contractual agreement.

Rather, the Court concluded that MCL 600.5839(1) applies "to all actions brought against contractors on the basis of an improvement to real property, including those brought by owners for damage to the improvement itself."[30] With this statement, the Court of Appeals erroneously expanded the scope of MCL 600.5839(1) to contract actions, although it had been asked to determine only the disposition of a negligence action.[31] This conclusion was later cited in *Travelers Ins Co v Guardian Alarm Co of Mich*,[32] in which the Court held that the

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[28] *Id.*

[29] *Id.* at 378, quoting MCL 600.5839(1).

[30] *Mich Millers*, 196 Mich App at 378.

[31] In *Michigan Millers*, the plaintiffs acknowledged that their breach of contract claim was time-barred. *Mich Millers*, 196 Mich App at 372 n 1. Because of this acknowledgement, the Court of Appeals had no occasion to consider and decide whether a breach of contract claim is subject to MCL 600.5839. The Court was called on to decide only whether the plaintiffs' negligence claim—a claim stemming from a duty imposed by law—was barred by MCL 600.5839(1). Thus, the statement in *Michigan Millers* expanding the scope of § 5839(1) to contract actions was dictum.

[32] *Travelers Ins Co v Guardian Alarm Co of Mich*, 231 Mich App 473, 481-482; 596 NW2d 760 (1998).

statute of repose applied to the plaintiff's breach of contract and breach of warranty claims.

The *Michigan Millers* Court turned to the statute's legislative history in an attempt to substantiate its holding. However, the history on which it relied does not support expanding the scope of MCL 600.5839(1) beyond tort actions. It said only that " '[t]he bill would ensure that, in future claims against engineers, architects, and contractors, . . . [they would] be protected from suits charging *malpractice* or *negligence* in building improvements . . . .' "[33]

By expanding the scope of MCL 600.5839 to contract actions, *Michigan Millers* blurred the critical distinction between third-party tort claims and contract claims between parties to an express contract. It expanded the applicability of the statute beyond any arguable legislative intent. Furthermore, its holding exceeded that necessary to resolve the issues involved. In sum, the Court of Appeals in this case relied on *Michigan Millers* for a proposition that is unsubstantiated. We overrule *Michigan Millers* and *Travelers Ins Co* because they are inconsistent with § 5839.

In the 1980 case of *O'Brien v Hazelet & Erdal*,[34] this Court explained the Legislature's intent in drafting MCL 600.5839:

> [This statute] was enacted in 1967 in response to then recent developments in the law of torts. The waning of the privity doctrine as a defense against suits by injured third parties and other changes in the law increased the likelihood that persons taking part in the design and construction of improvements to real property might be forced to defend against claims arising out of alleged defects in such improvements, perhaps many years after construction of

[33] *Id.* at 376 (citations omitted; emphasis added).

[34] *O'Brien v Hazelet & Erdal*, 410 Mich 1, 14; 299 NW2d 336 (1980).

> the improvement was completed. The Legislature chose to limit the liability of architects and engineers in order to relieve them of the potential burden of defending claims brought long after completion of the improvement and thereby limit the impact of recent changes in the law upon the availability or cost of the services provided.

MCL 600.5839 was crafted in response to changes in tort law. A reference to it was placed in the general tort statute of limitations, MCL 600.5805. MCL 600.5839 also uses language—"injury to property" and "bodily injury or wrongful death"—that is generally associated with tort actions. The logical conclusion is that it was intended to apply to tort actions. However, no similar conclusion can be drawn with respect to its applicability to actions for breach of contract.

In 1986, in *City of Marysville v Pate, Hirn & Bogue, Inc*,[35] the Court of Appeals again commented on the Legislature's intent in enacting MCL 600.5839:

> [T]his statute was enacted primarily to limit the engineers' and architects' exposure to litigation by injured third persons as evidenced by the legislation's timing and relation to case law. However, the Legislature never intended this statute to fix the period of limitation in which an owner of an improvement to real property must bring an action against the architect or engineer for professional malpractice committed in the planning or building of the improvement which results in deficiencies to the improvement itself. Unlike the language of other states' statutes, the words selected by Michigan's Legislature make it clear that the statute simply applies when there is an injury ". . . arising out of the defect and unsafe condition . . . ." If there is no causal connection between the defective condition and the injury, the provision does not apply. Similarly, where the suit is for deficiencies in the improvement itself, the injury is the defective condition, hence, the injury does not "arise out of" the defective condi-

[35] *City of Marysville v Pate, Hirn & Bogue, Inc*, 154 Mich App 655, 660; 397 NW2d 859 (1986).

> tion, but, rather, it is the condition. Therefore, claims for deficiencies in the improvement itself do not come within the scope of this special statute of limitation.

We agree that the language of the provision strongly supports the conclusion that MCL 600.5839 does not apply to a breach of contract claim for a defect in a building improvement. We conclude that the Legislature intended the provision to be limited to actions in tort. Thus, it does not apply to a claim against an engineer or contractor for a defect in an improvement when the nature and origin of the claim is the breach of a contract.

In this case, the complaint alleged two counts against the construction company: (1) breach of contract for installing a roof that did not conform to plan specifications and (2) indemnity for the corrective work plaintiff had to perform. Neither claim fits within the language of MCL 600.5839(1).[36]

There was no allegation that the roof deck system caused any "injury to property" or "bodily injury or wrongful death."[37] Nor was there any allegation of a "defective and unsafe condition."[38] Rather, plaintiff claimed that, because defendant failed to build the roof to the agreed-upon specifications, plaintiff was forced to expend money repairing it. Thus, the damages involved in this case were not to plaintiff's person or property, but rather to its financial expectations.

A claim for damages for deficiencies in an improvement is not an "action to recover damages for any injury to property . . . or for bodily injury or wrongful death . . . ."[39] It is a suit for breach of con-

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[36] A third count, involving the surety's liability, is no longer at issue.

[37] See MCL 600.5839(1).

[38] See *id*.

[39] MCL 600.5839.

tract.[40] Here, there was a contract. Plaintiff did not rely on a duty implied in law, but solely on the terms of the contract. Thus, defendant's obligation to plaintiff arose out of the contract. Because plaintiff claimed that defendant breached the contract that defendant and plaintiff entered into, the six-year period of limitations for contract actions, MCL 600.5807(8), applies in this case. Because MCL 600.5839(1) does not apply to actions for breach of contract, it did not bar plaintiff's claims. Accordingly, the Court of Appeals erred by concluding that plaintiff's contract action was barred by MCL 600.5839(1).

CONCLUSION

MCL 600.5839(1) applies to actions for "injury to property" or "bodily injury or wrongful death," which are commonly viewed as tort actions. There is a reference to MCL 600.5839 in the statute of limitations covering tort actions, MCL 600.5805, but there is no similar reference to MCL 600.5839 in the statute of limitations covering contract actions, MCL 600.5807. Thus, the statutory language and the overall statutory scheme lead to the conclusion that MCL 600.5839 is limited to tort actions. This view is supported by *Huhtala* and *Garden City Osteopathic Hosp*. While *Michigan Millers* reached the opposite conclusion, it did so in dictum, and it misconstrued the legislative history. We overrule *Michigan Millers* and *Travelers Ins Co*, which relied on it.

We hold that MCL 600.5839(1) is limited to tort actions. It does not apply to breach of contract actions. The Court of Appeals erred by concluding that plain-

[40] *Marysville*, 154 Mich App at 660; see also *Burrows v Bidigare/Bublys, Inc*, 158 Mich App 175, 182; 404 NW2d 650 (1987).

tiff's contract action was barred by MCL 600.5839(1). Accordingly, we remand this case to the Court of Appeals for application of MCL 600.5807(8) and, if necessary, for consideration of the remaining issues raised in the appeal and cross-appeal.

YOUNG, C.J., and CAVANAGH, MARKMAN, HATHAWAY, MARY BETH KELLY, and ZAHRA, JJ., concurred with MARILYN KELLY, J.

PEOPLE v DOWDY

Docket No. 140603. Argued November 5, 2010 (Calendar No. 5). Decided July 11, 2011.

Randall L. Dowdy, a convicted sex offender, was charged in the Ingham Circuit Court, Thomas L. Brown, J., with failure to comply with the requirements of the Sex Offenders Registration Act (SORA), MCL 28.721 *et seq*., that he report the location of his residence or domicile to the appropriate law enforcement agency and verify the location quarterly. The court dismissed the charges on the ground that defendant could not have complied with the requirements because he was homeless. The Court of Appeals denied the prosecution's delayed application for leave to appeal in an unpublished order entered February 12, 2009 (Docket No. 287689). The Supreme Court, in lieu of granting leave to appeal, remanded the case to the Court of Appeals for consideration as on leave granted. 484 Mich 855 (2009). On remand, the Court of Appeals, BECKERING, P.J., and MARKEY and BORRELLO, JJ., affirmed, holding that SORA applies only to sex offenders who have a residence or a domicile as defined by the act, which defendant did not. 287 Mich App 278 (2010). The Supreme Court granted the prosecution's application for leave to appeal. 486 Mich 935 (2010).

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

Homeless sex offenders who are subject to SORA must comply with its reporting and notification requirements.

1. The Legislature described the scope and intent of SORA broadly. The act is intended to better assist law enforcement officers and the people of this state in preventing and protecting against the commission of future criminal sexual acts by convicted sex offenders by providing an appropriate, comprehensive, and effective means to monitor those persons. SORA requires all sex offenders convicted of one or more listed offenses that are felonies to report quarterly and in person to a law enforcement agency for the verification of their residence or domicile, MCL 28.725a(4)(b), and to apprise law enforcement within 10 days of changing or vacating their residence or domicile, MCL 28.725(1). Law enforcement agencies are under an affirmative statutory obligation to

verify this information. MCL 28.725a(8) requires sex offenders to maintain either a valid driver's license or an official state identification card, but also provides that the Michigan State Police may specify other satisfactory proof of residence or domicile. Under this authority, the state police have promulgated an order that permits homeless sex offenders to register their address as "123 Homeless," which allows the sex offenders and the police to fulfill their obligations under SORA.

2. MCL 28.722(g) defines "residence" as that place at which a person habitually sleeps, keeps his or her personal effects, and has a regular place of lodging. This definition contemplates a place, not necessarily a specific street address or even a physical structure.

3. SORA does not define "domicile," but because it used both "residence" and "domicile" to describe what a sex offender can register, construing the two terms as synonymous in this case would render one of the terms nugatory. Michigan courts have defined "domicile" as the place where a person has voluntarily fixed his or her abode not for a mere special or temporary purpose, but with a present intention of making it the person's home, either permanently or for an indefinite or unlimited length of time. Similarly, a "domicile" is the place where a person has his or her home, with no present intention of removing, and to which he or she intends to return after going elsewhere. The essential characteristic of a domicile that separates it from a residence under Michigan law is that every person has a domicile.

4. Even if a homeless sex offender cannot establish a residence under SORA, the offender can still report sufficient information about where he or she lives to identify a domicile. Difficulties in verifying an offender's information do not excuse the offender from complying with SORA's requirements, which may be done by the procedure set forth in the state police order.

5. The requirement that an offender report in person to law enforcement four times a year is unconditional, contains no exceptions or exclusions for homelessness, and applies regardless of the stability of where an offender resides or is domiciled. Any difficulty verifying the truthful information provided by a homeless sex offender is the responsibility of the law enforcement agency. Sixteen quarters passed without defendant ever having complied with the quarterly reporting requirement. Moreover, because the record indicated that defendant was no longer permitted at the shelter where he had resided, his residence had been vacated or changed, at which point he had 10 days to notify law enforcement that his registered residence or domicile was no longer accurate, regardless of whether he could identify his new

residence or domicile. The lower courts clearly erred by dismissing the charges. Where defendant was domiciled, however, is a question of fact that must be resolved on remand to the circuit court.

Reversed and remanded.

Justice MARILYN KELLY, joined by Justices CAVANAGH and HATHAWAY, dissenting, analyzed the definitions of "residence" and "domicile" and would have held that because defendant did not have a residence or domicile as those terms are used in SORA, he could not be held criminally liable for failure to register or report his residence or domicile. Justice MARILYN KELLY further noted that the state police order permitting entry of the fictitious address "123 Homeless" in the SORA registry contravened the language of SORA.

1. CRIMINAL LAW — SEX OFFENDERS REGISTRATION ACT — HOMELESS SEX OFFENDERS.

Homeless sex offenders who are subject to the Sex Offenders Registration Act must comply with its reporting and notification requirements (MCL 28.725, 28.725a).

2. CRIMINAL LAW — SEX OFFENDERS REGISTRATION ACT — WORDS AND PHRASES — RESIDENCE.

The Sex Offenders Registration Act defines a residence as the place at which a person habitually sleeps, keeps his or her personal effects, and has a regular place of lodging; this definition contemplates a place, not necessarily a specific street address or even a physical structure (MCL 28.722[g]).

3. CRIMINAL LAW — SEX OFFENDERS REGISTRATION ACT — WORDS AND PHRASES — DOMICILE — HOMELESS SEX OFFENDERS.

For purposes of the Sex Offenders Registration Act, a domicile is the place where a person has voluntarily fixed his or her abode, not for a mere special or temporary purpose but with a present intention of making it his or her home, either permanently or for an indefinite or unlimited length of time, and to which he or she intends to return after going elsewhere; every homeless sex offender can report sufficient information about where he or she lives to identify a domicile (MCL 28.725[1]).

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Stuart J. Dunnings, III*, Prosecuting Attorney, and *Joseph B. Finnerty*, Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *Christine A. Pagac*) for defendant.

Amici Curiae:

Ronald J. Schafer and *Terrence E. Dean* for the Prosecuting Attorneys Association of Michigan.

Legal Aid of Western Michigan (by *Miriam Aukerman*) for Jane Poe and others.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, and *Mark G. Sands*, Assistant Attorney General, for the Attorney General.

YOUNG, C.J. We granted leave to appeal in this case to determine whether homeless sex offenders are obligated to comply with the registration requirement imposed by the Sex Offenders Registration Act (SORA).[1] Specifically, we consider whether homeless sex offenders have a "residence" or "domicile" such that they can comply with the statute's registration requirements. We hold that homelessness is not a bar to compliance with SORA because homelessness does not preclude an offender from entering a police station and reporting to a law enforcement agency regarding the offender's residence or domicile. The Legislature intended SORA to be a comprehensive system that requires all sex offenders to register, whether homeless or otherwise. Therefore, we reverse the Court of Appeals' judgment and remand this case for trial.

I. FACTS AND PROCEDURAL HISTORY

In 1984, defendant, Randall Lee Dowdy, pleaded guilty to a charge of kidnapping, five counts of first-

[1] MCL 28.721 *et seq*. SORA has since been amended, see 2011 PA 17; however, those amendments do not apply to this case.

degree criminal sexual conduct (CSC-I), and a charge of possession of a firearm during the commission of a felony.[2] Defendant remained incarcerated until 2002.

As a consequence of defendant's CSC-I convictions, he is required to register as a sex offender.[3] Defendant signed a form upon being released from incarceration acknowledging that his obligations under SORA had been explained to him. Defendant registered his residence as 430 North Larch, Lansing, Michigan, which is a location of the Volunteers of America (VOA), a homeless shelter.[4] Defendant obtained services at the VOA until the fall of 2006, when the VOA staff discovered that he was a sex offender. He left the VOA in accordance with its policy barring sex offenders from receiving its services. It appears that defendant was homeless at all times relevant to this case.

In 2006, the Lansing Police Department attempted to verify where defendant was living. According to police records, the last time that defendant reported his residence or domicile, as SORA requires, was in November 2002. In October 2006, the police visited the VOA in a further attempt to verify defendant's information and determined that he no longer received services there. On the basis of these facts, the Ingham County Prosecutor charged defendant with violating the reporting and notification requirements of SORA.[5]

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[2] MCL 750.349 (kidnapping); MCL 750.520b (CSC-I); MCL 750.227b (felony-firearm). See *People v Dowdy*, 148 Mich App 517, 518; 384 NW2d 820 (1986). Defendant admitted committing "one vaginal, two oral, and two anal" penetrations of his victim. *Id*. at 520.

[3] MCL 28.722(e)(*x*).

[4] The Volunteers of America provides a variety of services for the homeless, including overnight shelters, free meals, counseling services, and employment preparation.

[5] Defendant was charged with one count of violating MCL 28.729(1)(a) for failure to notify law enforcement within 10 days after he "change[d]

After a preliminary examination, defendant was bound over to the Ingham Circuit Court, where he filed a motion to dismiss the charges. Defendant argued that SORA required him to register an address in order to comply with his statutory obligations, but claimed that because he was homeless and did not have an address, he was unable to comply with the obligation to report a "residence" to police under SORA. The circuit court found these arguments persuasive and dismissed the charges, holding that defendant's homelessness rendered it impossible for him to comply with SORA. The prosecution appealed, and the Court of Appeals denied leave to appeal for lack of merit in the grounds presented. On appeal in this Court, in lieu of granting leave to appeal, we remanded the case to the Court of Appeals for consideration as on leave granted.[6]

On remand, a Court of Appeals panel affirmed. The Court reasoned that homeless individuals have neither a residence nor a domicile as SORA defines those terms.[7] The panel explained that "residence" referred to "a place, a dwelling, an abode, where an individual has a 'regular place of lodging,' " and held that "[t]he provisional location where a homeless person happens to spend the night" does not satisfy the dictionary definitions of "lodging."[8] Therefore, the panel held that the statutory language required *only* those sex offenders with a "residence" or a "domicile" to notify law enforcement and that, because the homeless have neither, they cannot comply with the statute's require-

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or vacate[d] his . . . residence or domicile" pursuant to MCL 28.725(1) and two counts of violating MCL 28.729(2)(a) for failure to comply with his quarterly reporting requirements pursuant to MCL 28.725a(4)(b).

[6] *People v Dowdy*, 484 Mich 855 (2009).

[7] *People v Dowdy*, 287 Mich App 278, 281-282; 787 NW2d 131 (2010).

[8] *Id*. at 281, quoting MCL 28.722(g).

ments.[9] We granted leave to appeal to consider whether homeless sex offenders can comply with SORA.[10]

II. STANDARD OF REVIEW

Issues of statutory construction are questions of law that are reviewed de novo.[11] "The cardinal rule of statutory construction is to discern and give effect to the intent of the Legislature."[12] Courts must construe a statute in a manner that gives full effect to all its provisions.[13] If the language of a statute is clear and unambiguous, this Court must enforce the statute as written.[14] To the extent that constitutional issues are involved, they are also questions of law reviewed de novo.[15] A district court magistrate's decision to bind over a defendant and a trial court's decision on a motion to quash an information are reviewed for an abuse of discretion.[16]

III. ANALYSIS

A. THE SEX OFFENDERS REGISTRATION ACT

SORA is a conviction-based registration statute that requires individuals convicted of certain "listed of-

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[9] See *id*. at 282. Curiously, the Court of Appeals panel did not address defendant's quarterly reporting requirement pursuant to MCL 28.725a(4)(b). The Court's opinion only addressed defendant's obligation to notify law enforcement of a changed or vacated "residence" or "domicile" pursuant to MCL 28.725(1).

[10] *People v Dowdy*, 486 Mich 935 (2010).

[11] *City of Taylor v Detroit Edison Co*, 475 Mich 109, 115; 715 NW2d 28 (2006).

[12] *Drouillard v Stroh Brewery Co*, 449 Mich 293, 302; 536 NW2d 530 (1995).

[13] *People v Francisco*, 474 Mich 82, 87; 711 NW2d 44 (2006).

[14] *Robinson v Detroit*, 462 Mich 439, 459; 613 NW2d 307 (2000).

[15] *Toll Northville Ltd v Northville Twp*, 480 Mich 6, 10-11; 743 NW2d 902 (2008).

[16] *People v Hamblin*, 224 Mich App 87, 91; 568 NW2d 339 (1997).

fenses" to register as sex offenders.[17] An offender's registration disclosure includes information regarding where the offender lives, identifying information, and a summary of the offender's convictions.[18] Offenders are also required to sign a form acknowledging their obligations as sex offenders under SORA.[19]

The Legislature used broad language to describe SORA's scope and intent. SORA is intended to "better assist law enforcement officers and the people of this state in preventing and protecting against the commission of future criminal sexual acts by convicted sex offenders."[20] The Legislature determined that convicted sex offenders—homeless or otherwise—pose a potential serious danger to the safety and morals of the people of Michigan and particularly to the state's children.[21] SORA is therefore intended to "provide law enforcement and the people of this state with an appropriate, *comprehensive*, and effective means to monitor those persons who pose such a potential danger."[22] Consistent with this intent, SORA requires sex offenders to comply with a variety of statutory obligations, two of which are at issue here: (1) the quarterly reporting requirement of MCL 28.725a(4)(b), and (2) the notification requirement of MCL 28.725(1). Inherent in both obligations is the requirement that a sex offender inform law enforcement regarding the location of the offender's "residence" or "domicile."

All sex offenders convicted of one or more listed offenses that are felonies have an affirmative obligation

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[17] MCL 28.722(e).

[18] See MCL 28.727(1).

[19] MCL 28.725a(2).

[20] MCL 28.721a.

[21] *Id*.

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

to report quarterly to a law enforcement agency for "verification of domicile or residence."[23] These offenders "*shall report in person*" to the police between the first and fifteenth day of *each* January, April, July, and October.[24] This quarterly reporting requirement is not contingent on where an offender resides or is domiciled, and all offenders who are not incarcerated *must* comply.

Additionally, all sex offenders have an ongoing obligation to keep law enforcement apprised of changes to their residence or domicile. Specifically, sex offenders "*shall notify* the local law enforcement agency or sheriff's department having jurisdiction where his or her new residence or domicile is located or the department post of the individual's new residence or domicile within 10 days after the individual changes or vacates his or her residence [or] domicile . . . ."[25] According to the statute's plain language, a sex offender's obligation to notify law enforcement of a new "residence" or "domicile" is triggered when the offender changes or vacates the previous "residence" or "domicile," not when the new "residence" or "domicile" is established.

After an offender complies with the quarterly reporting requirement pursuant to MCL 28.725a(4)(b), the law enforcement agency to whom the offender reports is under an affirmative statutory obligation to verify the information provided by the sex offender.[26] MCL

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[23] MCL 28.725a(4).

[24] MCL 28.725a(4)(b) (emphasis added).

[25] MCL 28.725(1) (emphasis added). This version of the statute took effect on December 1, 2006. See 2006 PA 402. The previous version of MCL 28.725(1), which was in effect during part of the period in which defendant was charged with violating it, varied in word order but not in substance.

[26] See MCL 28.725a(6). Law enforcement "*shall verify* the individual's residence or domicile and any information required to be reported" under MCL 28.724a. (Emphasis added.)

28.725a(8) directs sex offenders to maintain either a valid driver's license or an official state identification card, either of which may be used as proof of an offender's residence or domicile for purposes of law enforcement verification. However, those are not the *exclusive* means by which an offender may prove residence or domicile to law enforcement. SORA expressly contemplates sex offenders with an uncommon residence or domicile by providing that Michigan State Police "may specify other satisfactory proof of domicile or residence."[27] Thus, if a sex offender is unable to provide any of the statutorily specified documents or the offender's residence or domicile is difficult to confirm, the Michigan State Police is empowered to formulate alternative methods whereby the offender may provide information to verify the offender's residence or domicile.

B. "RESIDENCE" AND "DOMICILE"

To comply with the statute's registration requirements, sex offenders must provide information regarding their "residence" or "domicile."[28] SORA defines "residence" for "registration and voting purposes" as

> *that place* at which a person habitually sleeps, keeps his or her personal effects, and has a regular place of lodging. If a person has more than 1 residence, or if a wife has a residence separate from that of the husband, that place at which the person resides the greater part of the time shall be his or her official residence for the purposes of this act.[29]

Thus, a person's "residence" under SORA is a combination of three things: that place where a person (1) habitually sleeps, (2) keeps personal effects, and (3) has a regular place of lodging.

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[27] MCL 28.725a(8).

[28] See MCL 28.725(1), MCL 28.725a(4), and MCL 28.725a(8).

[29] MCL 28.722(g) (emphasis added).

The words that the Legislature used to define "residence" have a broad scope and contemplate a wide array of "residences." However, the definition of "residence" does not include *every* location where a person might sleep, regardless of the length of the stay. A "residence," for purposes of SORA, is only that place where an offender *habitually* sleeps and establishes *regular* lodging. The Court of Appeals panel in this case held that defendant was relieved of any obligation to comply with SORA because "the concepts of habitually and regularity are antithetical to the circumstances of homelessness," because homeless people do not "have the security of a customary place of lodging" and do not live "within a home."[30]

The Court of Appeals panel erroneously concluded that the homeless were definitionally incapable of having a habitual "residence." This assumption is belied by the facts of this very case, in which the record shows that, at least for a time, defendant's "residence" was listed as the VOA. Nevertheless, the panel's legal conclusion equating a "residence" with a "home" is inconsistent with the statutory definition of "residence" in SORA. Nothing in the relevant statutory provision suggests that "residence" is synonymous with a home, a specific street address, or even a physical structure. Rather, the definition of "residence" merely contemplates a "place."[31] Moreover, the

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[30] *Dowdy*, 287 Mich App at 282.

[31] Contrary to the dissent's assertions, our discussion of a "place" is not a "judicially derived shorthand definition," *post* at 400; rather, it is simply an application of SORA's plain language. MCL 28.722(g) explicitly defines "residence" as "that *place* at which a person habitually sleeps, keeps his or her personal effects, and has a regular place of lodging." Thus, far from committing an "egregious error," *post* at 400, our analysis simply gives effect to the Legislature's intent by applying the statute's unambiguous language. The dissent misconstrues SORA; although the dissent believes that some homeless sex offenders can be required to register, the dissent would require only those offenders who live in a

Court of Appeals panel presumed that all homeless individuals sleep in a different location every night and can *never* have a regular place of lodging. Such a broad overgeneralization is unjustifiable and factually unsupported, even by the record in this case. It is entirely consistent with SORA for a sex offender to identify, for example, a vacant house or a park as a "residence" if it is, in fact, "that place at which" the sex offender "habitually sleeps, keeps his or her personal effects, and has a regular place of lodging."

Unlike "residence," "domicile" is not defined in SORA. Although this Court has, in several circumstances, treated the terms "residence" and "domicile" as synonymous,[32] the terms were accorded different meanings under the common law.[33] In SORA, the Legislature used both "residence" and "domicile" to describe what a sex offender can register. Therefore, construing the two terms as synonymous in this case would effectively render one of the terms nugatory—an outcome courts avoid when construing the language of a statute.[34] Accordingly, it is necessary to differentiate between "residence" and "domicile" for purposes of SORA.

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home, apartment, or homeless shelter to comply with SORA. However, the dissent's analysis ignores the fact that nowhere in SORA exists a requirement that offenders live in a home, or, indeed, any structure at all.

[32] See, e.g., *Gluc v Klein*, 226 Mich 175, 178; 197 NW 691 (1924) ("In this State, the words 'domicile' and 'residence' are treated as synonymous terms. In our statutes relating to voting, eligibility to hold office, taxation, probate and administration of estates, etc., no distinction is pointed out.").

[33] *Id*. at 177-178 ("Under the common law, there was a distinction between 'domicile' and 'residence.' . . . '[A]ny place of abode or dwelling place,' however temporary it might have been, was said to constitute a residence. A person's domicile was his legal residence or home in contemplation of law.").

[34] *Omelenchuk v City of Warren*, 466 Mich 524, 528; 647 NW2d 493 (2002).

Michigan courts have defined "domicile" as " 'that place where a person has voluntarily fixed his abode not for a mere special or temporary purpose, but with a present intention of making it his home, either permanently or for an indefinite or unlimited length of time.' "[35] Similarly, a domicile is "the place where a person has his home, with no present intention of removing, and to which he intends to return after going elsewhere for a longer or shorter time."[36] More significant to the instant case is that it has long been the law of this state that "[e]very person must have a domicile somewhere."[37] A person may have only one domicile, which continues until the person acquires a different one.[38] Thus, the essential characteristic of a "domicile" that separates it from a "residence" is that, under Michigan law, *every* person has a "domicile."[39]

Even if a homeless sex offender with transient sleeping arrangements cannot establish a "residence" as SORA defines it, the offender is still capable of reporting sufficient information regarding where the offender lives for purposes of identifying a "domicile." Although

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[35] *In re Servaas*, 484 Mich 634, 679; 774 NW2d 46 (2009) (MARKMAN, J., dissenting), quoting *Henry v Henry*, 362 Mich 85, 101-102; 106 NW2d 570 (1960).

[36] *Hartzler v Radeka*, 265 Mich 451, 452; 251 NW 554 (1933).

[37] *Beecher v Common Council of Detroit*, 114 Mich 228, 230; 72 NW 206 (1897); see also *Gluc*, 226 Mich at 179.

[38] *Beecher*, 114 Mich at 230, quoting Cooley, Taxation (2d ed), p 369.

[39] The dissent's critique of our "domicile" analysis is erroneous. In *Beecher*, the issue was whether the petitioner's residence was located in Detroit or Negaunee. *Beecher*, 114 Mich at 229. Thus, far from equating domicile with a street address, *Beecher* described domicile in terms similar to the Michigan State Police order cited in note 41 of this opinion: by reference to a city. Additionally, the dissent conflates "residence" and "domicile" although the Legislature plainly used the terms in the disjunctive, indicating that the Legislature sought to give the terms discrete meanings.

it may be difficult to verify where an offender is domiciled, as noted, difficulties in *verifying* an offender's information do not excuse the offender from *complying* with SORA's requirements. Moreover, SORA enables the Michigan State Police to respond to such situations by empowering it to "specify other satisfactory proof of domicile or residence."[40] Indeed, the Michigan State Police has exercised this statutory authority by promulgating an order that permits homeless sex offenders to register their domicile as "123 Homeless."[41] An offender thus satisfies the offender's statutory obligation by appearing at a law enforcement agency and advising the authorities of where the offender lives. Pursuant to SORA and the Michigan State Police order, the law enforcement agency can accept as "satisfactory proof" of the offender's "domicile" the state, city, zip code, and county in which the offender lives and must add that information to the "123 Homeless" designation in the registry. Thus, when the homeless sex offender's "domicile" is registered as "123 Homeless" in the city in which the offender lives, that is the offender's statutory domicile for purposes of SORA.[42] Therefore, homelessness in no way prevents a sex offender from complying with the notification obligation pursu-

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[40] MCL 28.725a(8).

[41] Michigan State Police, Official Order No. 79, April 27, 2007, p 2.

[42] Our analysis simply explains *how* homeless sex offenders may comply with their registration obligations under the framework *created by SORA*. Regardless of whether a homeless sex offender is nomadic or has a consistent place of residence, SORA ensures that the homeless sex offender is capable of providing sufficient information to comply with SORA's registration requirements. Our construction is consistent with SORA's stated purpose of creating a *comprehensive* system to monitor sex offenders and is far more faithful to the statute than the dissent's construction, which would defeat this basic goal by categorically allowing offenders who merely *claim* homelessness to opt out of complying with SORA. The dissent would clearly incentivize this conduct.

ant to MCL 28.725(1) either because every person must have a legal domicile or, for practical purposes, because the Michigan State Police has promulgated an order to accommodate homeless sex offenders for the purposes of registration.

The Michigan State Police order does not contravene SORA, and the dissent's arguments to the contrary misapprehend the order's purpose. Although "123 Homeless" is not an actual address, an offender does not violate MCL 28.727(6) when *law enforcement* records the offender's address in this manner.[43] The *offender* complies with SORA when the offender truthfully reports to the appropriate law enforcement agency that the offender is homeless. The law enforcement agency, in turn, records the reported information in a manner that facilitates the statutorily mandated verification obligation so that the offender's residence or domicile can be confirmed later. Thus, the Michigan State Police order does not subject homeless sex offenders to further prosecution. The order is both authorized by and in compliance with SORA.

The Court of Appeals panel did not address whether defendant had a domicile. Instead, the Court noted that "[d]omicile is not an issue in this case because the parties agree that as a homeless person, defendant has no 'true, fixed, principal, and permanent home.' "[44] Because this Court has long acknowledged that "[e]very person must have a domicile somewhere,"[45] it was error for the panel below to conclude otherwise. Because the

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[43] MCL 28.727(6) provides that "[a]n individual shall not knowingly provide false or misleading information concerning a registration, notice, or verification."

[44] *Dowdy*, 287 Mich App at 281, quoting Black's Law Dictionary (8th ed).

[45] *Beecher*, 114 Mich at 230.

determination of where an individual is domiciled is generally a question of fact,[46] we cannot determine where defendant was domiciled and leave this question for resolution on remand. The offender's obligation is to truthfully inform police regarding where the offender's residence or domicile is located, and the police have the separate obligation of verifying that information.[47]

IV. APPLICATION

A. THE QUARTERLY REPORTING REQUIREMENT

Defendant argues that he is categorically excused from the statutory obligation because it is "impossible for homeless offenders to comply" with SORA, as homeless sex offenders conclusively lack either a "residence" or a "domicile." Defendant also argues that prosecuting him for failing to comply with an impossible obligation violates his constitutional right to due process of law. We conclude that both arguments are unpersuasive.

Defendant has made no compelling claim that his homelessness rendered it impossible for him to comply with MCL 28.725a(4)(b). This provision requires sex offenders, such as defendant, to perform the physical act of reporting in person to law enforcement four times per year. This provision in SORA is unconditional and contains no exceptions or exclusions for homelessness.

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[46] See, e.g., *Servaas*, 484 Mich at 680 (MARKMAN, J., dissenting).

[47] We recognize the practical difficulties of registering an offender who is homeless, claims to be homeless, or otherwise has a nontraditional residence. That any of these circumstances exist, however, does not provide license for an offender to flout the mandates imposed by SORA. Additionally, as noted, the burden of accommodating these atypical circumstances and verifying the offender's information falls on the governmental body charged with ensuring that an offender who seeks to comply with his registration and notification requirements can, in fact, do so.

Moreover, it applies regardless of the stability of where an offender resides or is domiciled. This absolute reporting obligation arises from the offender's status as a sex offender and the potential danger the offender poses to the people of Michigan.[48] Therefore, defendant was required to report in person to a law enforcement agency four times per year and to provide the authorities with truthful information.

Despite this clear mandate, there is no evidence suggesting that defendant *ever* complied with his obligation to report in person each January, April, July, and October, *even during the time* defendant's registered residence was at the VOA.[49] In fact, the record shows that *16 quarters* passed without defendant *ever* having complied with the quarterly reporting requirement. Defendant has never claimed that it was impossible for him to appear in person at a police station. Defendant's perceived difficulty, it seems, concerns the quality of information he contends he *would* have given to the police *had* he made an in-person appearance. However, any difficulty verifying the truthful information provided by defendant is the responsibility of law enforcement and does not negate defendant's responsibility to appear to report in the first instance. The lower courts erred by ignoring the mandatory nature of SORA's quarterly reporting requirement.

B. THE NOTIFICATION REQUIREMENT

When the police attempted to verify defendant's registration information in October 2006, the investigating officer determined that defendant no longer

[48] MCL 28.721a.

[49] Counts II and III of the Information charged defendant with failing to comply with his quarterly reporting duties in July 2006 and October 2006, when defendant's registered residence was at the VOA in Lansing.

received services at the VOA. Because defendant had registered his residence as the VOA in Lansing, and because defendant was no longer permitted to receive services there, his "residence" had been "vacate[d]" or "change[d]."[50] From the date defendant no longer resided at the VOA, he had 10 days to notify the Lansing Police, the Ingham County Sheriff, or the local post of the Michigan State Police that his registered residence or domicile was no longer accurate. According to the record, after leaving the VOA, defendant never made any attempt to notify a law enforcement agency of the change. Even if defendant had difficulty in identifying his new residence or domicile, he was nevertheless obligated to notify the authorities that his residence or domicile had changed. Nothing in the text of SORA suggests that homelessness is an excuse for an offender's failure to comply with the act. Therefore, because it was certainly possible for defendant to notify law enforcement that he had changed his residence or domicile, and because defendant made *no effort* to do so, the lower courts erred by dismissing the charges.

We note further that there is no evidence in this case that defendant *attempted* to comply with his reporting or notification obligations and was prosecuted for failing to provide *sufficiently specific* information. In fact, the contrary is true. At defendant's preliminary examination, the following exchange occurred:

> *The Court*: So you're telling me that [defendant] went [to the police station] and tried to report that he was homeless and they wouldn't take the report?
>
> [*Defense Counsel*]: No, Your Honor, I'm saying he does not have an obligation to report anything if he doesn't have an address to report.

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[50] MCL 28.725(1).

This case would be different if defendant had gone to a law enforcement agency, attempted to notify or report that he was a homeless sex offender, and was turned away and subsequently prosecuted. That did not occur here. Our holding that homeless offenders must comply with the statute's reporting and notification requirements, combined with the record evidence indicating that defendant made absolutely *no effort* to comply with either requirement, is sufficient to resolve the present case.

The dissent would permit a sex offender to escape any obligation to comply with SORA if the offender merely *claims* homelessness. The dissent argues that, *as a matter of law*, defendant could not comply with *any* of his obligations under SORA. The practical and egregious consequence of this conclusion is that if an offender unilaterally decides that he is homeless, that offender can simply ignore SORA and is no longer required to comply with MCL 28.725a(4)(a) or (b)[51] or MCL 28.725(1).[52] Because the dissent would relieve homeless sex offenders of the obligation even to enter a law enforcement agency and inform the authorities that the offender is homeless, there is no way for law enforcement agencies to confirm the veracity of the offender's claim—creating an incentive for noncompliant sex offenders to claim homelessness once law enforcement ultimately finds them.[53] Indeed, in the

[51] MCL 28.725a(4)(a) and (b) require an offender to report to local law enforcement or to the State Police annually or quarterly depending on the offender's crime.

[52] MCL 28.725(1) requires an offender to report to local law enforcement or to the State Police within 10 days after the offender changes or vacates the offender's residence or domicile.

[53] The dissent argues that our opinion enables offenders with a home to falsely report as homeless. However, one need only read SORA's language to conclude that the dissent's claim lacks merit. If an offender dishonestly

months immediately following the release of the Court of Appeals' decision, the number of sex offenders claiming homelessness increased by 62 percent.[54] As noted previously, the stated purpose of SORA is to enable law enforcement and the public to monitor sex offenders. Applying a "modicum of common sense,"[55] it is difficult to imagine a conclusion that does more harm to this purpose than to enable the very people targeted by SORA to determine *for themselves* whether they must comply with the statute's requirements.[56]

V. CONCLUSION

By enacting SORA, the Legislature created a broad, comprehensive registration statute. The lower courts failed to give effect to the plainly expressed intent of SORA, which is to enable law enforcement and the public to monitor sex offenders. All sex offenders can, and therefore must, comply with the reporting obligations and notification requirements outlined in the statute. An offender's homelessness in no way prevents that offender from physically entering a law enforce-

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reports to law enforcement that the offender is homeless, the offender has "knowingly provide[d] false or misleading information concerning a registration, notice, or verification" and has violated SORA. MCL 28.727(6). Our opinion applies SORA's requirement that all sex offenders *must* report and that they must report truthfully. Far from incentivizing false reporting, our opinion requires *all* sex offenders to comply with SORA and to do so truthfully.

[54] See McVicar, *Since court ruled homeless sex offenders don't have to register, number claiming homelessness jumps 62 percent*, Grand Rapids Press, available at <http://www.mlive.com/news/grand-rapids/index.ssf/2010/05/since_court_ruled_homeless_sex.html> (accessed July 7, 2011).

[55] *Post* at 398.

[56] SORA is only "purge[d]" of "any meaning," *post* at 410, when the targets of the registration scheme—sex offenders—are permitted to determine whether they will comply with SORA's *mandatory* requirements.

ment agency and truthfully reporting to the authorities information regarding the offender's residence or domicile. It was clear legal error for the lower courts to excuse defendant's complete failure to comply with SORA. Therefore, because the Court of Appeals panel interpreted SORA in a manner contrary to the plainly expressed intent of the Legislature and because defendant made *no effort* to comply with his reporting obligations, we reverse the Court of Appeals' judgment and remand defendant's case to the Ingham Circuit Court for proceedings consistent with this opinion.

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

MARILYN KELLY, J. (*dissenting*). At issue in this case is whether defendant, a homeless person who is subject to the Sex Offenders Registration Act (SORA),[1] violated the act when he failed to report a residence or domicile. The majority concludes that homelessness does not prevent compliance with SORA. Accordingly, it reverses the judgment of the Court of Appeals, which held that homeless individuals have neither a "residence" nor a "domicile" as those terms are used in SORA.[2] For the

[1] MCL 28.721 *et seq*. On April 12, 2011, the Legislature amended SORA, including the definition of "residence" germane to this appeal. See 2011 PA 17. However, those amendments do not apply to this case given that defendant was charged with violating SORA in its previous form.

[2] To the extent that the Court of Appeals' holding can be construed as definitively precluding application of SORA's registration and reporting requirements to all homeless sex offenders, I believe that it erred. However, the majority commits the same error by reaching the opposite conclusion—that SORA's registration and reporting requirements categorically do apply to all homeless sex offenders. The more nuanced question in this appeal is whether *this* defendant could be criminally charged for his alleged failure to comply with SORA.

reasons I will detail, I believe the Court of Appeals properly held that, as a matter of law, defendant could not have complied with SORA's registration and reporting requirements. Accordingly, I dissent.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

In 1984, defendant pled guilty of kidnapping, first-degree criminal sexual conduct (CSC I), and felony-firearm. Under the terms of his plea agreement, he was sentenced to a mandatory two-year term for the felony-firearm conviction, followed by concurrent 10- to 20-year terms for the kidnapping and CSC I convictions. The Court of Appeals affirmed the judgment.[3]

When defendant was released from prison in November 2002, he signed a form that set forth his reporting obligations under SORA. He provided "430 North Larch, Lansing, Michigan" as his address, which is the location of a homeless shelter operated by Volunteers of America (VOA). Apparently, defendant never resided at the VOA. Rather, as the senior manager for social services at the VOA testified, defendant was at the shelter only for meals. When the manager became aware that defendant had listed the VOA as his address for purposes of SORA registration, she advised him that he was ineligible for VOA services. Defendant did not return to the VOA, and he remained homeless at all times relevant to this case.

Law enforcement agencies often run verification tests to determine whether persons required to register and report under SORA have complied. In 2006, Lansing police performed such a test and learned that defendant had failed to report as required. An officer visited the VOA in an attempt to verify defendant's location, but was told that defendant had "moved out."

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[3] *People v Dowdy*, 148 Mich App 517; 384 NW2d 820 (1986).

Consequently, defendant was charged with five criminal counts alleging failure to comply with SORA. Notwithstanding that the complaint and an entry on a preliminary data sheet show defendant as "homeless" and with "no address," the information lists his address as the VOA's Larch Street address. Following the preliminary examination, the Ingham Circuit Court bound him over on the charged offenses. Defendant then filed a motion to dismiss the charges, arguing that his homelessness rendered him incapable of complying with SORA's requirement that he report a "residence" to law enforcement. The trial court agreed with him and dismissed the charges. The Court of Appeals denied the prosecution's application for leave to appeal for lack of merit. But we remanded the case to the Court of Appeals for consideration as on leave granted.[4]

On remand, the Court of Appeals affirmed the trial court.[5] It held that, because defendant had neither a residence nor a domicile at which to register, he could not comply with the reporting requirements of SORA.[6] The Court of Appeals reasoned that the location where a nomadic homeless person spends the night does not fall within the ambit of SORA's definition of "residence." The Court concluded that the Legislature had written SORA's reporting requirements for persons who have a domicile or residence. It urged legislators to consider changes to SORA to make it possible for the homeless to comply.

We granted the prosecution's application for leave to appeal.[7]

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[4] *People v Dowdy*, 484 Mich 855 (2009).

[5] *People v Dowdy*, 287 Mich App 278; 787 NW2d 131 (2010).

[6] *Id*. at 281-282.

[7] *People v Dowdy*, 486 Mich 935 (2010).

STANDARD OF REVIEW AND LEGAL BACKGROUND

Generally, a trial court's ruling on a motion to quash an information is reviewed for an abuse of discretion.[8] However, the trial court's ruling in this case was based on its interpretation of SORA, which raises an issue of statutory interpretation. The proper interpretation of a statute presents a question of law, which we review de novo.[9]

It is not often that the Legislature expressly includes the purpose of an act in its provisions. Yet it did just that in writing SORA, providing in MCL 28.721a:

> The legislature declares that [SORA] was enacted pursuant to the legislature's exercise of the police power of the state with the intent to better assist law enforcement officers and the people of this state in preventing and protecting against the commission of future criminal sexual acts by convicted sex offenders. The legislature has determined that a person who has been convicted of committing an offense covered by this act poses a potential serious menace and danger to the health, safety, morals, and welfare of the people, and particularly the children, of this state. The registration requirements of this act are intended to provide law enforcement and the people of this state with an appropriate, comprehensive, and effective means to monitor those persons who pose such a potential danger.

When we interpret a statute, our goal is to give effect to the intent of the Legislature.[10] The first step in ascertaining its intent is to consider the language of the statute itself. Generally, the words provide the most reliable evidence of the Legislature's intent, and, as far

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[8] *People v Thomas*, 438 Mich 448, 452; 475 NW2d 288 (1991).

[9] *Univ of Mich Regents v Titan Ins Co*, 487 Mich 289, 297; 791 NW2d 897 (2010).

[10] *Brown v Detroit Mayor*, 478 Mich 589, 593; 734 NW2d 514 (2007).

as possible, we give separate meaning to every phrase, clause, and word.[11]

At issue in this case is the scope of SORA's provisions mandating registration and reporting. Specifically, defendant was charged with violating SORA by failing to notify law enforcement of a change in his residence or domicile. He was also charged with failure to comply with SORA's quarterly reporting requirements. Those requirements are set forth in MCL 28.725 and MCL 28.725a.

During most of the period in which defendant was charged with violating MCL 28.725(1), it provided, in relevant part:

> Within 10 days after any of the following occur, an individual required to be registered under this act shall notify the local law enforcement agency or sheriff's department having jurisdiction where his or her new residence or domicile is located or the [state police] department post of the individual's new residence or domicile:
>
> (a) The individual changes or vacates his or her residence, domicile, or place of work or education . . . .[12]

MCL 28.725a(4) provided, in relevant part:

> [F]ollowing initial verification . . . or registration . . . , an individual required to be registered under this act who is not incarcerated shall report in person to the local law enforcement agency or sheriff's department having jurisdiction where he or she is domiciled or resides or to the department post in or nearest to the county where he or she is domiciled or resides for verification of domicile or residence as follows:
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> * * *

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[11] *Petersen v Magna Corp*, 484 Mich 300, 307; 773 NW2d 564 (2009).

[12] This provision was amended effective December 1, 2006; however, the amendment did not affect the substantive requirements applicable to defendant in this case. See 2006 PA 402.

> (b) If the person is registered for 1 or more felony listed offenses, not earlier than the first day or later than the fifteenth day of each April, July, October, and January following initial verification or registration.

Thus, defendant's potential criminal liability under SORA hinges on whether he changed, or failed to quarterly report, a residence or domicile.

DEFENDANT DID NOT HAVE A "RESIDENCE" FOR PURPOSES OF SORA

The majority errs in its interpretation of SORA in numerous respects. First, it erroneously concludes that defendant, who was homeless at all times relevant to the charges that he failed to report, had a "residence" for purposes of the act. SORA specifically defines "residence" at MCL 28.722(g) as "that place at which a person habitually sleeps, keeps his or her personal effects, and has a regular place of lodging."

Thus, to establish a "residence," all three parts of the definition must be satisfied. As to the first, "habitual" is defined as "of the nature of a habit[.]"[13] A "habit" is (1) "an acquired pattern of behavior that has become almost involuntary as a result of frequent repetition," (2) "customary practice or use," or (3) "a particular practice, custom, or usage[.]"[14] The second and third parts are self-explanatory in that they require a "residence" to be a regular place of lodging where a person keeps his or her personal effects.

Defendant was unable to satisfy any part of the definition, let alone all three. When one applies the dictionary definitions of these terms and a modicum of common sense, it becomes obvious that defendant had

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[13] *Random House Webster's College Dictionary* (2001).

[14] *Id.*

no "residence" as that term is used in SORA. He had no habitual place at which to sleep. He had no place at which he kept his personal effects. Nor did he have a regular place of lodging.

A park bench, highway underpass, or steam grate may qualify as a place where a homeless individual sleeps, but they hardly qualify as a "regular place of lodging" under the statute. As the Court of Appeals astutely observed,

> the concepts of habitually and regularity are antithetical to the circumstances of homelessness. If there is anything "habitual" to the sleeping arrangements of the homeless, it is that it is customary for them not to have the security of a customary place of lodging. If there is anything "regular" about the place where a homeless person lives, it is that it is not within a home.[15]

The majority misinterprets this passage as equating a "residence" with a home. It does no such thing. The Court of Appeals merely pointed out that the homeless generally do not have a place at which they habitually sleep, keep their personal belongings, and customarily lodge. Hence, they often lack a "residence" under SORA.[16] To the extent that these criteria are tradition-

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[15] *Dowdy*, 287 Mich App at 282.

[16] I do not believe that all homeless sex offenders are incapable of registering and reporting under SORA. For example, homeless sex offenders may have a "residence" or "domicile" pursuant to SORA if they stay at the home of a relative, friend, or at a shelter. These offenders might easily be considered homeless in that they lack what is traditionally considered permanent housing. But their accommodations would nevertheless satisfy SORA's definition of "residence."

The majority claims, *ante* at 383-384 n 31, that I "would require only those offenders who live in a home, apartment, or homeless shelter to comply with SORA." That is manifestly incorrect, as evidenced by my preceding analysis. Unlike the majority, I would apply MCL 28.722(g) in its entirety and require registration for those offenders who have a "residence" as defined by SORA as "[a] place *at which a person habitually*

ally associated with a home, the Court of Appeals was simply applying the Legislature's chosen definition of "residence."

The majority commits an even more egregious error by stating that "the definition of 'residence' merely contemplates a 'place.' "[17] This judicially derived shorthand definition aids the majority in holding that a vacant house or park qualifies as a residence under SORA. But the term "place," standing alone, is not found within the relevant provisions of the act. Instead, SORA enumerates three criteria that must be satisfied for a "place" to be considered a "residence." Those are the criteria that the majority fails to faithfully apply. Simply put, applying MCL 28.722(g) as written, defendant did not have a "residence."

DEFENDANT DID NOT HAVE A "DOMICILE" FOR PURPOSES OF SORA

The majority next errs by perverting the legal definition and application of the term "domicile." The word "domicile" is not defined in SORA. However, because "domicile" has acquired a peculiar meaning under the law, we should construe and apply the word according to that meaning.[18]

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sleeps, keeps his or her personal effects, and has a regular place of lodging." (Emphasis added). Whether a "residence" is a "home, or, indeed, [a] structure at all," *ante* at 384 n 31, is immaterial. And contrary to the majority's reading of my dissent, nothing I have written here stands for the proposition that, to be subject to SORA's requirements, an offender must live in a home or structure. I have simply applied the unabridged definition of "residence" as provided by the Legislature.

[17] *Ante* at 383.

[18] See MCL 8.3a, which provides:

> All words and phrases shall be construed and understood according to the common and approved usage of the language; but technical words and phrases, and such as may have acquired a

Numerous cases have discussed the concept of domicile. In fact, for more than 160 years, the Court has defined "domicile" as a person's "permanent home."[19] This definition is consistent with Black's Law Dictionary (9th ed), which defines "domicile" as "the place at which a person has been physically present and that the person regards as home; a person's true, fixed, principal, and permanent home, to which that person intends to return and remain even though currently residing elsewhere."

As the majority acknowledges, the terms "domicile" and "residence" have often been used interchangeably and synonymously.[20] In *Campbell v White*, this Court approvingly quoted the following passage:

> "Ordinarily one's residence and domicile (if they do not always mean the same thing) are in fact the same, and where they so concur they are that place which we all mean when we speak of one's home. And it may safely be asserted that where one has a *home*, as that term is ordinarily used and understood among men, and he habitually resorts to that place for comfort, rest and relaxation from the cares of business, and restoration to health, and there abides in the

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peculiar and appropriate meaning in the law, shall be construed and understood according to such peculiar and appropriate meaning.

[19] See, e.g., *In re High*, 2 Doug 515, 523 (Mich, 1847) ("Domicile has been defined to be the place where a person has his true, fixed, permanent home, and principal establishment, and to which, whenever he is absent, he has the intention of returning[.]"); *Henry v Henry*, 362 Mich 85, 101-102; 106 NW2d 570 (1960) ("[A domicile is] that place where a person has voluntarily fixed his abode not for a mere special or temporary purpose, but with a present intention of making it his home, either permanently or for an indefinite or unlimited length of time.") (citations and quotation marks omitted).

[20] See, e.g., *Cervantes v Farm Bureau Gen Ins Co*, 478 Mich 934, 936 (2007) (MARKMAN, J., dissenting); *Workman v Detroit Auto Inter-Ins Exch*, 404 Mich 477, 495; 274 NW2d 373 (1979).

> intervals when business does not call—that is his residence, both in the common and legal meaning of the term."[21]

The majority trumpets the proposition that every person has a domicile. Under our centuries-old caselaw, that would be true only if every person had a permanent home. Unfortunately, that postulation is belied by reality, and, what is more important in the context of this case, SORA makes no such assumption. In support of its analysis, the majority selectively cites one sentence from *Beecher v Common Council of Detroit*[22] for the proposition that every person has a domicile, while omitting the next sentence. In its entirety, the relevant portion of *Beecher* provides:

> Every person must have a domicile somewhere. The domicile is acquired by the combination of *residence and the intention to reside in a given place*, and can be acquired *in no other way*. The residence which goes to constitute domicile need not be long in point of time. If the intention of permanently residing in a place exists, a residence in pursuance of that intention, however short, will establish a domicile.[23]

Hence, to establish a domicile, a person must first

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[21] *Campbell v White*, 22 Mich 178, 197 (1871), quoting *Chaine v Wilson*, 14 NY Sup Ct 673; 8 Abb Pr 78 (1858).

[22] *Beecher v Common Council of Detroit*, 114 Mich 228; 72 NW 206 (1897).

[23] *Id*. at 230 (emphasis added; citations omitted). In *In re High*, this Court wrote that "every man must have . . . a *national* domicile somewhere." *High*, 2 Doug at 523 (emphasis added). In other words, one cannot be a man without a country. But the Court recognized that a domicile was "defined to be the habitation fixed in any place without any present intention of removing therefrom[.]" *Id*. Therefore, domicile must be established through residence, but residence "is not indispensible to retain domicile after it has been once acquired[.]" *Id*. Thus, the Court recognized a distinction in scope between domicile and residence.

establish a residence.[24] Thus, the case the majority cites for the proposition that every person must have a domicile made the proposition contingent on the underlying assumption that the person first had a residence. And as previously discussed, given that defendant did not have a residence, then by definition he did not have a domicile as that word is used in SORA. Consequently, the majority's claim that defendant must have a domicile for purposes of SORA is legally unsupported.[25]

Perhaps more alarming, the majority does not engage in an analysis of whether defendant has a "domicile" under any definition of that term. Rather, it states as an ipse dixit that defendant must have a domicile. It then makes a leap in logic by concluding that "123 Home-

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[24] The majority's chosen definition of "domicile" supports this conclusion. For example, it states that Michigan courts have defined "domicile" as "that place where a person has voluntarily fixed his abode not for a mere special or temporary purpose, but with a present intention of making it his home, either permanently or for an indefinite or unlimited length of time." *Ante* at 385 (citations and quotation marks omitted). "Abode" is defined as "a place in which a person resides; residence; dwelling; home." *Random House Webster's College Dictionary* (2001). Thus, there is a two-step process to establishing a domicile, the first of which is establishing a residence.

[25] The majority also claims that the Michigan State Police order allows the police to "accept as 'satisfactory proof' of the offender's 'domicile' the state, city, zip code, and county in which the offender lives . . . . Thus, when the homeless sex offender's 'domicile' is registered as '123 Homeless' in the city in which the offender lives, that is the offender's statutory domicile for purposes of SORA." *Ante* at 386. This is simply false. The Michigan State Police order provides, in relevant part, "If the offender is homeless, the generic address of '123 Homeless' shall be entered into the computerized database, along with the offender's city, state, zip code, and county code." Michigan State Police, Official Order No. 79, issued April 27, 2007 (MSP Order), p 4. The order does not state that this information constitutes an offender's domicile (or residence). Nor is there *any* authority, be it caselaw, statute, or otherwise, that establishes that a state, city, zip code, and county constitute a domicile. Therefore, those generic locations may furnish evidence of an offender's location, but the order cannot trump our binding legal definitions of "domicile."

less" qualifies as a domicile. This conclusion is unsupported by the majority's cited (but not applied) definition of "domicile" as "the place where a person has his home, with no present intention of removing, and to which he intends to return after going elsewhere for a longer or shorter time."[26] As further explained later in this opinion, a fictitious address does not satisfy any definition of "domicile." The majority opinion is devoid of a meaningful legal analysis with respect to defendant's domicile or lack thereof.

Even assuming, arguendo, that all persons do have a domicile, defendant still could not comply with SORA's registration and reporting requirements. The written form that each convicted sex offender must tender upon registration, Michigan State Police Form DD-004, requires the submission of general offender information (name, date of birth, height, weight, etc.), offense information (offense date, place of crime, conviction type, etc.), and address information.[27] Under the address heading, a convicted sex offender is required to list a "Current Primary Address." The form provides space for two address lines, an apartment or lot number, city, state, zip code, county, and a telephone number. The form also provides for the name of a penal institution if the offender is incarcerated.

Not only was defendant incapable of providing a current primary address pursuant to the form's instructions, but he was incapable of listing a residence or domicile. Those terms are absent from the form, which

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[26] *Ante* at 385 (citation and quotation marks omitted).

[27] Michigan State Police Form DD-004 (12/2007), available at <http://www.michigan.gov/documents/msp/dd-004_218346_7.doc> (accessed July 7, 2011); see also Michigan State Police Form DD-004R (12/2007), available at <http://www.michigan.gov/documents/msp/dd-004R_218341_7.doc> (accessed July 7, 2011).

also fails to instruct an offender how to register if he or she does not have a residence. And given that "residence" and "domicile" have often been considered synonymous in the eyes of the law, this Court cannot reasonably expect the homeless to discern a difference between them.[28]

The majority ignores this practical reality by stating that "difficulties in *verifying* an offender's information do not excuse the offender from *complying* with [SORA]."[29] This distinguishes between verification of a "residence" or "domicile" and compliance with registration and reporting requirements. SORA does not make this distinction. I ask the majority to explain how defendant could have adequately completed the registration form when he had no residence or domicile as the majority itself defines those terms, i.e., as "the place where a person has his home . . . ."[30] This is not a rhetorical question, and its lack of a legally defensible answer should give the majority pause.

THE MICHIGAN STATE POLICE ORDER CONTRAVENES SORA

Defendant's lack of a "residence" or "domicile" aside, the majority relies on the fact that MCL 28.725a(8)

[28] I further question whether SORA, as applied in this case, is unconstitutionally vague for lack of objective standards or guidelines. Arguably, SORA did not give defendant notice of what conduct was required of him with respect to registration as a homeless individual. See, e.g., *Santos v State*, 284 Ga 514; 668 SE2d 676 (2008), in which the Georgia Supreme Court held that a statutory sex-offender-registration requirement was unconstitutionally vague as applied to homeless sex offenders with no street address for a residence. However, because I believe this case can be resolved on statutory grounds, I do not reach this constitutional issue. See *Smith v Curran*, 267 Mich 413, 418; 255 NW 276 (1934) (indicating that questions of constitutionality should not be decided if a case can be disposed of on other grounds).

[29] *Ante* at 386 (emphasis in original).

[30] *Ante* at 385 (citation and quotation marks omitted).

empowers the Michigan State Police to "specify other satisfactory proof of domicile or residence" to facilitate compliance with SORA. In what was likely an attempt to remedy the problem of homeless sex offenders who lack a residence or domicile, the Michigan State Police issued an official order indicating that, "[i]f [an] offender is homeless, the generic address of '123 Homeless' shall be entered into the computerized database, along with the offender's city, state, zip code, and county code."[31] The majority seizes on this order as proof that defendant could indeed have complied with SORA by telling police that he was homeless. In turn, the police could then have entered "123 Homeless" in the registry on his behalf. There are several critical flaws in this reasoning.

An agency order is unlawful if it is based on an erroneous interpretation of a statute.[32] Although this Court accords due deference to an agency's interpretation of a statute, we grant no deference to an interpretation that contravenes the language of a statute.[33] Furthermore, when interpreting statutes, we give effect to every word, phrase, and clause in a statute and avoid an interpretation that would render any part of the statute surplusage or nugatory.[34] Under SORA, two provisions preclude the listing of 123 Homeless as an offender's address.

The first is MCL 28.727(6), which provides that "[a]n individual shall not knowingly provide false or mislead-

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[31] MSP Order, p 4.

[32] *Ass'n of Businesses Advocating Tariff Equity v Pub Serv Comm*, 219 Mich App 653, 659; 557 NW2d 918 (1996).

[33] *Ludington Serv Corp v Acting Ins Comm'r*, 444 Mich 481, 505; 511 NW2d 661 (1994).

[34] *Pittsfield Charter Twp v Washtenaw Co*, 468 Mich 702, 714; 664 NW2d 193 (2003); see also *Grimes v Dep't of Transp*, 475 Mich 72, 89; 715 NW2d 275 (2006).

ing information concerning a registration, notice, or verification." Without question, the generic address 123 Homeless would be a false and misleading address because that address does not exist in Michigan.[35] Thus, listing 123 Homeless, which cannot be verified as an address, would violate MCL 28.727(6). Moreover, it would subject those who list it, including a police officer who does so on behalf of a homeless offender, to criminal prosecution. For purposes of MCL 28.727(6), it does not matter if an offender honestly informs the police that he or she is homeless. Even if the offender *is* homeless, a police officer may not lawfully enter into the SORA registry an address that does not exist. Accordingly, the Michigan State Police order contravenes SORA.

The second statutory provision that renders the Michigan State Police order unlawful is MCL 28.725a(8). It requires "individuals . . . registered under [SORA to] maintain either a valid [driver's] license . . . or an official state personal identification card . . . *with the individual's current address*." (Emphasis added.)

However, to obtain a driver's license or state identification card, the Secretary of State requires an applicant to provide at least two documents "with [his or her] name and Michigan residence address."[36] Hence, by the Secretary of State's own requirements, an individual cannot obtain a state identification card absent a

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[35] A cursory Google Maps search indicates that the only street in the United States named "Homeless Road" is in Kitts Hill, Ohio. Ironically, it does appear that there are homes on that street. In any event, even if 123 Homeless did exist in Michigan, it would still be a false address if an offender who registered it did not live there.

[36] See the Secretary of State's form "Applying for a license or ID?" available at <http://www.michigan.gov/documents/sos/Applying_for_lic_or_ID_SOS_428_222146_7.pdf> (accessed July 7, 2011).

valid residential address, which defendant did not have. Nor does the majority, the Michigan State Police, or the prosecutor indicate how a homeless sex offender like defendant could obtain an identification card without a permanent address, much less change an address to reflect transient accommodations.

This analysis is further supported by the Michigan State Police order—the very order flaunted by the majority as proof that defendant could have registered 123 Homeless as his address. The order provides:

> The address on the [sex offender registry] record *must* match the address on the Michigan driver license or Personal Identification Card. If the address does not match, the member shall give the offender the opportunity to immediately visit the nearest Secretary of State branch office for the necessary address change and return to the post to verify their address before taking enforcement action.[37]

Thus, if an offender cannot verify his or her address upon registration, the order requires that the offender be directed to the Secretary of State for an identification card with a valid address. Why? Because MCL 28.725a(8) mandates that the address entered in the sex offender registry match the address on an offender's identification card. But as demonstrated earlier, a homeless offender cannot obtain such a card because 123 Homeless is a bogus address. Accordingly, the Michigan State Police order further undermines the majority's analysis.

Applying MCL 28.725a(8) to the facts of this case, contrary to the majority's assertion, the address 123 Homeless will never be sufficient for purposes of SORA. That address cannot match the address on a homeless

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[37] MSP Order, p 4 (emphasis added).

offender's identification card because a homeless person cannot obtain an identification card to comply with SORA. This Catch-22 highlights the facile nature of the majority's analysis. SORA does not permit registration using 123 Homeless. The majority is unable to refute this fact.

The majority speculates that the approach taken in my dissent would incentivize sex offenders who do have a home to report that they are homeless.[38] It fails to recognize that its opinion is equally susceptible to this conundrum. The majority opines that an offender need report only that he or she is homeless. The police will in turn record that information and enter "123 Homeless" into the sex offender registry.

As indicated in MCL 28.721a, SORA was designed to assist law enforcement and residents of this state in preventing and protecting against the commission of criminal sexual conduct by convicted sex offenders. SORA's registration requirements are intended to provide a comprehensive and effective means to monitor those persons. The registration of a legitimate address that constitutes a residence or domicile that can be verified by law enforcement furthers this goal. Likewise, the public is able to monitor the address of convicted sex offenders by visiting the online sex of-

[38] The online article the majority cites in support of this claim does not offer any verifiable statistics of an increase in allegedly homeless sex offenders. Rather, the article merely credits this increase to the opinion of a single police officer. In fact, the article states that "[p]olice aren't sure how many of Michigan's 260 sex offenders who list themselves as homeless are using the law to avoid registering . . . ." McVicar, *Since court ruled homeless sex offenders don't have to register, number claiming homelessness jumps 62 percent*, Grand Rapids Press, available at <http://www.mlive.com/news/grand-rapids/index.ssf/2010/05/since_court_ruled_homeless_sex.html> (accessed July 7, 2011). In any event, absent real statistics, the majority's claim remains merely speculative.

fender registry, which provides a comprehensive database of offenders' addresses.[39]

But by validating the Michigan State Police order and effectively mandating that homeless sex offenders who do not have a residence or domicile register with 123 Homeless, the majority purges SORA of any meaning. As of today, any convicted sex offender who wishes to keep secret his or her whereabouts may be registered at the fictitious address 123 Homeless. Registration at this fictitious address is tantamount to, and in fact more misleading to the public than, an utter failure to register. Families with young children who visit the online sex offender registry will not be able to learn the whereabouts of these offenders. But they will be able to discern the consequences of this Court's approval of the registration of a fictitious address when they are left wondering where 123 Homeless is. Compliance for compliance's sake is worthless if it provides no valuable practical information.[40] Thus, the majority's criticism of the consequences of this dissent applies with equal weight to its own opinion.[41]

In sum, because the Michigan State Police order contravenes the language of SORA, it is unlawful. The

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[39] The Michigan Public Sex Offender Registry is available at <http://www.mipsor.state.mi.us/> (accessed July 7, 2011).

[40] This is especially true in light of the majority's misinterpretation and misapplication of "residence" and "domicile" as those terms are used in SORA.

[41] The majority mischaracterizes my dissent by claiming that I would allow homeless offenders "to opt out of complying with SORA." *Ante* at 386 n 42; see also *ante* at 391. Nothing in my opinion allows all homeless offenders to opt out of SORA registration. Rather, I would hold that *this* defendant, as a matter of law, could not have complied with SORA because he did not have a "residence" or "domicile" as contemplated by the act.

The majority further errs by claiming, absent any authority, that "SORA ensures that [a] homeless sex offender is capable of providing sufficient information to comply with SORA's registration require-

majority's reliance on that order lacks a meaningful basis in the law and renders two provisions of the act utterly meaningless.

CONCLUSION

I dissent from the majority's decision to reverse the judgment of the Court of Appeals. Not having a residence or domicile, as those terms are used in SORA, is often a sad reality of the homeless. Had they a place where they habitually slept, kept their personal belongings, and regularly lodged, they would no longer be homeless. Because defendant did not have a residence or domicile under SORA, he could not be held criminally liable for failure to register or report. Therefore, the trial court did not abuse its discretion by granting defendant's motion to quash the information.

The majority construes my interpretation of SORA as rendering imperfect the tracking of homeless sex offenders. To the extent that it does so, my interpretation is steadfastly faithful to the language of SORA. The majority's is not. It defies SORA, the Michigan State Police order, and common sense.

CAVANAGH and HATHAWAY, JJ., concurred with MARILYN KELLY, J.

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ments." *Ante* at 386 n 42. The majority does not cite any statutory language in support of this naked assertion because there is no such language in the act.

PEOPLE v BONILLA-MACHADO

Docket No. 140510. Argued on application for leave to appeal January 20, 2011. Decided July 26, 2011.

An Ionia Circuit Court jury convicted Johnny Bonilla-Machado of two counts of assaulting a prison employee. MCL 750.197c(1) provides a maximum sentence of 5 years for the crime, and MCL 769.10(1)(a) allows the sentencing court to enhance the maximum sentence imposed for a defendant with subsequent felony convictions by not more than 1½ times the statutory maximum. The court, Charles H. Miel, J., indicated that it was bound by the habitual-offender statute, multiplied the maximum sentence by 1½, and sentenced defendant as a second-offense habitual offender to concurrent terms of 30 to 90 months' imprisonment for each conviction. Defendant appealed, arguing that the court and his trial counsel had coerced him into forgoing his right to testify, that the court had erroneously assessed 10 points for offense variable 13 (OV 13) (continuing pattern of criminal behavior) when scoring the sentencing guidelines, and that the court had erred by failing to exercise its discretion when setting his maximum sentences. The Court of Appeals, TALBOT, P.J., and O'CONNELL and DAVIS, JJ., affirmed defendant's convictions in an unpublished opinion per curiam, issued December 15, 2009 (Docket No. 287605), but remanded for resentencing, requiring the trial court to either clarify that it knew it had discretion when it imposed the enhanced maximum sentences or redetermine defendant's maximum sentences after using its discretion. The Court of Appeals also concluded that the trial court had erred by assessing 10 points for OV 13 and sua sponte directed the assessment of 25 points for that offense variable instead, noting that MCL 777.43(1)(c) requires the assessment of 25 points when the sentencing offense was part of a pattern of felonious criminal activity involving three or more crimes against a person. Defendant's prior convictions included two felonies that under the sentencing guidelines were included in the offense category of crimes against a person. While assault of a prison employee was designated as being in the offense category of crimes against public safety, the Court of Appeals reasoned that the crime could also be considered a crime against a person for purposes of scoring OV 13 because a prison employee is

a person. The Supreme Court ordered and heard oral argument on whether to grant defendant's application for leave to appeal or take other peremptory action. 486 Mich 907 (2010).

In an opinion by Justice HATHAWAY, joined by Justices CAVANAGH, MARILYN KELLY, MARKMAN, and MARY BETH KELLY, the Supreme Court *held*:

The offense categories designated in the sentencing guidelines apply to the scoring of offense variables, and a felony designated as a crime against public safety may not be used to establish a pattern of felonious activity involving a requisite number of crimes against a person for purposes of scoring OV 13.

1. Neither the trial court nor defendant's trial counsel coerced him into forgoing his right to testify. Defendant's counsel advised defendant of the risks of testifying, after which defendant ultimately made the decision not to testify. The trial court merely confirmed defendant's decision. There was no error on this issue.

2. MCL 777.5 lists six offense categories, including crimes against a person, crimes against property, and crimes against public safety, and MCL 777.11 through 777.19 place each felony covered by the sentencing guidelines into one of those six categories. The offense categories are used under MCL 777.22 to determine which offense variables to score for each felony and are also used to determine how those offense variables should be scored. The offense categories are statutorily defined phrases that are applied uniformly throughout the sentencing guidelines. While a trial court must score OV 13 for felonies in any offense category, the court must assess zero points under MCL 777.43(1)(g) when scoring the offense variable if there was no continuing pattern of criminal behavior. Defendant was convicted of crimes against public safety, and those offenses could not be used under MCL 777.43(1)(c) to establish a pattern of felonious criminal activity involving three or more crimes against a person. Because the scoring error changed defendant's recommended minimum sentence range, the trial court was required to assess zero points for OV 13 on remand and resentence defendant.

3. The trial court erred by stating that it could not exercise discretion with regard to enhancing defendant's maximum sentences. Because the trial court had already indicated that it exercised its discretion when it resentenced defendant on remand from the Court of Appeals, however, the issue was moot.

Affirmed in part, reversed in part, and remanded for resentencing.

Justice MARKMAN, joined by Justices CAVANAGH and MARILYN KELLY, concurring, also wrote separately to respond to Chief Justice YOUNG's partial dissent. Justice MARKMAN concluded that 25 points could not be assessed for OV 13 because, under MCL 777.43(1)(c), 25 points can only be assessed if the sentencing offense "was part of a pattern of felonious criminal activity involving 3 or more crimes against a person" and the Legislature placed the sentencing offense in this case (assault of a prison employee) in the offense category of "crimes against public safety," MCL 777.16j, not the offense category of "crimes against a person." The Legislature is entitled to define crimes, classify and categorize them, and establish punishment for them, all as it sees fit. In the context of the sentencing guidelines, the offense categories serve as a convenient shorthand to ensure that crimes the Legislature wished to be treated similarly and those it wished to be treated dissimilarly would, in fact, be treated that way.

Chief Justice YOUNG, joined by Justice ZAHRA, concurring in part and dissenting in part, concurred in the portion of the majority opinion holding that defendant was not denied his right to testify at trial. Chief Justice YOUNG would have further held, however, that OV 13 is properly scored if the crime charged was part of a pattern of criminal activity involving crimes against a person or property, regardless of the offense category to which the Legislature assigned the crime. The sole purpose served by the offense categories in the sentencing guidelines scheme is determining which offense variables must be scored because not every felony requires the scoring of every offense variable. Under the majority's analysis, points could not be assessed under OV 13 for four of the six offense categories, rendering the directive in MCL 777.22 to score OV 13 for every offense category nugatory. Defendant's sentencing offense involved or implicated persons, that is, the prison guards who were the victims of his felonious behavior, and the Court of Appeals correctly determined that 25 points should have been assessed for OV 13. Because the issue involving enhancement of defendant's maximum sentences was moot, defendant's application for leave to appeal should have been denied.

SENTENCES — SENTENCING GUIDELINES — OFFENSE VARIABLE 13 — OFFENSE CATEGORIES — CRIMES AGAINST A PERSON.

The offense categories designated in the sentencing guidelines apply to the scoring of offense variables; a felony that is not designated in the offense category of crimes against a person cannot be used to establish a pattern of felonious activity involving a requisite number of crimes against a person for purposes of scoring offense

variable 13 (continuing pattern of criminal behavior) (MCL 777.5, 777.11 through 777.19, 777.43[1]).

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Ronald J. Schafer*, Prosecuting Attorney, and *Mark G. Sands*, Assistant Attorney General, for the people.

Matthew Posner for defendant.

HATHAWAY, J. This case presents three issues for review. First, we review whether defendant was coerced by the trial court and defense trial counsel into forgoing his right to testify. Second, we review whether an offense that is statutorily designated as a "crime against public safety" may also be considered a "crime against a person" to establish a continuing pattern of criminal behavior for purposes of scoring offense variable (OV) 13, MCL 777.43. Finally, we review whether defendant is entitled to resentencing as a matter of law in light of the trial court's erroneous statement that it was statutorily bound to enhance defendant's maximum sentences.

We first conclude that neither the trial court nor defense trial counsel coerced defendant into forgoing his right to testify. Instead, the record shows that defense counsel advised defendant of the risks of testifying and that, ultimately, defendant himself made the decision not to testify. The trial court merely confirmed defendant's decision. Accordingly, there was no error on this issue, and defendant is not entitled to a new trial.

Next, we hold that the Court of Appeals erroneously concluded that even though assault of a prison employee[1] is statutorily designated as a crime against public safety, MCL 777.16j, it can also be considered a

[1] MCL 750.197c.

crime against a person for purposes of scoring OV 13 because a prison employee is a "person." We hold that the six named offense category designations used in MCL 777.5 and 777.11 through 777.19 apply to the scoring of offense variables and, therefore, a felony designated as a "crime against public safety" may not be used to establish a "pattern of felonious criminal activity involving 3 or more crimes against a person," MCL 777.43(1)(c), for purposes of scoring OV 13. Because this changes defendant's sentencing guidelines range, we agree with defendant that this matter must be remanded for resentencing. See *People v Francisco*, 474 Mich 82, 88-89; 711 NW2d 44 (2006).

Finally, we hold that the trial court erred when it stated that it was bound by law to enhance defendant's maximum sentences. Application of the enhanced maximum sentence is discretionary, not mandatory. *People v Turski*, 436 Mich 878 (1990). The Court of Appeals acknowledged the error and remanded to allow the trial court to clarify whether the trial court knew it had discretion to enhance the maximum sentences or to redetermine the maximum sentences after using its discretion. Because the trial court, on remand, has already resentenced defendant in accordance with the Court of Appeals' remand order, this issue is now moot.

Accordingly, we reverse the judgment of the Court of Appeals in part and remand this matter to the trial court for resentencing. On remand, we instruct the trial court to assess zero points for OV 13. We affirm the judgment of the Court of Appeals in all other respects.

I. FACTS AND PROCEDURAL HISTORY

This case arises from events that occurred in November 2007 while defendant was incarcerated in the Bellamy Creek Correctional Facility in Ionia. Defendant

was serving prison terms for unarmed robbery and attempted carjacking. While in his cell, defendant assaulted two corrections officers by overflowing his toilet and then splashing the toilet water on the corrections officers as they made their respective rounds approximately 30 minutes apart.

Defendant was charged with two counts of assaulting a prison employee and was found guilty by a jury on both counts. Defendant did not testify at his trial. MCL 750.197c(1) sets the maximum sentence of imprisonment for assaulting a prison employee at five years, and MCL 769.10(1)(a) allows a trial court to enhance the maximum sentence imposed for a subsequent felony conviction by not more than 1½ times the statutory maximum. The trial court indicated that it was bound by statute to enhance the sentences and sentenced defendant as a second-offense habitual offender to concurrent terms of 30 to 90 months (2½ to 7½ years) of imprisonment for each conviction. Defendant objected to the enhanced maximum sentences.

Defendant also objected to the minimum sentence range, specifically the scoring of OV 13. OV 13 addresses patterns of felonious conduct within a five-year period, including the sentencing offense.[2] The trial court assessed 10 points for OV 13, which are the total points prescribed for an offense that "was part of a pattern of felonious criminal activity involving a combination of 3 or more crimes against a person or property . . . ."[3]

In his appeal of right, defendant argued that the trial court and defense counsel had coerced him into forgoing his right to testify, that the trial court had erroneously

[2] MCL 777.43(2)(a).

[3] MCL 777.43(1)(d).

scored OV 13, and that the trial court had erred by failing to exercise its discretion when setting his maximum sentences. In an unpublished opinion per curiam, the Court of Appeals affirmed defendant's convictions but remanded for resentencing.[4] The Court of Appeals concluded that defendant made his decision not to testify after he had been properly reminded of the hazards of doing so.[5] Additionally, the Court of Appeals concluded that the trial court had erred by assessing 10 points for OV 13 and sua sponte directed the assessment of 25 points for this variable instead.[6] Finally, the Court of Appeals remanded the matter to the trial court to either clarify that it knew it had discretion in imposing the enhanced maximum sentences or to redetermine the maximum sentences after using its discretion.[7]

Defendant sought leave to appeal in this Court, and this Court heard oral argument on defendant's application.[8]

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[4] *People v Bonilla-Machado*, unpublished opinion per curiam of the Court of Appeals, issued December 15, 2009 (Docket No. 287605).

[5] *Id*. at 2-3.

[6] *Id*. at 4.

[7] *Id*. at 3. In the Court of Appeals, defendant also challenged the scoring of OV 9, which addresses the number of victims involved in an offense. The trial court had assessed 10 points for OV 9, which are the total points prescribed for an offense involving "2 to 9 victims who were placed in danger of physical injury . . . ." MCL 777.39(1)(c). Citing *People v McGraw*, 484 Mich 120; 771 NW2d 655 (2009), the Court of Appeals concluded that the trial court had erred by aggregating the victims from the two separate assault incidents for purposes of scoring OV 9. *Bonilla-Machado*, unpub op at 3-4.

Defendant additionally argued that his counsel was ineffective for failing to properly advise him regarding his right to testify at trial and for failing to challenge the scoring of OV 9 and OV 13. The Court of Appeals concluded that counsel had not been ineffective with regard to advising defendant of his right to testify and found it unnecessary to consider counsel's effectiveness with regard to the OVs because it remanded for resentencing. *Id*. at 5. We do not disturb the Court of Appeals' holdings on these issues.

[8] *People v Bonilla-Machado*, 486 Mich 907 (2010).

II. STANDARD OF REVIEW

This Court reviews unpreserved claims of constitutional error under the plain-error standard.[9] The interpretation and application of the legislative sentencing guidelines, MCL 777.1 *et seq*., involve legal questions that this Court reviews de novo.[10]

III. ANALYSIS

A. DEFENDANT'S RIGHT TO TESTIFY

Defendant first argues that his right to testify was violated because he was coerced by the trial court and defense trial counsel into giving up his stated desire to testify. We disagree. A defendant's right to testify in his own defense arises from the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution.[11] Although counsel must advise a defendant of this right, the ultimate decision whether to testify at trial remains with the defendant.[12]

At his jury trial, the following exchange took place regarding defendant's decision whether to testify:

> *The Court*: [D]oes your client want to testify?
>
> [*Defense Counsel*]: That's what I'm trying to find out right now, your Honor.
>
> *The Court*: . . . He should have made his decision before now.
>
> [*Defense Counsel*]: He's going to testify, your Honor.

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[9] *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

[10] *People v Morson*, 471 Mich 248, 255; 685 NW2d 203 (2004).

[11] *Rock v Arkansas*, 483 US 44, 51-52; 107 S Ct 2704; 97 L Ed 2d 37 (1987).

[12] *Jones v Barnes*, 463 US 745, 751; 103 S Ct 3308; 77 L Ed 2d 987 (1983).

The Court: Would you like to explain his rights to him on the record?

[*Defense Counsel*]: Yes, I would, your Honor. John, it's going to be your choice to take the stand here today?

The Defendant: Yes.

[*Defense Counsel*]: You understand if you take the stand today anything you say on the stand can be used against you? . . . Do you understand? You have a right not to take the stand. So are you going to take the stand or not take the stand?

The Defendant: No.

[*Defense Counsel*]: Your Honor, he's indicated to me he's not going to take the stand. Is that right Johnny? You're not going to take the stand?

The Defendant: No.

[*Defense Counsel*]: But I've explained to you, if you take the stand, anything you say can be held against you. Do you understand that?

The Defendant: Yes.

[*Defense Counsel*]: So it's your choice not to take the stand here today?

The Defendant: I'm not going to go up there.

The Court: Mr. Machado, do you want to testify today?

The Defendant: No.

Thus, the record reflects that defendant had previously decided that he might want to testify. Counsel advised him on the record that it was his decision to do so, but also warned him of the risks involved. Specifically, counsel advised defendant that anything he might say on the stand could be used against him. Defendant argues that this advice was inappropriate because not *everything* could be used against him. Defendant claims that if he had testified that he was innocent of the charges, the prosecutor could not possibly have used that against him. Again,

we disagree. Anything defendant might have said on the stand would have been subject to cross-examination designed for use against him.

Both defense counsel and the trial court sought clarification from defendant regarding whether he wished to testify. Defendant expressly acknowledged on the record that he understood it was his choice whether to testify and that he understood that anything he testified to could be used against him. Defendant explicitly and repeatedly stated his decision not to testify. The record does not reveal any coercive actions by counsel or the trial court. Instead, the record illustrates that defendant made a rational choice not to testify after he was warned of the risks involved. In light of the facts on the record, we conclude that defendant was not denied his right to testify and there is no error requiring reversal. We affirm the judgment of the Court of Appeals on this issue.

B. OFFENSE VARIABLE 13: CONTINUING PATTERN OF CRIMINAL BEHAVIOR

Next, defendant argues that the Court of Appeals erroneously ordered that the score for OV 13 be increased from 10 points to 25 points. We agree with defendant and conclude that both the trial court and the Court of Appeals scored OV 13 incorrectly because zero points should have been assessed.

In deciding this issue, we must interpret the relevant statutes within the sentencing guidelines chapter of the Code of Criminal Procedure.[13] When interpreting statutes, this Court must "determine and give effect to the Legislature's intent."[14] The words used in the statute are the most reliable indicator of the Legislature's

[13] MCL 777.1 *et seq*.

[14] *People v Lowe*, 484 Mich 718, 721; 773 NW2d 1 (2009), citing *People v Koonce*, 466 Mich 515, 518; 648 NW2d 153 (2002).

intent and should be interpreted on the basis of their ordinary meaning and the context within which they are used in the statute.[15] In interpreting a statute, this Court avoids a construction that would render any part of the statute surplusage or nugatory.[16] Similarly, when determining how offense variables should be scored, this Court reads the sentencing guideline statutes as a whole.[17]

MCL 777.5, a provision within the sentencing guidelines, lists six statutory offense categories for felonies: (1) crimes against a person, (2) crimes against property, (3) crimes involving a controlled substance, (4) crimes against public order, (5) crimes against public trust, and (6) crimes against public safety. MCL 777.11 through 777.19 place each felony covered by the guidelines within one of these six offense categories. These offense categories are used to determine which of the OVs to score for each crime[18] *and* how those OVs should be scored.[19] While MCL 777.5 provides abbreviated designations for the offense categories, the fully named offense categories are used uniformly and consistently throughout the sentencing guidelines.

MCL 777.43, also contained within the sentencing guidelines, governs OV 13 and provides:

> (1) Offense variable 13 is continuing pattern of criminal behavior. Score offense variable 13 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:

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

[16] *McGraw*, 484 Mich at 126, citing *Baker v Gen Motors Corp*, 409 Mich 639, 665; 297 NW2d 387 (1980).

[17] *McGraw*, 484 Mich at 124-125.

[18] MCL 777.22.

[19] See, e.g., MCL 777.42 (scoring of OV 12 for contemporaneous felonious criminal acts) and MCL 777.43 (scoring of OV 13 for a continuing pattern of criminal behavior).

(a) The offense was part of a pattern of felonious criminal activity involving 3 or more sexual penetrations against a person or persons less than 13 years of age ..... 50 points

(b) The offense was part of a pattern of felonious criminal activity directly related to causing, encouraging, recruiting, soliciting, or coercing membership in a gang or communicating a threat with intent to deter, punish, or retaliate against another for withdrawing from a gang ..... 25 points

(c) *The offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person*. ..... 25 points

(d) *The offense was part of a pattern of felonious criminal activity involving a combination of 3 or more crimes against a person or property or a violation of section 7401(2)(a)*(i) *to* (iii) *or section 7403(2)(a)*(i) *to* (iii) *of the public health code, 1978 PA 368, MCL 333.7401 and 333.7403* ..... 10 points

(e) The offense was part of a pattern of felonious criminal activity involving a combination of 3 or more violations of section 7401(2)(a)(*i*) to (*iii*) or section 7403(2)(a)(*i*) to (*iii*) of the public health code, 1978 PA 368, MCL 333.7401 and 333.7403 ..... 10 points

(f) The offense was part of a pattern of felonious criminal activity involving 3 or more crimes against property ..... 5 points

(g) *No pattern of felonious criminal activity existed* ..... 0 points

(2) All of the following apply to scoring offense variable 13:

(a) *For determining the appropriate points under this variable, all crimes within a 5-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction*.

(b) The presence or absence of multiple offenders, the age of the offenders, or the degree of sophistication of the organized criminal group is not as important as the fact of the group's existence, which may be reasonably inferred from the facts surrounding the sentencing offense.

(c) Except for offenses related to membership in an organized criminal group or that are gang-related, do not score conduct scored in offense variable 11 or 12.

(d) Score 50 points only if the sentencing offense is first degree criminal sexual conduct.

(e) Do not count more than 1 controlled substance offense arising out of the criminal episode for which the person is being sentenced.

(f) Do not count more than 1 crime involving the same 1 [sic] controlled substance. For example, do not count conspiracy and a substantive offense involving the same amount of controlled substances or possession and delivery of the same amount of controlled substances. [Emphasis added.]

As specifically set forth in the language of MCL 777.43(2)(a), in order to assess points under OV 13 for a continuing pattern of criminal behavior, a trial court must count all relevant crimes within a five-year period, including the sentencing offense at issue. Moreover, according to the plain language of the statute, to assess 10 points for OV 13, a person must have committed three or more "crimes against a person or property" or violations of either MCL 333.7401(2)(a)(*i*) through (*iii*) or MCL 333.7403(2)(a)(*i*) through (*iii*), which relate to crimes involving controlled substances. To assess 25 points when crimes related to gang activity are not counted, there must be three or more crimes against a person. The issue before us is whether the phrases "crimes against a person" and "crime against a person or property" used in MCL 777.43 are limited to those offenses designated as such by the Legislature in MCL 777.11 through 777.19.

In this case, defendant's relevant criminal history includes two crimes that are statutorily designated as "crimes against a person" and one crime that is statutorily designated as a "crime against public safety"

under MCL 777.11 through 777.19.[20] No claim has been made that these crimes were gang-related. The trial court assessed 10 points for OV 13. On appeal in the Court of Appeals, defendant argued that zero points should have been assessed for OV 13 because his current crimes, two counts of assault of a prison employee, are designated by statute as "crimes against public safety," not "crimes against a person or property," and he therefore had not committed "3 or more crimes against a person or property," as required to score OV 13 at 10 points.[21] The Court of Appeals rejected defendant's argument and instead concluded that the score for OV 13 should be increased from 10 points to 25 points. The Court of Appeals explained that "[a]lthough MCL 777.16j indicates that assault of a prison guard is a crime against public safety, this offense is *also* a crime against a person because, obviously, a prison guard is a person."[22] The Court of Appeals reasoned that the explicit statutory offense category designations in MCL 777.11 through 777.19 do not limit a sentencing court's interpretation of the named offense category when scoring offense variables. We disagree with this reasoning because it does not comply with the express language of the sentencing guidelines. We instead hold that the six named offense categories in MCL 777.5 are statutorily defined phrases

[20] Defendant has prior convictions for attempted carjacking and unarmed robbery, which are both statutorily categorized as crimes against a person. MCL 777.16y. Defendant also has a prior unrelated conviction for assaulting a prison employee, which is statutorily categorized as a crime against public safety. MCL 777.16j. As the statute governing OV 13 indicates, the sentencing offenses must be considered as well. Both of the sentencing offenses at issue are assault of a prison employee, which is, again, categorized as a crime against public safety.

[21] MCL 777.43(1)(d).

[22] *Bonilla-Machado*, unpub op at 4.

that encompass only those specific crimes designated as such by the Legislature in MCL 777.11 through 777.19.

MCL 777.21 explicitly sets forth instructions for scoring the sentencing guidelines and provides, in relevant part:

> (1) Except as otherwise provided in this section, for an offense enumerated in [MCL 777.11 through 777.19], determine the recommended minimum sentence range as follows:
>
> (a) *Find the offense category for the offense from* [*MCL 777.11 through 777.19*]. From [MCL 777.22], *determine the offense variables to be scored for that offense category* and score only those offense variables for the offender as provided in [MCL 777.31 through 777.49a]. Total those points to determine the offender's offense variable level. [Emphasis added.]

MCL 777.21(1)(a) explicitly instructs a court to first "[f]ind the *offense category* for the offense from" MCL 777.11 through 777.19 and then "determine the offense variables to be scored for that *offense category* . . . ."[23] MCL 777.11 through 777.19 include an extensive list that designates which of the six offense categories each felony covered by the guidelines falls under. Thus, the plain language of MCL 777.21 mandates that the statutorily named offense categories and the distinct designation system for felonies are the starting points for proper application of the sentencing guidelines. The use of the named offense categories throughout the sentencing guidelines chapter indicates legislative intent to have the offense categories applied in a uniform manner, including when they are applied in the offense variable statutes.

The Court of Appeals' opinion would permit courts to ignore the explicit statutory offense categories and

[23] Emphasis added.

designate an offense as a "crime against a person" sua sponte whenever a "person" is involved in a crime. We cannot agree with that interpretation. The Court of Appeals' conclusion is inconsistent with the well-accepted rules of statutory construction because it is unsupported by the clear and unambiguous language of MCL 777.21.

The Legislature's directive is clear. MCL 777.43 specifically provides that zero to 50 points be assessed for OV 13 in accordance with a defendant's criminal history, dependent upon a sufficient number of crimes falling within specifically listed offenses and offense categories. In this case, the combination of designated crimes needed to assess 5 to 50 points for OV 13 is not present, and the only allowable score under the categories designated in the statute is zero points. Moreover, nothing in the language of MCL 777.43 allows courts to consider crimes falling within other designated offense categories to establish a continuing pattern of criminal behavior.

It is also important to recognize that while the Legislature directed that OV 13 be scored for each offense category,[24] it also explicitly mandated that *zero* points be assessed for OV 13 when a continuing pattern of criminal behavior is not shown.[25] Thus, in MCL 777.43(1)(g), the Legislature unambiguously directed *how* to score OV 13 when a defendant did not engage in the requisite pattern of criminal behavior. Clearly, the score for an offense variable can—and sometimes, as here, will—be zero points. This does not mean that the variable was not scored.[26]

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[24] MCL 777.22.

[25] MCL 777.43(1)(g).

[26] We find no merit in the argument that the sole purpose of the offense categories is to determine which of the 20 offense variables are to be

Moreover, the Legislature is free to group together, or to separate, crimes under categorical headings in order to accomplish its desired intent. The Legislature uses categories to ensure that crimes it wishes to treat in a particular manner are, in fact, treated in that manner. If the Legislature had intended to allow courts to consider crimes within *all* the offense categories when scoring OV 13, it could have expressly included additional offense categories or simply stated that all crimes could be considered to establish a continuing pattern of criminal behavior.[27] For example, MCL 777.42, which governs OV 12 and addresses contemporaneous felonious criminal acts, requires the assessment of 25 points for "[t]hree or more contemporaneous felonious criminal acts involving *crimes against a person*," but 10 points for "[t]hree or more contemporaneous felonious criminal acts involving *other crimes*[.]"[28] The plain language of MCL 777.42 indicates the Legislature's express intent to allow sentencing courts to consider crimes within *all* the offense categories when scoring

scored. As we previously indicated, the offense categories are used to determine not only which offense variables to score but also *how* those variables are to be scored. While MCL 777.5 provides abbreviated designations for the offense categories, the language of the defining terms themselves—"crimes against a person" and "crimes against property," for example—are employed *outside* this provision. Our reading of the relevant statutory provisions gives effect to the straightforward language contained in those provisions and appropriately allows the variables that are required to be considered to be scored properly. Our reading also recognizes that the score for OVs will at times be zero points in accordance with the statutory language.

[27] We are not persuaded that the language in MCL 777.43(2)(f) prohibiting counting a drug conspiracy offense along with a substantive drug offense when scoring OV 13 affects our analysis. MCL 777.43(2)(f) indicates nothing more than the Legislature's intent to clarify that a conspiracy involving controlled substances shall not be counted when scoring OV 13.

[28] MCL 777.42(1)(a) and (c) (emphasis added).

OV 12. MCL 777.43 does not include any similar language for purposes of scoring OV 13. Instead, its plain language is limited to specific statutory violations and specific offense categories. Therefore, both the trial court and the Court of Appeals erred in scoring OV 13, and on remand OV 13 must be scored at zero points.

C. ENHANCED MAXIMUM SENTENCE

Finally, defendant argues that the trial court failed to exercise discretion in setting the maximum sentences for a second-offense habitual offender. We agree. The statutory maximum sentence of imprisonment for assault of a prison employee is five years.[29] However, a court is given discretion to enhance the maximum sentence for subsequent felony convictions.[30] MCL 769.10(1) governs punishment for subsequent felonies, and subdivision (a) employs the term "may" when referring to the imposition of an enhanced sentence. In *Turski*, this Court clarified that imposing an enhanced maximum sentence is discretionary, not mandatory. In its order in *Turski* remanding the case for resentencing, this Court stated:

> A trial court, when sentencing a defendant as an habitual offender, must exercise its discretion in setting the maximum sentence, that is, it is not required by law to increase the maximum sentence. The sentencing court, in the instant case, indicated that it was required "as a matter of law" to enhance the defendant's maximum sentences.[31]

In this case, the trial court imposed the enhanced maximum sentences and stated: "That's the sentence.

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[29] MCL 750.197c(1).

[30] MCL 769.10(1)(a).

[31] *Turski*, 436 Mich at 878; see also *People v Green*, 205 Mich App 342, 346-347; 517 NW2d 782 (1994).

That's what the statute says it has to be." As in *Turski*, the trial court erroneously asserted that it was bound by law to enhance the maximum sentences. Accordingly, the Court of Appeals remanded the case to allow the trial court to either clarify that it understood it had discretion in imposing the enhanced sentences or to redetermine the maximum sentences after properly exercising its discretion. We note that during the pendency of defendant's appeal in this Court, the trial court resentenced him. Because the trial court has already resentenced defendant and indicated at resentencing that, in its discretion, defendant's maximum sentences should be enhanced, we conclude that this issue need not be addressed by the trial court on remand.

IV. CONCLUSION

Neither the trial court nor defense trial counsel coerced defendant into forgoing his right to testify. Instead, the record shows that defense counsel advised defendant of the risks of testifying and that, ultimately, defendant himself made the decision not to testify. Accordingly, there was no error on this issue, and defendant is not entitled to a new trial.

However, we agree with defendant that this matter must be remanded for resentencing. Both the trial court and the Court of Appeals incorrectly scored OV 13. The Court of Appeals erroneously concluded that even though assault of a prison employee is statutorily designated as a "crime against public safety," MCL 777.16j, it can also be considered a "crime against a person" for purposes of scoring OV 13 because a prison employee is a "person." We hold that the six named offense categories in MCL 777.5 and 777.11 through 777.19 apply to the scoring of offense variables and, therefore, a felony statutorily designated as a "crime

against public safety" may not be used to establish a pattern of felonious criminal activity involving three or more crimes against a person for purposes of scoring OV 13.

In addition, the trial court erred by stating that it could not exercise discretion in enhancing defendant's maximum sentences. But because defendant has already been resentenced, and the trial court indicated at resentencing that, in its discretion, defendant's maximum sentences should be enhanced, we conclude that it is unnecessary for the trial court to address this issue on remand.

For these reasons, we reverse the judgment of the Court of Appeals in part and remand this matter to the trial court for resentencing. On remand, we instruct the trial court to assess zero points for OV 13. We affirm the judgment of the Court of Appeals in all other respects.

CAVANAGH, MARILYN KELLY, MARKMAN, and MARY BETH KELLY, JJ., concurred with HATHAWAY, J.

MARKMAN, J. (*concurring*). I fully concur in the majority's analysis and holding that defendant was not denied his right to testify at his trial and that zero points should be assessed for offense variable (OV) 13. I write separately to respond to the partial dissent, which concludes that 25 points should be assessed for OV 13.

MCL 777.43, which governs the scoring of OV 13, provides, in pertinent part:

> (1) Offense variable 13 is continuing pattern of criminal behavior. Score offense variable 13 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:
>
> (a) The offense was part of a pattern of felonious criminal activity involving 3 or more sexual penetrations

against a person or persons less than 13 years of age ..... 50 points

(b) The offense was part of a pattern of felonious criminal activity directly related to causing, encouraging, recruiting, soliciting, or coercing membership in a gang or communicating a threat with intent to deter, punish, or retaliate against another for withdrawing from a gang ..... 25 points

(c) *The offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person ..... 25 points*

(d) The offense was part of a pattern of felonious criminal activity involving a combination of 3 or more crimes against a person or property or a violation of section 7401(2)(a)(*i*) to (*iii*) or section 7403(2)(a)(*i*) to (*iii*) of the public health code, 1978 PA 368, MCL 333.7401 and 333.7403 .....10 points

(e) The offense was part of a pattern of felonious criminal activity involving a combination of 3 or more violations of section 7401(2)(a)(*i*) to (*iii*) or section 7403(2)(a)(*i*) to (*iii*) of the public health code, 1978 PA 368, MCL 333.7401 and 333.7403 ..... 10 points

(f) The offense was part of a pattern of felonious criminal activity involving 3 or more crimes against property ..... 5 points

(g) No pattern of felonious criminal activity existed ..... 0 points

(2) All of the following apply to scoring offense variable 13:

* * *

(f) Do not count more than 1 crime involving the same . . . controlled substance. For example, do not count conspiracy and a substantive offense involving the same amount of controlled substances or possession and delivery of the same amount of controlled substances. [Emphasis added.]

The Legislature has categorized each felony covered by the sentencing guidelines into one of six offense categories—crimes against a person, crimes against property, crimes involving a controlled substance, crimes against public order, crimes against public trust, and crimes against public safety. MCL 777.5; MCL 777.11 through 777.19. The sentencing offense in this case—assault of a prison employee—has been explicitly categorized by the Legislature as a "crime against public safety." MCL 777.16j. The prosecutor argues that 25 points should be assessed for OV 13 pursuant to MCL 777.43(1)(c), which provides that 25 points should be assessed for OV 13 if the sentencing offense "was part of a pattern of felonious criminal activity involving 3 or more crimes against a person." However, because the sentencing offense here is expressly a "crime against public safety," rather than a "crime against a person," it cannot be said to have been "part of a pattern of felonious criminal activity involving 3 or more crimes against a person," and thus 25 points cannot be assessed for OV 13.

Although the partial dissent's argument that 25 points should be assessed for OV 13 has superficial appeal because a prison employee is obviously a "person," the equally obvious flaw in this argument is that the Legislature has stated that an assault of a prison employee is a "crime against public safety," not a "crime against a person." In other words, although the partial dissent's argument is consistent with the common understanding of the phrase "crime against a person," it is not consistent with the Legislature's stated understanding of this phrase. And it is well established that the Legislature is free to define terms as it sees fit. *Breighner v Mich High Sch Athletic Ass'n, Inc*, 471 Mich 217, 228 n 3; 683 NW2d 639 (2004) ("[T]he Legislature has the discretion to define [terms] in any

way it chooses . . . ."). Accordingly, the Legislature is free to define "crimes against a person" to encompass crimes that might not be understood in common parlance to constitute "crimes against a person" and to exclude crimes that might be understood in common parlance to constitute "crimes against a person." That is, the Legislature is free to group together, or to separate, crimes into categories as it sees fit for its purposes. Particularly in the context of the sentencing guidelines, these categories serve as a convenient shorthand to ensure that crimes the Legislature wishes to treat in a similar manner are, in fact, treated in a similar manner, and that crimes the Legislature wishes to treat in a dissimilar manner are, in fact, treated in a dissimilar manner.

The partial dissent argues that the "*sole purpose* served by the offense categories in our legislative sentencing scheme is determining which of the 20 offense variables are to be scored, as not every felony requires the scoring of every offense variable." *Post* at 444 (emphasis added). Although I agree that *one* of the purposes served by the offense categories is to determine which of the offense variables are to be scored, it is clearly not accurate that this is the "sole purpose" served by the offense categories. Chapter XVII of the Code of Criminal Procedure is entitled "Sentencing Guidelines." Part 1 of this chapter designates the six offense categories; part 2 designates which felonies are included in which offense categories; part 3 designates which offense variables to score for each offense category; and part 4 sets forth all the offense variables, including, of course, OV 13. Given that the offense categories are set forth within the very same chapter of the Code of Criminal Procedure as the offense variables, and that this chapter is specifically entitled "Sentencing Guidelines," it seems reasonably clear that the Legisla-

ture intended the offense categories to be used consistently throughout the chapter. That is, if an offense is considered a "crime against public safety" for purposes of parts 2 and 3, it should also be considered a "crime against public safety" for purposes of part 4.

As it applies to the instant case, part 2 of the sentencing guidelines instructs us that an assault of a prison employee is a "crime against public safety." MCL 777.16j. Part 3 instructs us to score OV 13 because MCL 777.22(5) states, "For all crimes against public safety, score offense variable[] . . . 13 . . . ." And part 4, specifically MCL 777.43(1)(c), instructs us not to assess 25 points for OV 13 because 25 points are to be assessed pursuant to this provision only when the sentencing offense is "part of a pattern of felonious criminal activity involving 3 or more crimes against a person," and assault of a prison employee is not a "crime against a person" since part 2 has already instructed us that assault of a prison employee is a "crime against a public safety."

The partial dissent, however, would hold that while an assault of a prison employee is a "crime against public safety" for purposes of parts 2 and 3, it is a "crime against a person" for purposes of part 4. Contrary to the partial dissent, nothing within any part of chapter XVII instructs us to construe the language "crime against a person" in such an inconsistent manner. Part 2 instructs us what comprises "crimes against a person," and there is no obvious reason to depart from this understanding once we reach part 4. In other words, there is no basis for concluding, as the partial dissent does, that although an assault of a prison employee is not a "crime against a person" for purposes of parts 2 and 3, it *is* such a crime for purposes of part 4.

The partial dissent asserts that its basis for doing this is because "the plain language limits the applicability of MCL 777.5 to 'part 2' . . . ." *Post* at 445 n 12. However, this is not so. MCL 777.5 does not in any way limit itself to part 2. Rather, MCL 777.5, which is found in part 1 of chapter XVII, lists the six offense categories and states that "[t]he offense categories are designated in part 2 of this chapter . . . ." As explained earlier, part 2 designates which felonies fall into which offense categories. Thus, MCL 777.5 instructs us that "the offense categories are designated in part 2"; it does not state that the offense categories are only to be used in part 2. Indeed, such a limitation would not even make sense because part 2 only tells us which felonies fall into which offense categories. If the offense categories only applied to part 2, the offense categories would serve *no* purpose at all. Indeed, the partial dissent's assertion that the offense categories only apply to part 2 is patently inconsistent with its own conclusion that the "*sole purpose* served by the offense categories in our legislative sentencing scheme is determining which of the 20 offense variables are to be scored," *post* at 444 (emphasis added), because it is part 3, not part 2, of chapter XVII that instructs us which offense variables are to be scored for each offense category. That is, if the offense categories are only to be used in part 2, as the partial dissent asserts, why does that same opinion also allow use of the offense categories in part 3? And given that the partial dissent allows use of the offense categories in parts 2 and 3, why does it not also allow use of the offense categories in part 4?

The partial dissent suggests that it would allow use of the offense categories in part 4 if, for example, MCL 777.43(1)(f) stated "that a court should assess 5 points when the offense was part of a pattern of felonious criminal activity involving three or more crimes *classi-*

fied as a crime against property or in the offense category of crimes against a person." *Post* at 448-449 (emphasis in the original). However, as this Court explained in *Robinson v City of Lansing*, 486 Mich 1, 16; 782 NW2d 171 (2010), "the Legislature is not required to be overly repetitive in its choice of language." That is, the Legislature should not be required to repetitively restate "classified as a crime against property" everywhere throughout the entire chapter. Such repetition is not required of the Legislature in order for it to communicate its intentions. Instead, I believe that a reasonable person reading this chapter would understand quite clearly that "crimes against a person" means those "crimes *classified as* crimes against a person." Indeed, even the partial dissent concedes that "crimes against a person" in part 2 means "crimes *classified as* crimes against a person." In view of this concession, it is difficult to understand why the partial dissent believes that "crimes against a person" in part 4 of this very same chapter means something other than "crimes *classified as* crimes against a person." It is entirely commonsensical that "unless the Legislature indicates otherwise, when it repeatedly uses the same phrase in a statute, that phrase should be given the same meaning throughout the statute." *Robinson*, 486 Mich at 17, citing *Paige v Sterling Hts*, 476 Mich 495, 520; 720 NW2d 219 (2006) (indicating that "absolutely identical phrases in our statutes" should have identical meanings); see also *People v Wiggins*, 289 Mich App 126, 131; 795 NW2d 232 (2010) ("Given that identical language in various provisions of the same act must be construed identically, [*People ex rel Simmons v Munising Twp*, 213 Mich 629, 633; 182 NW 118 (1921)], we conclude that only crimes with the offense category designated as 'person' under MCL 777.11 to MCL 777.18 can be

considered 'crimes against a person' for purposes of scoring OV 12 pursuant to MCL 777.5 and MCL 777.6.").

Contrary to the partial dissent, the majority's analysis does not render the Legislature's command in MCL 777.22(5) to score OV 13 "[f]or all crimes against public safety" "nugatory." *Post* at 442. Nor does the majority "disregard[] unequivocal proof that the Legislature 'intended to allow courts to consider crimes within all the offense categories when scoring OV 13.' " *Post* at 447, quoting *ante* at 428. Instead, the partial dissent fails to grasp the significant distinction between the Legislature directing sentencing courts to score OV 13 "[f]or all crimes against public safety," and indeed, for *all* crimes, MCL 777.22, and the Legislature directing sentencing courts to count all crimes as "crimes against a person" for purposes of determining how many points should be assessed under OV 13. Although the Legislature has directed the former, it has not directed the latter. That is, while the Legislature has directed sentencing courts to always score OV 13, regardless of the sentencing offense, it has not directed sentencing courts to always assess 25 points for OV 13, regardless of the sentencing offense. Instead, the Legislature has directed sentencing courts to only assess 25 points under MCL 777.43(1)(c) when the sentencing "offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person[.]" Therefore, when the sentencing offense is a "crime against public safety," as in this case, MCL 777.22(5) directs us to score OV 13, and MCL 777.43(1)(c) directs us to not assess 25 points for OV 13 because 25 points can only be assessed under this provision when the sentencing offense is a "crime against a person." And because no other provision of MCL 777.43(1) is applicable, MCL 777.43(1)(g) directs

us to assess zero points for OV 13.[1] When zero points are assessed for OV 13, as they should be in this case,

[1] The partial dissent argues that zero points cannot be assessed for OV 13 here because MCL 777.43(1)(g) directs us to assess zero points for OV 13 only when "[n]o pattern of felonious criminal activity existed," and such a pattern clearly existed here. However, the partial dissent again fails to read the statute in context. Although defendant may have engaged in a "pattern of felonious criminal activity" as that phrase is commonly understood, he did not engage in the kind of "pattern of felonious criminal activity" that the Legislature has indicated is deserving of having points assessed under OV 13. That is, defendant did not engage in a "pattern of felonious criminal activity involving 3 or more sexual penetrations against a person or persons less than 13 years of age," MCL 777.43(1)(a); he did not engage in a "pattern of felonious criminal activity directly related to causing, encouraging, recruiting, soliciting, or coercing membership in a gang or communicating a threat with intent to deter, punish, or retaliate against another for withdrawing from a gang," MCL 777.43(1)(b); he did not engage in a "pattern of felonious criminal activity involving 3 or more crimes against a person," MCL 777.43(1)(c); he did not engage in a "pattern of felonious criminal activity involving a combination of 3 or more crimes against a person or property or a violation of section 7401(2)(a)(*i*) to (*iii*) or section 7403(2)(a)(*i*) to (*iii*) of the public health code, 1978 PA 368, MCL 333.7401 and 333.7403," MCL 777.43(1)(d); he did not engage in a "pattern of felonious criminal activity involving a combination of 3 or more violations of section 7401(2)(a)(*i*) to (*iii*) or section 7403(2)(a)(*i*) to (*iii*) of the public health code, 1978 PA 368, MCL 333.7401 and 333.7403," MCL 777.43(1)(e); and he did not engage in a "pattern of felonious criminal activity involving 3 or more crimes against property," MCL 777.43(1)(f). Because defendant did not engage in any of the *preceding* "pattern[s] of felonious criminal activity," and because MCL 777.43(1) directs us to score OV 13 "by determining which of the [these provisions] apply and by assigning the number of points attributable to the one that has the highest number of points," we must assess zero points for OV 13 here. Assessing zero points is the only way to be "faithful to the legislative command that OV 13 must be *accurately* scored for *every* crime covered by the guidelines." *Post* at 448 (emphasis in the original). However, I do agree with the partial dissent that a "pattern of felonious criminal activity" that cannot be scored under OV 13 or any other offense variable may well constitute a "substantial and compelling" reason to justify an upward departure from the recommended minimum sentence range under the sentencing guidelines. *People v Babcock*, 469 Mich 247, 257-258 & n 12; 666 NW2d 231 (2003).

the variable is "score[d]" as is required by MCL 777.22(5). That is, assessing zero points for OV 13 is in no way inconsistent with the command in MCL 777.22(5) to score OV 13 "[f]or all crimes against public safety . . . ."

Further, the partial dissent's contention that, under the majority's analysis, the score for OV 13 can never be anything but zero points when the sentencing offense is a "crime against public safety" is simply wrong. Suppose, for example, that a defendant repeatedly assisted prisoners in escaping from prison in violation of MCL 750.183 so that these prisoners would join defendant's gang. Although this offense is a "crime against public safety," MCL 777.16j, 25 points could be assessed for OV 13 under MCL 777.43(1)(b) because the sentencing offense was "part of a pattern of felonious criminal activity directly related to causing, encouraging, recruiting, soliciting, or coercing membership in a gang . . . ." There is nothing "illogical" about the Legislature's directive to score OV 13 "[f]or all crimes against public safety," MCL 777.22(5), but not to assess 25 points for OV 13 under MCL 777.43(1)(c) unless the sentencing offense is a "crime against a person." *Post* at 447.

Similarly, the partial dissent is wrong in its assertion that, under the majority's analysis, a conspiracy could never be counted when scoring OV 13 because a conspiracy is a "crime against public safety," MCL 777.18, and thus the Legislature's directive in MCL 777.43(2)(f) not to count a conspiracy in certain circumstances, would be completely unnecessary. To the contrary, under the majority's analysis, a conspiracy could be counted when scoring OV 13 if, for example, a defendant repeatedly conspired to threaten to harm persons who withdrew from his gang. In that situation, the

conspiracy could be considered "part of a pattern of felonious criminal activity directly related to . . . communicating a threat with intent to deter, punish, or retaliate against another for withdrawing from a gang[.]" MCL 777.43(1)(b). Once again, the Legislature's directive in MCL 777.43(2)(f) not to count conspiracy in certain circumstances is in no way rendered meaningless under the majority's analysis of OV 13, and once again there is nothing that the majority has "disregard[ed]." *Post* at 447.

For these reasons, and for the additional reasons articulated in the majority opinion, I concur in the majority's conclusion that zero points should have been assessed for OV 13. And because this scoring error altered his guidelines range, defendant is entitled to be resentenced. *People v Francisco*, 474 Mich 82, 89-91; 711 NW2d 44 (2006). That is, defendant is entitled to be sentenced in accordance with the sentencing guidelines, and the Legislature is entitled to have its sentencing guidelines taken seriously. In particular, the Legislature is entitled to define crimes as it sees fit, classify and categorize crimes as it sees fit, and establish terms of punishment for crimes as it sees fit without being countermanded by this Court.

CAVANAGH and MARILYN KELLY, JJ., concurred with MARKMAN, J.

YOUNG, C.J. (*concurring in part and dissenting in part*). I concur in that portion of the majority opinion holding that defendant was not denied his right to testify at his trial. Because the record indicates that defendant made the volitional choice to refrain from testifying, it cannot be said that defendant was *denied* the right to testify at his trial.

However, I dissent from that that portion of the majority opinion holding that the scoring of offense variable (OV) 13, MCL 777.43, which considers a "continuing pattern of criminal behavior," is limited to using a narrow subset of offense categories. Because the Legislature has unambiguously indicated that OV 13 is to be scored for crimes in *all* offense categories, the analysis proffered by the majority necessarily renders the explicit legislative command nugatory. I believe that OV 13 is properly scored under the relevant provisions if the charged crime is part of a pattern of criminal activity "involving" crimes against a person or property, regardless of the offense category to which the crime is assigned.[1]

ANALYSIS

This Court reviews questions of statutory interpretation de novo.[2] In order to effectuate the intent of the Legislature, we must interpret every word, phrase, and clause in a statute so as to avoid rendering any portion of the statute nugatory or surplusage.[3]

Defendant was convicted of two counts of assaulting a prison employee[4] as a second-offense habitual offender.[5] At issue in this case is the proper scoring of OV 13, which provides in full as follows:

> (1) Offense variable 13 is continuing pattern of criminal behavior. Score offense variable 13 by determining which of

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[1] I decline to address the third issue considered by the majority opinion, as the issue is undisputedly moot.

[2] *Jenkins v Patel*, 471 Mich 158, 162; 684 NW2d 346 (2004).

[3] *Herald Co, Inc v Eastern Mich Univ Bd of Regents*, 475 Mich 463, 470; 719 NW2d 19 (2006).

[4] MCL 750.197c.

[5] MCL 769.10. Defendant's prior convictions include assaulting a prison employee just five weeks before the instant offenses, as well as convictions for attempted carjacking and unarmed robbery.

the following apply and by assigning the number of points attributable to the one that has the highest number of points:

(a) The offense was part of a pattern of felonious criminal activity involving 3 or more sexual penetrations against a person or persons less than 13 years of age ..... 50 points

(b) The offense was part of a pattern of felonious criminal activity directly related to causing, encouraging, recruiting, soliciting, or coercing membership in a gang or communicating a threat with intent to deter, punish, or retaliate against another for withdrawing from a gang ..... 25 points

(c) The offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person ..... 25 points

(d) The offense was part of a pattern of felonious criminal activity involving a combination of 3 or more crimes against a person or property or a violation of section 7401(2)(a)(*i*) to (*iii*) or section 7403(2)(a)(*i*) to (*iii*) of the public health code, 1978 PA 368, MCL 333.7401 and 333.7403 ..... 10 points

(e) The offense was part of a pattern of felonious criminal activity involving a combination of 3 or more violations of section 7401(2)(a)(*i*) to (*iii*) or section 7403(2)(a)(*i*) to (*iii*) of the public health code, 1978 PA 368, MCL 333.7401 and 333.7403 ..... 10 points

(f) The offense was part of a pattern of felonious criminal activity involving 3 or more crimes against property ..... 5 points

(g) No pattern of felonious criminal activity existed ..... 0 points

(2) All of the following apply to scoring offense variable 13:

(a) For determining the appropriate points under this variable, all crimes within a 5-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction.

(b) The presence or absence of multiple offenders, the age of the offenders, or the degree of sophistication of the organized criminal group is not as important as the fact of the group's existence, which may be reasonably inferred from the facts surrounding the sentencing offense.

(c) Except for offenses related to membership in an organized criminal group or that are gang-related, do not score conduct scored in offense variable 11 or 12.

(d) Score 50 points only if the sentencing offense is first degree criminal sexual conduct.

(e) Do not count more than 1 controlled substance offense arising out of the criminal episode for which the person is being sentenced.

(f) Do not count more than 1 crime involving the same 1 [sic] controlled substance. For example, do not count conspiracy and a substantive offense involving the same amount of controlled substances or possession and delivery of the same amount of controlled substances.[6]

Additionally, all felonies covered by the sentencing guidelines have been placed into one of six offense categories: crimes against a person, crimes against property, crimes involving a controlled substance, crimes against public order, crimes against public trust, and crimes against public safety.[7] The sole purpose served by the offense categories in our legislative sentencing scheme is determining which of the 20 offense variables are to be scored, as not every felony requires the scoring of every offense variable.[8]

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[6] MCL 777.43.

[7] MCL 777.11 through 777.19; see also MCL 777.5 and MCL 777.22.

[8] MCL 777.22. Citing OV 12 and OV 13, the majority concludes that the offense categories also determine how those OVs should be scored. However, the issue to be determined in this case is *whether* the phrases "crimes against a person" and "crimes against property" used in OV 13 refer to the offense categories listed at MCL 777.5. Simply declaring as a fait accompli the issue to be determined is a poor substitute for reasoned legal analysis.

The Court of Appeals held that 25 points rather than 10 points were properly assessed for OV 13 because, although assault against a prison employee was *classified* as a crime against public safety, the offense was "*also* a crime against a person" because "a prison guard is a person."[9] The Court of Appeals reasoned that the phrases "crimes against a person" and "crimes against property" in OV 13 did not limit scoring to those two statutory offense classifications; rather, points were properly assessed if the sentencing offense was part of a pattern involving crimes "against a person" or "property" without regard to the designated offense category.

The majority disagrees, concluding that the "offense categories in MCL 777.5 are statutorily defined phrases"[10] to be applied "in a uniform manner"[11] throughout chapter XVII of the Code of Criminal Procedure.[12] However, MCL 777.5 does not define or give *any meaning whatsoever* to the various offense categories.[13] Rather, MCL 777.5, contained in part 1 of the sentencing guidelines, merely designates *abbreviations*

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[9] *People v Bonilla-Machado*, unpublished opinion per curiam of the Court of Appeals, issued December 15, 2009 (Docket No. 287605), p 4.

[10] *Ante* at 425-426.

[11] *Ante* at 426.

[12] Acknowledging, as it must, that MCL 777.5 merely "provides abbreviated designations for the offense categories," the majority then concludes that "the fully named offense categories are used uniformly and consistently throughout the sentencing guidelines." *Ante* at 422. However, the plain language limits the applicability of MCL 777.5 to "part 2" of chapter XVII, and contains no language indicating its universal applicability "throughout the sentencing guidelines."

[13] MCL 777.5 states:

> The offense categories are designated in part 2 of this chapter as follows:
>
> (a) Crimes against a person are designated "person".
>
> (b) Crimes against property are designated "property".

for the offense categories to be used in part 2 of the sentencing guidelines.[14] Assuming, arguendo, that one could describe the listed abbreviations as "definitions," it is difficult to see how these definitions would have any applicability outside part 2—the one and only part of the sentencing guidelines specifically "designated" in MCL 777.5. Certainly, there is no statutory indication that the Legislature intended that these so-called "definitions" be carried over into part 4 of the sentencing guidelines, the part dedicated to the offense variables.[15]

The majority opinion further states that "[i]f the Legislature had intended to allow courts to consider crimes within *all* the offense categories when scoring OV 13, it could have expressly included additional offense categories or simply stated that all crimes could be considered to establish a continuing pattern of

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(c) Crimes involving a controlled substance are designated "CS".

(d) Crimes against public order are designated "pub ord".

(e) Crimes against public trust are designated "pub trst".

(f) Crimes against public safety are designated "pub saf".

[14] Part 2 of the sentencing guidelines, entitled "Included Felonies," can be found at MCL 777.11 through 777.19. This part lists each felony by MCL number, provides a short description of the offense, and assigns each felony an offense category and offense class. The offense class determines the proper sentencing grid to use. See MCL 777.61 through 777.69.

[15] For similar reasons, the majority is incorrect in stating that "[t]he Court of Appeals' opinion would permit courts to ignore the explicit statutory offense categories . . . ." *Ante* at 426. Regardless of whether the categorizations apply in part 4, the offense categories are appropriately applied in part 2, as explicitly directed by statute. Thus, the offense categories retain meaning under the Court of Appeals' interpretation, and not applying the categorizations in part 4 simply does *not* mean that the offense categories are being "ignore[d]."

criminal behavior."[16] This reasoning, however, disregards unequivocal proof that the Legislature "intended to allow courts to consider crimes within all the offense categories when scoring OV 13." Significantly, MCL 777.22 *specifically commands* that OV 13 be scored for *each and every* offense category, including those offenses categorized as crimes involving a controlled substance, crimes against public order, crimes against public trust, and crimes against public safety.[17]

It is illogical to conclude that the Legislature did not *intend* the very act that it explicitly *requires*. Under the majority's analysis, four of the six offense categories[18] cannot be used to assess points under OV 13 because the offense variable is limited to "specific offense categories."[19] Interpreting MCL 777.43 in a way that excludes these offense categories from scoring consideration renders the specific legislative directive to score

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[16] *Ante* at 428.

[17] MCL 777.22 states, in relevant part:

> (1) For all crimes against a person, score offense variables 1, 2, 3, 4, 7, 8, 9, 10, 11, 12, 13, 14, 19, and 20. . . .
>
> (2) For all crimes against property, score offense variables 1, 2, 3, 4, 9, 10, 12, 13, 14, 16, 19, and 20.
>
> (3) For all crimes involving a controlled substance, score offense variables 1, 2, 3, 12, 13, 14, 15, 19, and 20.
>
> (4) For all crimes against public order and all crimes against public trust, score offense variables 1, 3, 4, 9, 10, 12, 13, 14, 16, 19, and 20.
>
> (5) For all crimes against public safety, score offense variables 1, 3, 4, 9, 10, 12, 13, 14, 16, 19, and 20.

[18] The only apparent exceptions would be the specifically enumerated crimes contained in MCL 777.43(1)(d) and (e) that are classified as "crimes involving a controlled substance" and those crimes that may be considered gang-related under MCL 777.43(1)(b).

[19] *Ante* at 429.

OV 13 for *every* offense category a nullity.[20] The majority believes that its analysis is faithful to the intent of the Legislature because the score for "an offense variable can—and sometimes, as here, will—be zero points."[21] However, assessing zero points is appropriate only when "[*n*]*o* pattern of felonious criminal activity existed."[22] In this case, as no one disputes, defendant clearly engaged in a "pattern of felonious criminal activity." The majority's argument that OV 13 should not be scored *at all* given that the Legislature allows zero points to be assessed when appropriate does not withstand scrutiny and is not faithful to the legislative command that OV 13 must be *accurately* scored for *every* crime covered by the guidelines. The majority has, in effect, eliminated four of the six offense categories from inclusion as part of a pattern of felonious criminal activity and has thus accomplished a judicial rewriting of the statute.

I further note that nothing in the language of OV 13 explicitly refers to offense *categories*. If the Legislature had intended to limit the scoring of OV 13 to those crimes *classified* as being "crimes against a person" or "crimes against property," it would have made some reference to crime classifications or offense categories. It might have stated, for example, that a court should assess 5 points when the offense was part of a pattern of felonious criminal activity involving three or more

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[20] I note, however, that if, as the majority opinion now requires, defendant's "continuing pattern of criminal behavior" could not be scored under OV 13, it would provide a substantial and compelling reason for an upward sentencing departure because it is both "objective and verifiable" and not already considered in determining the guidelines recommended minimum sentence range. *People v Babcock*, 469 Mich 247, 257-258 & n 12; 666 NW2d 231 (2003).

[21] *Ante* at 427.

[22] MCL 777.43(1)(g) (emphasis added).

crimes *classified as* a crime against property or in the offense category of crimes against a person.

Lastly, the example contained in MCL 777.43(2)(f) provides further indication that the Legislature did not intend that the scoring of OV 13 be restricted to using a narrow subset of offense categories as the majority contends. The statutory provision provides:

> Do not count more than 1 crime involving the same 1 [sic] controlled substance. For example, *do not count conspiracy* and a substantive offense involving the same amount of controlled substances or possession and delivery of the same amount of controlled substances.[23]

This subdivision prohibits scoring a drug conspiracy offense along with a substantive drug offense, but does not *in any other way* limit the scoring of OV 13 for the crime of conspiracy. Conspiracy is not classified as a crime against a person, nor is it classified as a crime against property. Rather, conspiracy[24] is classified as a crime against public safety.[25] If the Legislature had intended that crimes against public safety could not be used to score OV 13, then there would have been no need for the Legislature to describe a narrow exception under which a *specific* crime against public safety (conspiracy) could not be counted.

In order to give meaning to the language contained in MCL 777.43 as well as the language contained in MCL 777.22, I would hold that the relevant portions of OV 13 may be scored when the sentencing offense is part of a pattern of criminal activity "involving"[26] crimes against a

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[23] MCL 777.43(2)(f) (emphasis added).

[24] MCL 750.157a(a).

[25] MCL 777.18.

[26] To "involve" means "to implicate, as in guilt or crime, or in any matter or affair." *Random House Webster's College Dictionary* (2000), p 698, def 7.

person or property, regardless of the offense categories of those crimes. Certainly, defendant's sentencing offenses involved or implicated "persons"—the two prison guards who were the victims of defendant's felonious behavior. Therefore, I believe the Court of Appeals correctly determined that OV 13 was properly scored at 25 points.

Because the majority's conclusion that OV 13 is limited to "specific offense categories" renders the explicit legislative command contained in MCL 777.22 nugatory, I dissent and would deny defendant's application for leave to appeal.

ZAHRA, J., concurred with YOUNG, C.J.

PEOPLE v HUSTON

Docket No. 141312. Argued March 9, 2011 (Calendar No. 7). Decided July 26, 2011.

Cecil D. Huston pleaded guilty of armed robbery and was sentenced by the Berrien Circuit Court, Dennis M. Wiley, J., to 180 to 600 months in prison. Defendant and his accomplice had hidden themselves from view in a mall parking lot at night while armed. They then robbed a woman who was by herself and happened to park in the lot. The Court of Appeals denied defendant's delayed application for leave to appeal and motion for reconsideration in unpublished orders, entered December 9, 2008, and January 28, 2009, respectively (Docket No. 288843). The Supreme Court, in lieu of granting leave to appeal, remanded the case to the Court of Appeals for consideration as on leave granted, limited to defendant's challenge to the scoring of offense variable (OV) 10, MCL 777.40 (exploitation of a vulnerable victim), in light of *People v Cannon*, 481 Mich 152 (2008). 485 Mich 885 (2009). The Court of Appeals, SERVITTO, P.J., and FITZGERALD and BECKERING, JJ., reversed and remanded for resentencing, holding that the trial court had improperly assessed 15 points for OV 10 because there was no evidence to indicate that the victim was personally or inherently vulnerable and that the trial court should therefore have assessed zero points for that offense variable. 288 Mich App 387 (2010). The Supreme Court granted the prosecution's application for leave to appeal. 488 Mich 876 (2010).

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

For a trial court to assess 15 points for OV 10, the defendant's preoffense predatory conduct need only have been directed at a victim, not any specific victim, and the victim need not have been inherently vulnerable.

1. MCL 777.40(1)(a) directs the court to assess 15 points for OV 10 if predatory conduct was involved in the exploitation of a vulnerable victim. MCL 777.40(3)(a) defines "predatory conduct" as preoffense conduct directed at "a victim" for the primary purpose of victimization. Accordingly, the statute cannot be con-

strued as requiring that the defendant's preoffense conduct have been directed at one particular or specific victim. The Legislature intended that 15 points be assessed only for those forms of preoffense conduct commonly understood as being predatory in nature, such as lying in wait and stalking, as opposed to purely opportunistic criminal conduct or preoffense conduct involving nothing more than run-of-the-mill planning to effect a crime or subsequent escape without detection. In this case, defendant lay in wait for a victim, and that preoffense conduct was for the primary purpose of victimization. Therefore, defendant's conduct was predatory conduct.

2. With respect to exploitation of a vulnerable victim, MCL 777.40(2)(c) defines "vulnerability," as the readily apparent susceptibility of a victim to injury, physical restraint, persuasion, or temptation. The statute does not mandate that this susceptibility be inherent in the victim's characteristics, but allows for susceptibility arising externally from the victim's relationships or circumstances. Thus, a defendant's predatory conduct can create or enhance the vulnerability of a victim. Predatory conduct deserves to be treated as the most serious of all exploitations of vulnerability because that conduct itself created or enhanced the vulnerability in the first place, and it may have done so with regard to the community as a whole, not merely with regard to persons who were already vulnerable for one reason or another. In this case, the victim was alone in the dark, and defendant and his accomplice outnumbered her. Moreover, defendant and his accomplice were lying in wait for her, armed and hidden from view, making her more susceptible to injury or physical restraint, i.e., more vulnerable. Because defendant engaged in predatory conduct to exploit a vulnerable victim, the trial court did not err by assessing 15 points for OV 10.

Reversed and judgment of sentence reinstated.

Justice HATHAWAY, joined by Justice MARILYN KELLY, concurring in part and dissenting in part, concurred with the majority's conclusion that for purposes of scoring OV 10, the vulnerability of a victim is not limited to inherent or personal characteristics of the victim. However, she dissented from the majority's conclusion that a defendant's preoffense conduct need not be directed at a specific victim to constitute predatory conduct. Under MCL 777.40(3)(c), a victim must have a readily apparent susceptibility to injury, physical restraint, persuasion, or temptation. Thus, the victim must have been ascertainable before the offense took place. While the majority focuses on the use of the phrase "a victim" in MCL 777.40(3)(c), it is likely that the Legislature used that phrase

rather than "the victim" because it contemplated that a defendant might victimize more than one victim. The majority's interpretation of what constitutes predatory conduct failed to limit the circumstances under which a court may assess 15 points for OV 10. *Cannon* properly limited the assessment of 15 points to situations in which the preoffense conduct involved first selecting a specific victim to target, not run-of-the mill planning to commit a crime against someone. Justice HATHAWAY would have vacated the Court of Appeals' holdings that a victim's vulnerability is limited to personal or inherent characteristics of the victim and that defendant's preoffense conduct was directed at this victim, affirmed its reversal of defendant's sentence, and remanded for resentencing, instructing the trial court to assess zero points for OV 10.

Justice CAVANAGH, dissenting, would have held that for purposes of scoring OV 10 a victim's vulnerability must have been personal or inherent to the victim, that the victim in this case was not a vulnerable victim, and that to assess points for predatory conduct, the preoffense conduct engaged in by the offender must have been directed at one or more specific victims. The nonexhaustive *Cannon* list of factors taken from the statutory language to guide sentencing courts in assessing victim vulnerability all related to the victim's inherent characteristics or personal situation. The majority's conclusion that vulnerability need not be inherent in the victim was inconsistent with the *Cannon* test. With regard to the victim in this case, being alone and outnumbered in a parking lot at night did not relate to her inherent or personal characteristics, and defendant's preoffense conduct did not actively alter the victim's state of inherent susceptibility, nor was it directed at this victim. The majority erred by concluding that preoffense conduct directed at the community at large is sufficient to constitute preoffense conduct directed at a victim under OV 10. The reversal of defendant's sentences should be affirmed, and defendant should be resentenced, with zero points assessed for OV 10.

SENTENCES — GUIDELINES — OFFENSE VARIABLES — PREDATORY CONDUCT — VULNERABILITY.

A sentencing court scoring the sentencing guidelines must assess 15 points under offense variable 10 if the offender engaged in predatory conduct to exploit a vulnerable victim; predatory conduct is preoffense conduct directed at a victim for the primary purpose of victimization; the offender's preoffense conduct need not have been directed at one particular or specific victim, and 15 points may be assessed only for those forms of preoffense conduct commonly understood as being predatory in nature, such as lying in wait or stalking; "vulnerability" is the readily apparent suscep-

> tibility of a victim to injury, physical restraint, persuasion, or temptation; the statute does not mandate that this susceptibility be inherent in the victim's characteristics, but allows for susceptibility arising externally from the victim's relationships and circumstances, including susceptibility arising from or enhanced by the defendant's predatory conduct; predatory conduct deserves to be treated as the most serious of all exploitations of vulnerability because that conduct itself created or enhanced the vulnerability in the first place, and it may have done so with regard to the community as a whole, not merely with regard to persons who were already vulnerable for one reason or another (MCL 777.40[1][a], [3][a] and [c]).

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Arthur J. Cotter*, Prosecuting Attorney, and *Aaron J. Mead*, Assistant Prosecuting Attorney, for the people.

Ronald D. Ambrose for defendant.

Amicus Curiae:

Ronald J. Schafer and *Terrence E. Dean* for the Prosecuting Attorneys Association of Michigan.

MARKMAN, J. At issue in this case is whether the trial court properly assessed 15 points for offense variable (OV) 10. OV 10 should have 15 points assessed when the defendant has engaged in "predatory conduct" to "exploit[] . . . a vulnerable victim." MCL 777.40(1)(a). Contrary to the Court of Appeals' holding, in order to assess 15 points for OV 10, the defendant's preoffense conduct only has to be directed at "a victim," not any specific victim, and the victim does not have to be inherently vulnerable. Instead, a defendant's "predatory conduct," by that conduct alone (*eo ipso*), can create or enhance a victim's "vulnerability." In this case, defendant engaged in "predatory conduct" to "exploit[] . . . a vulnerable victim" because, before defendant and his cohort robbed the victim, they were lying in wait, armed with

two BB guns and a knife, and hidden from the victim, who was by herself at night in an otherwise empty parking lot. Because the trial court properly assessed 15 points for OV 10, we reverse the judgment of the Court of Appeals and reinstate the trial court's judgment of sentence.

I. HISTORY

This case arises from events that occurred in February 2005 in the Orchards Mall parking lot in Benton Harbor. The victim, Jackie Flanagan, drove to the mall and parked her vehicle in front of the Sears store where she intended to shop. The victim chose a well-lit parking spot because it was dark outside. When she got out of her vehicle, she was approached by defendant and his cohort, who were 15 and 16 years old respectively. One of the boys pointed a BB gun at the victim's face and demanded her purse, wallet, and car keys, while the other boy put a BB gun to the back of the victim's head. The victim gave the boys her cell phone and car keys but had trouble getting her purse off her shoulder. Defendant's cohort pushed the victim to the ground and cut the purse from her shoulder with a utility knife. Both boys then fled the scene in the victim's vehicle. The next day, police recovered the victim's vehicle and found two BB guns inside it. Further investigation led police to defendant and his cohort.

Defendant was charged with armed robbery and carjacking. He entered a plea of guilty of armed robbery, MCL 750.529, pursuant to a plea bargain offered by the prosecutor.[1] At sentencing, defendant challenged the scoring of OV 10, arguing that it was incorrectly scored at 15 points. OV 10 addresses "exploitation of a vulner-

[1] Defendant's cohort also entered a guilty plea to armed robbery.

able victim" and requires "predatory conduct" for the assessment of 15 points. MCL 777.40(1)(a). Defendant argued that there was nothing "predatory" about this robbery because it was a "random" act. The trial court rejected defendant's argument and concluded that predatory conduct was established for purposes of scoring OV 10 at 15 points because defendant was lying in wait in the parking lot where he robbed the victim. Defendant's recommended minimum sentence range under the sentencing guidelines was calculated as 126 to 210 months. The trial court sentenced defendant to 180 months to 600 months in prison.

On appeal in the Court of Appeals,[2] defendant argued that the trial court had improperly scored OV 10 and that this error affected his sentencing guidelines range.[3] In a published opinion per curiam, the Court of Appeals reversed defendant's judgment of sentence and remanded for resentencing, concluding that OV 10 should have been scored at zero points, not at 15 points. *People v Huston*, 288 Mich App 387, 397-398; 794 NW2d 350 (2010). The Court of Appeals held that the "vulnerability" of a victim must be determined by characteristics personal to the victim. *Id.* at 395-397. The Court of Appeals acknowledged that at the time of the offense it was dark outside and the victim was alone, which may have made the robbery easier to carry out. *Id.* at 397. Nevertheless, the Court of Appeals reasoned that those

[2] The Court of Appeals originally denied defendant's application for leave to appeal. However, this Court remanded the case to the Court of Appeals for consideration as on leave granted in light of *People v Cannon*, 481 Mich 152; 749 NW2d 257 (2008). *People v Huston*, 485 Mich 885 (2009).

[3] If OV 10 had been scored at zero points instead of 15 points, defendant's total OV score would have been 51 points, which would decrease his OV level from IV to III. This reduction would have made defendant's minimum sentence range 108 to 180 months, instead of 126 to 210 months. See MCL 777.62.

facts failed to establish that the victim was personally or inherently vulnerable and, therefore, that the trial court erred by assessing 15 points for OV 10. *Id.*

This Court granted the prosecutor's application for leave to appeal in order to consider whether the "vulnerability" of a victim, for purposes of scoring OV 10, is limited to the victim's personal characteristics. *People v Huston*, 488 Mich 876 (2010).

II. STANDARD OF REVIEW

The interpretation and application of the legislative sentencing guidelines, MCL 777.1 *et seq*., involve legal questions that this Court reviews de novo. *People v Morson*, 471 Mich 248, 255; 685 NW2d 203 (2004).

III. ANALYSIS

MCL 777.40 provides:

> (1) Offense variable 10 is *exploitation of a vulnerable victim*. Score offense variable 10 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:
>
> (a) *Predatory conduct* was involved ..... 15 points
>
> (b) The offender exploited a victim's physical disability, mental disability, youth or agedness, or a domestic relationship, or the offender abused his or her authority status ..... 10 points
>
> (c) The offender exploited a victim by his or her difference in size or strength, or both, or exploited a victim who was intoxicated, under the influence of drugs, asleep, or unconscious ..... 5 points
>
> (d) The offender did not exploit a victim's vulnerability ..... 0 points
>
> (2) The mere existence of 1 or more factors described in subsection (1) does not automatically equate with victim vulnerability.

(3) As used in this section:

(a) *"Predatory conduct" means preoffense conduct directed at a victim for the primary purpose of victimization*.

(b) "Exploit" means to manipulate a victim for selfish or unethical purposes.

(c) *"Vulnerability" means the readily apparent susceptibility of a victim to injury, physical restraint*, persuasion, or temptation.

(d) "Abuse of authority status" means a victim was exploited out of fear or deference to an authority figure, including, but not limited to, a parent, physician, or teacher. [Emphasis added.]

A. "PREDATORY CONDUCT"

Contrary to the Court of Appeals' and the dissents' contentions, MCL 777.40(3)(a) does not define "predatory conduct" to mean preoffense conduct directed at *the* victim; instead, MCL 777.40(3)(a) defines "predatory conduct" to mean "preoffense conduct directed at *a* victim . . . ."[4] (Emphasis added.) As this Court has explained:

> "Traditionally in our law, to say nothing of our classrooms, we have recognized the difference between 'the' and 'a.' 'The' is defined as 'definite article. 1. (used, esp. before a noun, with a specifying or particularizing effect, as opposed to the indefinite or generalizing force of the

[4] We recognize that in *Cannon*, 481 Mich at 162, this Court indicated that the defendant's preoffense conduct must be directed at "one or more specific victims . . . ." However, this question was not at issue in *Cannon*, there was no analysis concerning this issue in *Cannon*, and it was clearly dictum in *Cannon*. See *Wold Architects & Engineers v Strat*, 474 Mich 223, 232 n 3; 713 NW2d 750 (2006). Contrary to the dissent's contention, it was clearly dictum because it was not "essential to [the] determination of the case in hand," *id*. (quotation marks and citations omitted), whatever *Cannon*'s desire "to provide the correct framework for lower courts to apply when deciding whether to assess points for predatory conduct under OV 10," *post* at 484 n 7.

> indefinite article a or an) . . . .' *Random House Webster's College Dictionary*, p 1382." [*Robinson v Detroit*, 462 Mich 439, 461; 613 NW2d 307 (2000) (citation omitted).]

Because the Legislature chose to use the words "a victim" in MCL 777.40(3)(a), we must construe MCL 777.40(3)(a) to mean *a* victim, rather than *the* victim. That is, we must take care not to construe MCL 777.40(3)(a) as requiring that the defendant's preoffense predatory conduct have been directed at one particular or specific victim, but instead as requiring only that the defendant's preoffense predatory conduct have been directed at *a* victim.[5]

Furthermore, from a policy perspective, we are unsure why the Legislature would want a defendant who directed his preoffense conduct toward a specific victim, say, for example, at his ex-girlfriend, to be sentenced more severely than the defendant who directed his preoffense conduct at the community at large by lying in wait, armed, in a parking lot at night, waiting for the first random person to come along so that he or she

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[5] The dissents conclude that the defendant's preoffense predatory conduct must be directed at one particular or specific victim because "vulnerability" is defined as a "readily apparent susceptibility . . . to injury, physical restraint, persuasion, or temptation," MCL 777.40(3)(c), and "[i]t cannot become 'readily apparent' to an offender that a victim is susceptible *before* the offender identifies the victim." *Post* at 473 (HATHAWAY, J., dissenting in part) (emphasis in the original). We respectfully disagree. If a defendant hides in the bushes of a mall parking lot at night with the intention of waiting there until a woman who is by herself parks nearby so that he can rob her, it is most certainly "readily apparent" to that defendant that the victim is susceptible *before* he even identifies the victim. Indeed, that is the very reason the defendant is hiding in the bushes at night in the first place—to render the victim more susceptible to robbery. And, contrary to the dissents' contentions, we are not "delet[ing] the phrase 'directed at a victim' " from the statute. *Post* at 485 (CAVANAGH, J., dissenting). Instead, we are simply refusing to rewrite the statute to read "directed at one or more specific victims," as do the dissents. *Post* at 485 (CAVANAGH, J., dissenting).

could be criminally victimized. Who poses the greater threat to society—the defendant who seeks revenge on his ex-girlfriend, and thus who directs his preoffense conduct only toward a single person, or the defendant who seeks opportunistically to rob the first vulnerable person within the community at large who happens along? Certainly, the latter instills greater fear and apprehension in more people and has a greater impact on society. Indeed, this case illustrates how this fear is diffused throughout the community. The victim here felt vulnerable even *before* the attack and testified that she specifically "circled the parking lot" to "park[] safely under a street lamppost . . . ." Unfortunately, her fears were justified, and defendant's preoffense conduct effectively made a victim not only of *this* victim, but all members of the larger community, each of whom must take precautions against criminal behavior and each of whom may have reasonable apprehensions concerning the threat of criminal conduct being directed toward them.

This also explains why the Legislature chose to assess 15 points for "predatory conduct," the highest number of points that can be assessed under OV 10. The hierarchical range of points that may be assessed under OV 10 extends from zero to 15 points. Zero points are to be assessed when "[t]he offender did not exploit a victim's vulnerability." MCL 777.40(1)(d). Five points are to be assessed when "[t]he offender exploited a victim by his or her difference in size or strength, or both, or exploited a victim who was intoxicated, under the influence of drugs, asleep, or unconscious"—things that are largely within the victim's own control.[6] MCL 777.40(1)(c). Ten points are to be assessed when "[t]he

[6] We, of course, recognize, as does the dissent, *post* at 482 n 2, that these things are not *always* within the victim's own control.

offender exploited a victim's physical disability, mental disability, youth or agedness, or a domestic relationship, or the offender abused his or her authority status"—things that are largely outside of the victim's control. MCL 777.40(1)(b). Finally, 15 points are to be assessed when "[p]redatory conduct was involved"—something that is *always* outside of the victim's control and something that may impact the community as a whole and not only persons with already-existing vulnerabilities. That is, we can only interpret the Legislature's hierarchical approach in OV 10 as indicating its own view that "predatory conduct" deserves to be treated as the *most serious* of all exploitations of vulnerability because that conduct itself created or enhanced the vulnerability in the first place, and it may have done so with regard to the community as a whole, not merely with regard to persons who were *already* vulnerable for one reason or another. By its essential nature, predatory conduct may render *all* persons uniquely susceptible to criminal exploitation and transform all persons into potentially "vulnerable" victims. Only in this way can MCL 777.40(1)(a) be understood as connected with MCL 777.40(1)(b) through (d).

The fact that the Legislature has directed sentencing courts to assess 15 points, the highest number of points that can be scored under OV 10, for "predatory conduct," also strongly suggests that the Legislature did not intend "predatory conduct" to describe *any* manner of "preoffense conduct." Indeed, if that were the case, 15 points could be assessed under OV 10 in almost *all* cases because there will almost always be some manner of preliminary or "preoffense conduct." Few criminal offenses arise utterly spontaneously and without forethought. Most importantly, reading MCL 777.40(1)(a) as requiring 15 points to be assessed for OV 10 in *every* case would essentially render nugatory MCL

777.40(1)(b) through (d), the provisions directing when OV 10 requires a score of 10, 5, and zero points respectively, "and it is well established that '[i]n interpreting a statute, we [must] avoid a construction that would render part of the statute surplusage or nugatory.' " *Robinson v City of Lansing*, 486 Mich 1, 21; 782 NW2d 171 (2010) (citation omitted) (alteration in *Robinson*). To enable MCL 777.40(1)(a) whenever there is *any* "preoffense conduct" would effectively ensure that MCL 777.40(1)(b) through (d) would never be enabled. Thus, to give meaning to the entirety of MCL 777.40(1), and out of recognition that 15 points for "predatory conduct" constitutes the highest number of points available under OV 10 and that "preoffense conduct" is being used to define "predatory conduct," we conclude that the latter term does not encompass *any* "preoffense conduct," but rather only those forms of "preoffense conduct" that are commonly understood as being "predatory" in nature, e.g., lying in wait and stalking, as opposed to purely opportunistic criminal conduct or "preoffense conduct involving nothing more than run-of-the-mill planning to effect a crime or subsequent escape without detection."[7] *People v Cannon*, 481 Mich 152, 162; 749 NW2d 257 (2008). This is the only interpretation that gives meaning to all the paragraphs

[7] Given that we expressly hold that *only* genuinely predatory conduct, such as lying in wait and stalking, can justify assessing 15 points for OV 10, our construction of MCL 777.40(3)(a), contrary to the partial dissent's contention, does not "lack[] any limitation on the circumstances in which a court may assess the highest number of points possible under OV 10." *Post* at 475. And given that we specifically hold that "preoffense conduct involving nothing more than run-of-the-mill planning to effect a crime or subsequent escape without detection" is not "predatory conduct," the partial dissent is simply wrong to assert that "under the majority's standard today, such 'run-of-the-mill planning' could be used to assess 15 points for OV 10." *Post* at 478 n 26; see also *post* at 475 n 19 ("[I]t is unclear . . . whether the mere planning of a crime would suffice.").

of MCL 777.40(1), while respecting the obviously hierarchal character of those provisions. In short, "preoffense conduct" must be read in context. *Robinson*, 486 Mich at 15 (statutory language "cannot be read in isolation, but must be read in context").

In the instant case, although defendant may not have been lying in wait for a *specific* victim, he was unquestionably lying in wait for *a* victim. Therefore, his preoffense conduct was directed at "a victim." MCL 777.40(3)(a). In this regard, it is helpful to consider why defendant was lying in wait, armed and hidden from view. And the answer to this question is quite obvious—he was doing this in order to place himself in a better position to be able to successfully rob someone in the parking lot. That is, defendant's preoffense conduct of predatorily lying in wait, armed, and hidden from view was directed at "a victim." Although defendant may not have known who his victim was going to be when he first undertook these actions, that does not undermine the fact that he was lying in wait for "a victim," and thus that his preoffense conduct was directed toward such "a victim."

In addition, defendant's preoffense conduct was "for the primary purpose of victimization." MCL 777.40(3)(a). As *Cannon*, 481 Mich at 161, explained, " '[v]ictimize' is defined as 'to make a victim of.' " (Citation omitted.) And "victim" is defined as " 'a person who suffers from a destructive or injurious action . . . .' " *Id.* (citation omitted). Therefore, "predatory conduct" under the statute is behavior that is predatory in nature, "precedes the offense, [and is] directed at a person for the primary purpose of causing that person to suffer from an injurious action . . . ." *Id.* In this case, before the robbery, defendant laid in wait while armed and hidden from view for the primary

purpose of eventually causing a person to suffer from an injurious action, i.e., an armed robbery. In light of these facts, defendant's preoffense conduct constituted "predatory conduct" both under the statutory definition of this phrase and according to common understanding under which lying in wait constitutes quintessential "predatory conduct."

B. "VULNERABILITY"

The Court of Appeals concluded and the dissent agrees that the victim was not "vulnerable" because there was nothing in the record to indicate that she suffered from an *inherent* or *personal* vulnerability. *Huston*, 288 Mich App at 395-396. We disagree. The Court of Appeals' and the dissent's analyses limit "vulnerability" of a victim to inherent or personal characteristics of the victim, and such a limitation is contrary to the express language of MCL 777.40. We read the statute as contemplating vulnerabilities that may arise not only out of a victim's characteristics, but also out of a victim's relationships or circumstances.

MCL 777.40(1)(b) and (c) explicitly define characteristics, relationships, and circumstances that may make a victim susceptible to injury, physical restraint, persuasion, or temptation.[8] The specified factors listed in subdivisions (b) and (c) relate to the inherent characteristics of the victim, as well as the victim's relationships and circumstances.

[8] Subdivision (b) directs the assessment of 10 points in the expressly limited instances of when the offender exploited "a victim's physical disability, mental disability, youth or agedness, or a domestic relationship, or [when] the offender abused his or her authority status[.]" Subdivision (c) directs the assessment of 5 points in the expressly limited instances of when the offender exploited "a victim by his or her difference in size or strength, or both, or [when the offender] exploited a victim who was intoxicated, under the influence of drugs, asleep, or unconscious[.]"

Using the statutory language as guidance, *Cannon* listed factors to be considered by a sentencing court when determining whether a victim was vulnerable. *Cannon*, 481 Mich at 158-159. Those factors include the expressly listed characteristics, relationships, and circumstances identified in subdivisions (b) and (c), which are:

> (1) the victim's physical disability, (2) the victim's mental disability, (3) the victim's youth or agedness, (4) the existence of a domestic relationship, (5) whether the offender abused his or her authority status, (6) whether the offender exploited a victim by his or her difference in size or strength or both, (7) whether the victim was intoxicated or under the influence of drugs, or (8) whether the victim was asleep or unconscious. [*Id.*][9]

Both *Cannon* and the express language of MCL 777.40(2) instruct that the mere existence of one of the listed factors does not automatically render the victim "vulnerable" for purposes of scoring OV 10. *Id.* at 159.

In contrast to subdivisions (b) and (c), subdivision (a) does not list any specific characteristics, relationships, or circumstances of the victim. Rather, that subdivision merely requires that "[p]redatory conduct was involved" in order to assess 15 points for OV 10. MCL 777.40(1)(a). Recognizing this notable distinction, *Cannon* explained that the factors it enumerated were *not* meant as an exhaustive list for purposes of finding "vulnerability." *Cannon*, 481 Mich at 158 n 11. Instead, *Cannon* clarified that

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[9] We disagree with the dissent that all of these factors are "independent of the victim's external physical environment." *Post* at 482. The existence of a domestic relationship, whether the offender abused his or her authority status, and whether the offender exploited a victim by his or her difference in size or strength or both are clearly not. Rather, they are at least in part dependent on the *offender's* relationship to the victim, the *offender's* authority status over the victim coupled with the *offender's* decision to abuse this status, and the *offender's* size or strength.

> [t]he absence of one of these factors does not preclude a finding of victim vulnerability when determining whether it is appropriate to assess 15 points for predatory conduct. Rather, the evidence must show merely that it was readily apparent that the victim was susceptible to injury, physical restraint, persuasion, or temptation. [*Id.*]

Accordingly, to assess 15 points for OV 10, a court must find that an offender engaged in predatory conduct and exploited a vulnerable victim, using only the statutory definition of "vulnerability." Again, MCL 777.40(3)(c) defines "vulnerability" as the "readily apparent susceptibility of a victim to injury, physical restraint, persuasion, or temptation," and such vulnerability may or may not arise from the explicitly listed characteristics, relationships, and circumstances set forth in subdivisions (b) and (c). The statute does not mandate that this "susceptibility" be *inherent* in the victim. Rather, the statutory language allows for susceptibility arising from external circumstances as well.

In the instant case, the victim was alone in the dark, and defendant and his cohort outnumbered her. Moreover, a key fact that greatly increased the "vulnerability" of the victim in these specific circumstances was that defendant and his cohort were lying in wait for her, armed and hidden from her view. By lying in wait for a victim in the manner that defendant did here, he made the victim more "susceptib[le] . . . to injury [or] physical restraint," i.e., more "vulnerable." MCL 777.40(3)(c).[10]

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[10] Although the partial dissent is "unclear . . . whether the mere planning of a crime would suffice" to establish "genuinely" predatory conduct, *post* at 475 n 19, it is worth emphasizing that lying in wait is not the equivalent of the "mere planning of a crime." See, e.g., *Webster v Woodford*, 369 F3d 1062, 1073 (CA 9, 2004) ("[L]ying in wait requires three elements: concealment, watching, and waiting."). Each of these elements, when joined together, has the potential to render any member of the public vulnerable to criminal activity, as the perpetrator by such

That is, just as the defendant in *People v Apgar*, 264 Mich App 321; 690 NW2d 312 (2004), enhanced the victim's "vulnerability" by forcing her to smoke marijuana before he sexually assaulted her; and the defendant in *People v Kimble*, 252 Mich App 269; 651 NW2d 798 (2002), enhanced the victim's "vulnerability" by following her and waiting until she pulled into her driveway before striking; and the defendant in *People v Mahon*, 485 Mich 971; 774 NW2d 691 (2009) (CORRIGAN, J., concurring), enhanced the victim's "vulnerability" by waiting for the bar to close and the victim to exit the bar before he assaulted her, the defendant in the instant case enhanced the victim's "vulnerability" by lying in wait while armed and hidden from view before he robbed her.

We conclude that a person walking alone at night in a parking lot while two armed people hidden from that person's view lie in wait to rob that person is a "vulnerable" victim because he or she would have a "readily apparent susceptibility . . . to injury [or] physical restraint . . . ." MCL 777.40(3)(c). This conclusion avoids the problem that the dissent is concerned about of characterizing all victims of crimes as "vulnerable" victims, while at the same time it recognizes that a defendant's "predatory conduct" can establish or enhance the "vulnerability" of a victim.[11] Finally, defendant unquestionably "exploit[ed]" the

conduct both strengthens his own hand and weakens that of the public, until the former believes that his opportunity to victimize the latter has been optimized. Lying in wait describes the kind of conduct that in the context of a homicide would be sufficient to satisfy the elements of first-degree murder. See MCL 750.316(1)(a) ("Murder perpetrated by . . . lying in wait" is "first degree murder.").

[11] The dissent is concerned that under our approach "all victims [are] vulnerable." *Post* at 483. However, what the dissent does not seem to appreciate is that we *only* find the victim here to be "vulnerable" because defendant and his cohort engaged in "predatory conduct" that trans-

"vulnerable victim" in this case because he "manipulate[d] [her] for selfish or unethical purposes" by lying in wait for her and then robbing her of her purse and car.[12] MCL 777.40(3)(b). As this Court explained in *Cannon*, 481 Mich at 159, "predatory conduct" "inherently involves some level of exploitation," and thus "points may be assessed under OV 10 for exploitation of a vulnerable victim when the defendant has engaged in conduct that is considered predatory under the statute."

IV. CONCLUSION

For these reasons, we conclude that defendant engaged in "predatory conduct" to "exploit[] . . . a vulnerable victim," MCL 777.40(1)(a), and thus that the trial court did not err by assessing 15 points for OV 10. For a trial court to assess 15 points for OV 10, the defendant's preoffense conduct only has to be directed at "a victim," not any specific victim, and the victim does not have to be inherently vulnerable. Instead, a defendant's "predatory conduct," by that conduct alone (*eo ipso*), can create or enhance a victim's "vulnerability." Therefore, we reverse the judgment of the Court of Appeals and reinstate the trial court's judgment of sentence.

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

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formed an "ordinary" victim into a "vulnerable" victim. Obviously, not all, or even most, defendants engage in "predatory conduct," and, thus, not "all victims [are] vulnerable."

[12] Contrary to the partial dissent's contention, *post* at 474-475 n 18, OV 10 could not be assessed at 15 points under our approach if the defendant engaged in preoffense predatory conduct but was arrested before he could commit the intended offense because OV 10 requires "exploitation of a vulnerable victim." MCL 777.40(1).

HATHAWAY, J. *(concurring in part and dissenting in part)*. I concur with the majority's conclusion that for purposes of scoring offense variable (OV) 10, the "vulnerability" of a victim is not limited to inherent or personal characteristics of the victim. I agree with this conclusion because MCL 777.40 expressly contemplates vulnerabilities that may arise out of a victim's characteristics, as well as a victim's relationships or circumstances. However, I dissent from the majority's conclusion that a defendant's preoffense conduct need not be directed at a specific victim in order to constitute "predatory conduct." Instead, I believe that this Court correctly interpreted MCL 777.40(1)(a) in *People v Cannon*, 481 Mich 152; 749 NW2d 257 (2008), to require that a defendant's preoffense conduct must have been directed at one or more specific victims for 15 points to be assessed under OV 10.

Accordingly, I would vacate the Court of Appeals' holdings that a victim's vulnerability is limited to personal or inherent characteristics of the victim and that defendant's preoffense conduct was targeted at this victim. I would affirm the judgment of the Court of Appeals reversing defendant's sentence and remanding this matter to the trial court for resentencing and instruct the trial court assess zero points for OV 10.

I. ANALYSIS

A. OFFENSE VARIABLE 10—EXPLOITATION OF A VULNERABLE VICTIM

At issue in this case is whether defendant exploited a vulnerable victim by engaging in predatory conduct for purposes of assessing 15 points for OV 10. In deciding this matter, we must interpret the statute governing OV 10, MCL 777.40. When interpreting statutes, this Court must determine and give effect to the Legislature's

intent.[1] The words used in the statute are the most reliable indicator of the Legislature's intent and should be interpreted in light of their ordinary meaning and the context within which they are used in the statute.[2] When interpreting a statute, this Court avoids a construction that would render any part of the statute surplusage or nugatory.[3] Similarly, when determining how offense variables should be scored, this Court reads the sentencing guidelines statutes as a whole.[4]

MCL 777.40 governs OV 10 and provides:

> (1) Offense variable 10 is exploitation of a vulnerable victim. Score offense variable 10 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:
>
> (a) Predatory conduct was involved ..... 15 points
>
> (b) The offender exploited a victim's physical disability, mental disability, youth or agedness, or a domestic relationship, or the offender abused his or her authority status ..... 10 points
>
> (c) The offender exploited a victim by his or her difference in size or strength, or both, or exploited a victim who was intoxicated, under the influence of drugs, asleep, or unconscious ..... 5 points
>
> (d) The offender did not exploit a victim's vulnerability ..... 0 points
>
> (2) The mere existence of 1 or more factors described in subsection (1) does not automatically equate with victim vulnerability.
>
> (3) As used in this section:

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[1] *People v Lowe*, 484 Mich 718, 721; 773 NW2d 1 (2009), citing *People v Koonce*, 466 Mich 515, 518; 648 NW2d 153 (2002).

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

[3] *People v McGraw*, 484 Mich 120, 126; 771 NW2d 655 (2009).

[4] *Id*. at 124-125.

(a) "Predatory conduct" means preoffense conduct directed at a victim for the primary purpose of victimization.

(b) "Exploit" means to manipulate a victim for selfish or unethical purposes.

(c) "Vulnerability" means the readily apparent susceptibility of a victim to injury, physical restraint, persuasion, or temptation.

(d) "Abuse of authority status" means a victim was exploited out of fear or deference to an authority figure, including, but not limited to, a parent, physician, or teacher.

In *Cannon*, this Court considered MCL 777.40 in its entirety and specifically addressed the issue of when 15 points are properly assessed under OV 10.[5] *Cannon* clarified that "the Legislature did not intend that 15 points be assessed for preoffense conduct involving nothing more than run-of-the-mill planning to effect a crime or subsequent escape without detection."[6] Instead, the focus of MCL 777.40(1)(a) is on the exploitation of vulnerable victims involving predatory conduct.[7]

Pursuant to *Cannon*, 5 to 15 points should be assessed under OV 10 only when it is "readily apparent that a victim was 'vulnerable,' i.e., was susceptible to injury, physical restraint, persuasion, or temptation."[8] In addition, MCL 777.40 requires that 5 to 15 points be assessed when the offender exploited a vulnerable vic-

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[5] *Cannon*, 481 Mich at 156-162. In *Cannon*, the defendant and his two cohorts waited outside a Burger King until no customers were inside. They then entered the Burger King, where four employees were on duty, and committed a robbery. The trial court assessed 15 points for OV 10, following the prosecutor's argument that defendant and his cohorts targeted the restaurant and planned their actions to victimize the employees. *Id.* at 154-155.

[6] *Id.* at 162.

[7] *Id*.

[8] *Id*. at 158.

tim. The statute defines "exploit" as "to manipulate a victim for selfish or unethical purposes."[9] If a "vulnerable victim" has not been "exploited," MCL 777.40(1)(d) expressly mandates that OV 10 must be scored at zero points.

For a score of 15 points under OV 10, the offender who exploited the vulnerable victim must have also engaged in "predatory conduct."[10] MCL 777.40(3)(a) defines "predatory conduct" as "preoffense conduct directed at a victim for the primary purpose of victimization." *Cannon* clarified when 15 points should be assessed for predatory conduct by setting forth three analytical questions to aid lower courts:

> (1) Did the offender engage in conduct before the commission of the offense?
>
> (2) Was this conduct directed at one or more specific victims who suffered from a readily apparent susceptibility to injury, physical restraint, persuasion, or temptation?
>
> (3) Was victimization the offender's primary purpose for engaging in the preoffense conduct?[11]

The three-pronged *Cannon* test for predatory conduct incorporates the statutory requirements of predatory conduct, exploitation, and vulnerability. Thus, all three prongs of the test must be met in order to assess 15 points for OV 10.[12]

B. PREDATORY CONDUCT

In this case, defendant did not engage in predatory conduct because his preoffense conduct was not di-

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[9] MCL 777.40(3)(b).

[10] MCL 777.40(1)(a).

[11] *Cannon*, 481 Mich at 162.

[12] *Id.*

rected at this victim, as this Court has concluded is required by MCL 777.40(1)(a). According to *Cannon*, the preoffense conduct "must have been 'directed at a victim' before the offense was committed."[13] *Cannon* provided the following guidance regarding this part of the test:

> A lion that waits near a watering hole hoping that a herd of antelope will come to drink is not engaging in conduct directed at a victim. However, a lion that sees antelope, determines which is the weakest, and stalks it until the opportunity arises to attack it engages in conduct directed at a victim. Contrast that with an individual who intends to shoplift and watches and waits for the opportunity to commit the act when no one is looking. The individual has not directed any action at a victim.[14]

The majority focuses on the use of the phrase "a victim" rather than "the victim" in the definition of "predatory conduct" in MCL 777.40(3)(a) to conclude that the offender's conduct need not be directed at a specific victim. But the definition of "vulnerability" in MCL 777.40(3)(c) requires that a victim have a "readily apparent susceptibility . . . to injury, physical restraint, persuasion, or temptation." This language suggests that, before points can be assessed for preoffense conduct, it must be clear that the victim was ascertainable *before* the offense took place. It cannot become "readily apparent" to an offender that a victim is susceptible *before* the offender identifies the victim.[15]

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[13] *Id*. at 160.

[14] *Id*.

[15] For example, in this case, when defendant decided to lie in wait in the mall parking lot, he did not know the identity of the victim he would eventually rob. The victim whom defendant eventually robbed was allegedly "vulnerable" because she was alone in the dark and outnumbered. However, suppose that defendant had engaged in exactly the same preoffense conduct but eventually robbed a group of three women in

However, it is more reasonable to conclude that the Legislature selected the term "a victim" rather than "the victim" simply because it contemplated that a defendant might victimize more than one victim. In the case of more than one victim, the Legislature intended 15 points to be assessed for OV 10 when the defendant directed predatory conduct at "a" preselected victim, but ultimately victimized multiple victims.[16]

In any situation in which a defendant engages in "nothing more than run-of-the-mill planning to effect a crime," the community at large is still a conceivable target because the offender will inevitably carry out the offense against some member of the community.[17] However, that member of the community may only become the offender's target by random chance. If simply targeting the community at large and then carrying out an offense against a random victim who comes along is sufficient to establish predatory conduct, then nearly any type of preoffense conduct will suffice for assessing 15 points under OV 10.[18] Under the majority's analysis,

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broad daylight. Under the majority's analysis, 15 points would still be assessed because simply lying in wait for any victim is sufficient to justify a score of 15 points for OV 10. The majority essentially disregards the statutory requirement that a victim's vulnerability be "readily apparent."

[16] For example, consider a situation in which a defendant selects a robbery target (Victim A) and stalks him, waiting for an opportunity to strike. When the best opportunity presents itself, however, Victim A has been joined by Victim B. The defendant seizes the opportunity and robs both Victim A and Victim B. Even though Victim A and Victim B would each be considered "a victim" of the eventual crime, only Victim A was "a victim" who was the target of defendant's predatory conduct.

[17] *Cannon*, 481 Mich at 162.

[18] The majority's analysis reads the requirement that the preoffense conduct be "directed at a victim" out of the statute. See *People v Couzens*, 480 Mich 240, 249; 747 NW2d 849 (2008) (" 'Courts must give effect to every word, phrase, and clause in a statute and avoid an interpretation that renders nugatory or surplusage any part of a statute.' ") (citation

it is difficult to imagine a situation in which a person intending to carry out a crime would not engage in *some* type of preoffense conduct for the purpose of victimizing *someone* before actually selecting a victim to carry out the offense against. The majority's construction of MCL 777.40(3)(a) lacks any limitation on the circumstances in which a court may assess the highest number of points possible under OV 10.[19]

The majority uses hindsight to suggest that defendant's conduct was "directed at a victim" because he lay in wait for "a victim" whom he ultimately robbed. By

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omitted). Preoffense conduct for the primary purpose of victimization is always generally directed at victimizing the community at large. Thus, under the majority's approach, any "preoffense conduct . . . for the primary purpose of victimization" will always be sufficient to assess 15 points for OV 10. MCL 777.40(3)(a).

Consider a defendant who lies in wait in a mall parking lot to rob someone who passes by. Before the defendant selects a victim to rob, the police observe him and attempt to detain him. He puts up a fight and attempts to flee. The officers catch him, and he is convicted of resisting arrest under MCL 750.81d(1). Under the majority's approach, 15 points could be assessed for OV 10 could be scored at 15 points because defendant's conduct was directed at the community at large for the primary purpose of victimization. It does not matter under the majority's test that no victim was actually robbed or that the defendant did not engage in the preoffense conduct to carry out the crime of resisting arrest.

[19] The majority states that its analysis is not without a limiting factor because only "genuinely predatory conduct" can be used to justify a 15-point score for OV 10. But the guidance the majority offers regarding what constitutes "genuinely predatory conduct" is simply that it includes "e.g., lying in wait and stalking" and does not include "purely opportunistic criminal conduct." Obviously, "purely opportunistic criminal conduct" cannot justify a 15-point score for OV 10 because such conduct is by its nature spontaneous and, therefore, will not be "preoffense" conduct. Thus, it is unclear what constitutes "genuinely" predatory conduct and whether the mere planning of a crime would suffice. Certainly, planning a crime involves "preoffense conduct . . . for the primary purpose of victimization" and exploits the community at large.

taking this approach, the majority essentially rewrites the applicable statute to state that an offender's preoffense conduct must be "directed at a potential victim," even if that victim is not identifiable at the time of the preoffense conduct.[20] In contrast, *Cannon* correctly concluded that an offender's preoffense conduct must be directed at a specific victim. *Cannon*'s interpretation of MCL 777.40 was not only consistent with the statutory language, but it properly limited the assessment of 15 points to circumstances in which an offender's preoffense conduct involved first selecting a specific victim to target.[21]

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[20] See, e.g., *Reed v Breton*, 475 Mich 531, 550; 718 NW2d 770 (2006) (KELLY, J., dissenting) ("The interpretation offered by the majority contradicts well-established rules of statutory construction because it adds words to the statute that the Legislature did not put there.").

[21] In analyzing whether preoffense conduct was sufficiently directed at a victim, *Cannon* cited *People v Kimble*, 252 Mich App 269; 651 NW2d 798 (2002), as instructive. *Cannon*, 481 Mich at 160. In *Kimble*, the defendant drove around for an hour in search of a car he could steal so that he could sell its wheel rims. *Kimble*, 252 Mich App at 274. The defendant spotted the victim driving a car with valuable rims and followed her home. *Id*. at 274-275. After watching the victim pull into her driveway, the defendant shot the victim and stole her car. *Id*. The Court of Appeals reasoned that the preoffense conduct of seeking out a victim and following her home for the specific purpose of committing a crime against her constituted predatory conduct. *Id*. at 275. *Cannon* observed that once the defendant in *Kimble* had targeted the owner of the car with valuable rims, his act of following her and waiting for the opportunity to strike was "conduct directed at a victim." *Cannon*, 481 Mich at 160.

The facts of the instant case are distinguishable from *Kimble*. In *Kimble*, the prosecutor presented evidence that the defendant was specifically looking for a vehicle with expensive rims, searched until he found the victim driving a car with expensive rims, and followed the victim for quite some time before shooting the victim in her driveway and stealing her car. Unlike in the record in *Kimble*, the record in this case does not reflect that the victim was specifically targeted for any reason other than that she happened to arrive in the shopping mall parking lot where defendant was waiting for *someone* to rob. In fact, the prosecutor acknowledged that this victim was probably a "random" target and that she may just have been the first person defendant came across.

In applying the second part of the *Cannon* test for predatory conduct, the Court of Appeals correctly acknowledged that a defendant's conduct must have been directed at a specific victim; however, it then erroneously concluded that this defendant's preoffense conduct was directed at this victim.[22] The Court of Appeals reasoned that even though defendant was initially looking for "any victim," he eventually chose "a lone and isolated victim . . . ."[23] The Court of Appeals concluded that defendant's actions were similar to a lion "focusing on the weakest antelope in the herd" because defendant waited for particular circumstances to arise before seizing his opportunity to commit the offense.[24] Accordingly, the Court of Appeals concluded that this was "not a random attack on just anyone in the parking lot but a planned attack on an individual perceived to be weak."[25]

From the record, it is reasonable to conclude that defendant's objective was to rob a shopper in the mall parking lot. To accomplish this offense, defendant waited in the mall parking lot for a shopper to come along. The prosecutor acknowledged that the victim may simply have been the first person who did come along. The apparent reasoning of the prosecutor and the Court of Appeals was that once a random person came along and defendant carried out his intended offense against that random person, defendant's conduct was targeted at a specific victim. I disagree.

If defendant's act of waiting for *someone* to come along and then robbing the unlucky person who happened to arrive in that location constituted preoffense

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[22] *Huston*, 288 Mich App at 394.

[23] *Id.*

[24] *Id.*

[25] *Id.*

conduct sufficiently directed at a "specific" victim, there would be only rare circumstances in which this part of the *Cannon* test would not be met. It may be true that defendant waited for the right time to approach the victim and commit the offense; however, this same argument can be made about almost every offense involving an attack on an individual. Unless an offense is truly of a random nature, eventually every offender will select a victim or victims against whom to carry out their intended offenses.[26]

As previously noted, using the analogy suggested in *Cannon*, the Court of Appeals concluded that defendant's actions were "akin to focusing on the weakest antelope in the herd."[27] However, defendant's preoffense conduct was much more analogous to a lion simply waiting near a watering hole, hoping that a herd of antelope will come to drink.[28] Defendant wanted to rob someone, presumably to get money and a vehicle. A shopping mall is a location where potential victims with money would almost certainly arrive. Therefore, defen-

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[26] The majority dismisses language from *Cannon*—that a defendant's preoffense conduct must be directed at one or more specific victims—as dictum. However, in *Cannon* we also stated that "the Legislature did not intend that 15 points be assessed for preoffense conduct involving nothing more than run-of-the-mill planning to effect a crime or subsequent escape without detection." *Cannon*, 481 Mich at 162. This statement was not dictum, as it directly involved the issue in *Cannon*. Yet under the majority's standard today, such "run-of-the-mill planning" could be used to assess 15 points for OV 10.

[27] *Huston*, 288 Mich App at 394.

[28] *Cannon* provided a hypothetical example explaining that "[a] lion that waits near a watering hole hoping that a herd of antelope will come to drink is not engaging in conduct directed at a victim." *Cannon*, 481 Mich at 160. But under the majority's analysis, simply "lying in wait" is now sufficient to assess 15 points for OV 10. Thus, the majority's analysis is directly contrary to the hypothetical example in *Cannon* that we crafted specifically to guide lower courts in determining what constitutes "predatory conduct."

dant went to a shopping mall where he waited in the hope of a victim arriving. While it is true that defendant may have narrowed in on this particular victim during the short time between when the victim entered the parking lot and when she got out of her vehicle, almost every crime involves the offender's eventually settling on one or more targeted persons and waiting for just the right moment to carry out the offense.

Cannon clearly directed that targeting a specific person, following that person, and waiting for the opportunity to commit an offense against that person is preoffense conduct sufficiently directed at a victim.[29] On the record in the instant case, I conclude that defendant's preoffense conduct of waiting in the mall parking lot was not sufficiently directed at *this* victim.

Because a requirement of the *Cannon* test for predatory conduct cannot be met, and *Cannon* directed that all three prongs of the test must be answered affirmatively in order to properly assess 15 points for OV 10, I dissent from the majority's conclusion that defendant is not entitled to resentencing.

II. CONCLUSION

I concur with the majority's conclusion that, for purposes of scoring OV 10, the "vulnerability" of a victim is not limited to inherent or personal characteristics of the victim. However, I dissent from the majority's conclusion that a defendant's preoffense conduct need not be directed at a specific victim in order to constitute "predatory conduct." I believe that the majority opinion creates an overly broad test for "predatory conduct" and misconstrues the language of MCL 777.40.

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[29] *Id.*

Contrary to the majority's analysis, I do not believe that defendant engaged in "predatory conduct." This Court has held that a defendant's preoffense conduct must be directed at a specific victim in order to constitute predatory conduct, and the record here does not reflect that defendant's preoffense conduct was directed at *this* victim. Instead, the record only establishes that defendant was in a shopping mall parking lot waiting for someone to rob and that, ultimately, this victim arrived. Defendant's preoffense conduct was simply run-of-the-mill planning to effect a crime, which is not "predatory conduct" for purposes of MCL 777.40(1)(a).

Accordingly, I would vacate the Court of Appeals' holdings that a victim's vulnerability is limited to personal or inherent characteristics of the victim and that defendant's preoffense conduct was targeted at this victim. I would affirm the judgment of the Court of Appeals reversing defendant's sentence and remanding this matter to the trial court for resentencing and instruct the trial court to assess zero points for OV 10.

MARILYN KELLY, J., concurred with HATHAWAY, J.

CAVANAGH, J. (*dissenting*). I respectfully dissent from the majority opinion in this case.

Today, the majority holds that in order to assess 15 points for predatory conduct under offense variable (OV) 10, MCL 777.40(1)(a), the victim's vulnerability need not arise from the victim's inherent or personal characteristics. Further, the majority concludes that the victim here qualified as a "vulnerable victim" because she was alone and outnumbered at night while defendant and his cohort hid in the bushes adjacent to the parking lot. Lastly, the majority holds that a defendant's preoffense conduct need not have been directed

at a specific victim, even though MCL 777.40(3)(a) defines "predatory conduct" as "preoffense conduct directed *at a victim* for the primary purpose of victimization." (Emphasis added.) I respectfully disagree and would hold that (1) the victim's vulnerability for purposes of scoring OV 10 must be personal or inherent in the victim, (2) the victim in this case was not a "vulnerable victim" within the meaning of MCL 777.40(3)(c), and (3) the preoffense conduct engaged in by an offender for the primary purpose of victimization must be "directed at one or more specific victims . . . ." *People v Cannon*, 481 Mich 152, 162; 749 NW2d 257 (2008).[1] Accordingly, I would affirm the Court of Appeals' reversal of defendant's sentence and remand this case to the trial court for resentencing with instructions to assess zero points for OV 10.

I. VULNERABILITY

In my view, in order to assess 15 points for predatory conduct under OV 10, the readily apparent vulnerability exploited by the offender must relate to some inherent or personal characteristic of the victim. As this Court declared in *Cannon*, the exploitation of a vulnerable victim is a prerequisite for the assessment of points under OV 10. *Id*. at 156. Relying on the definition of "vulnerability" provided by MCL 777.40(3)(c), we held further that "points should be assessed under OV 10 only when it is readily apparent that a victim was 'vulnerable,' i.e., was susceptible to injury, physical restraint, persuasion, or temptation." *Id.* at 158. Therefore, the first step when applying OV 10 is to ask

[1] While I did not join the *Cannon* majority in full, *Cannon*, 481 Mich at 163 (CAVANAGH, J., concurring in part and dissenting in part), I agree that for purposes of scoring OV 10, the preoffense conduct must have been directed at one or more specific victims.

whether the victim was a "vulnerable victim" within the meaning of the statute. For assessing this threshold determination, *Cannon* provided a nonexhaustive list of considerations based on the statutory language to guide courts in assessing victim vulnerability:

> (1) the victim's physical disability, (2) the victim's mental disability, (3) the victim's youth or agedness, (4) the existence of a domestic relationship, (5) whether the offender abused his or her authority status, (6) whether the offender exploited a victim by his or her difference in size or strength or both, (7) whether the victim was intoxicated or under the influence of drugs, or (8) whether the victim was asleep or unconscious. [*Id.* at 158-159.]

Notably, all these factors relate to the victim's inherent characteristics or personal situation and are independent of the victim's external physical environment.[2] The majority's conclusion that vulnerability need not be inherent in the victim is misguided because it is inconsistent with *Cannon*'s statutorily based threshold test for vulnerability under OV 10.

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[2] While certain factors may at first blush seem substantively externalized, closer examination reveals that they too are premised on the victim's inherent state of vulnerability. The existence of a domestic relationship and the offender's abuse of his or her authority status over the victim both consider vulnerabilities that result from a preexisting relationship of trust or authority between the offender and the victim. This relationship renders the victim inherently more susceptible to an offender who chooses to exploit that relationship. Further, when an offender exploits a victim by his or her difference in size or strength, the relevance of this factor is premised on the *victim's* size and strength, both of which are inherent and personal characteristics.

Additionally, I take issue with the majority's declaration that differences in size or strength, or being intoxicated, drugged, asleep, or unconscious are "things that are largely within the victim's own control." *Ante* at 460. Differences in size or strength depend in large part on genetics—inherent characteristics over which the victim has no control. Further, being drugged, intoxicated, or asleep often may be induced by another—such as the use of a so-called date-rape drug. Likewise, being unconscious may be the result of an injury or ongoing medical treatment.

Because I believe that the readily apparent vulnerability exploited by the offender must relate to some inherent or personal characteristic of the victim, I believe the Court of Appeals correctly held that the victim in this case was not a vulnerable victim, within the meaning of MCL 777.40(3)(c). Merely being alone and outnumbered in a parking lot at night does not relate to an inherent or personal characteristic, but is instead the product of the victim's external environment.[3] And while hiding in the bushes may have increased defendant's likelihood of success, it did not actively alter the victim's state of inherent susceptibility.[4]

In my view, to hold that OV 10 does not depend on a victim's inherent state of vulnerability will lead to overscoring because, under the common meaning of "vulnerability," all victims were vulnerable. Had they not been, the crime would not have been successful. I can think of no situation in which a crime has been successful that it is not possible to point to specific facts of the offense to support the conclusion that the victim was "vulnerable," as that term is commonly understood. In an effort to narrow such a broad applicability of OV 10, the Legislature chose to limit its application to only situations in which an offender exploited some inherent or personal characteristic of the victim. Accordingly, I believe that this victim was not a vulnerable victim for purposes of scoring OV 10.

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[3] I find it notable that when considering the types of vulnerabilities to include in MCL 777.40, the Legislature did not include one of the most obvious circumstances—being outnumbered—as a listed vulnerability. While certainly not dispositive, this supports my conclusion that the vulnerability must be inherent, focused on the victim, and not on independent externalities.

[4] Conversely, when an offender drugs an intended victim, he has *actively* altered the victim's inherent state of susceptibility.

II. PREDATORY CONDUCT[5]

Even if I were to determine that this victim was vulnerable, I believe that nonetheless zero points should have been assessed for OV 10 because the preoffense conduct—hiding in the bushes waiting for a likely victim to happen along—was not directed at this particular victim.[6] In *Cannon*, a majority of this Court explained that when assessing points for predatory conduct, the preoffense conduct "must have been 'directed at a victim' before the offense was committed." *Cannon*, 481 Mich at 160, quoting MCL 777.40(3)(a). Additionally, the second prong of the *Cannon* test for predatory conduct mandated that the preoffense conduct must have been "directed at one or more specific victims . . . ." *Cannon*, 481 Mich at 162. Today's majority opinion, however, holds that the preoffense conduct need not be directed at a particular victim in order to assess 15 points for predatory conduct.[7]

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[5] While I agree generally with Justice HATHAWAY'S discussion of predatory conduct in part I(B) of her partial dissent, I write separately to elaborate further on my position.

[6] On this point, I think the Court of Appeals clearly erred by holding that defendant's choice of this specific victim to attack sufficed as preoffense conduct directed at the victim. Merely choosing a victim is not conduct directed at a victim.

[7] I think it is questionable for the majority to label as "clearly dictum" the statement in *Cannon* that the preoffense conduct must be directed at one or more specific victims. The whole point of the majority opinion in *Cannon* was to provide the correct framework for lower courts to apply when deciding whether to assess points for predatory conduct under OV 10. *Cannon*, 481 Mich at 154, 161-163. The second prong of the analytical framework *Cannon* provided required that the preoffense conduct be "directed at one or more specific victims . . . ." *Id.* at 162. The majority argues that this portion of *Cannon* was "clearly dictum" because it was "not essential to [the] determination of the case in hand . . . ." *Ante* at 458 n 4 (quotation marks and citations omitted). I would, however, remind the majority that there were four employees in the restaurant robbed by the *Cannon* defendant and his cohorts, and, thus, when the majority in

I disagree with the majority opinion's boundless interpretation of "conduct directed at a victim" in MCL 777.40(3)(a) as meaning conduct directed at the "community at large." *Ante* at 459-461. "Whenever possible, every word of a statute should be given meaning. And no word should be treated as surplusage or made nugatory." *Cannon*, 481 Mich at 158 (quotation marks and citation omitted). In direct contravention of this accepted principle of statutory construction, however, the majority essentially deletes the phrase "directed at a victim" from the explicit definition of "predatory conduct" found in MCL 777.40(3)(a). Under the majority opinion, preoffense conduct need only have been engaged in for the primary purpose of eventually victimizing someone, but need not be directed at anyone in particular. This interpretation fails to give effect to the statute's plain language.

I think the answer is simple concerning why the preoffense conduct must have been directed at a particular victim or group of victims: one cannot direct conduct at "a victim" without first identifying and selecting a victim. In addition, MCL 777.40(3)(c) defines "vulnerability" as "the readily apparent susceptibility of a victim to injury, physical restraint, persuasion, or temptation," and it is not possible to assess the "readily apparent susceptibility" of a victim until that victim is particularly identified. Therefore, I believe that the *Cannon* majority was correct in holding that the preoffense conduct must be "*directed at* one or more *specific* victims . . . ." *Cannon*, 481 Mich at 162 (emphasis added).

Cannon outlined a structural paradigm for the trial court to apply on remand, it was essential that the trial court be clear on how to apply OV 10 to a crime involving multiple victims. I would not be so quick to label as dictum an essential prong of an analytical framework provided by this Court.

The majority's reliance on the differences between the definite and indefinite articles is difficult to understand when the statute so clearly provides that the conduct must be *directed at a victim*. See MCL 777.40(3)(a). The indefinite articles "a" or "an" have little meaning when taken out of context. In the context of MCL 777.40(3)(a), "a victim" means "any one" or "one of many" victims, and that is the only meaning that should be definitively attributed to the Legislature's choice to use the indefinite instead of the definite article. To now hold that "a victim" actually means the "community at large" is simply not consistent with the statutory language.

I also disagree with the majority's attempt to mitigate the potential damage caused by its boundless interpretation of "a victim" by declaring that 15 points may be assessed only for preoffense conduct that is "commonly understood as being 'predatory' in nature . . . ." *Ante* at 462. Although it is correct that when a term is not defined by statute, it must be interpreted according to its common meaning, MCL 8.3a; *McCormick v Carrier*, 487 Mich 180, 192; 795 NW2d 517 (2010), such is not the case here. Instead, the Legislature expressly defined "predatory conduct" as "conduct directed at a victim for the primary purpose of victimization." MCL 777.40(3)(a). This statutory definition says nothing about how predatory conduct is commonly understood.

Finally, today's majority decision creates difficulty distinguishing between mere planning and preparation to commit a crime and actual preoffense conduct that supports assessing points under OV 10 for predatory conduct. See *Cannon*, 481 Mich at 162 ("[T]he Legislature did not intend that 15 points be assessed for preoffense conduct involving nothing more than run-of-

the-mill planning to effect a crime . . . ."). Before today's decision, courts only needed to consider the preoffense conduct during the limited window of time between the selection of a particular victim and the time the offense conduct began. Because it is no longer necessary under the position of the majority that the conduct be directed at any *specific* victim, but only toward the community at large, courts must now consider all conduct the offender engaged in for the primary purpose of victimizing some eventual victim. In my view, rather than clarifying our OV 10 jurisprudence, today's decision merely muddies the waters more.

I therefore respectfully dissent.

PEOPLE v KOWALSKI

Docket No. 141695. Argued April 5, 2011 (Calendar No. 3). Decided July 26, 2011.

A Lenawee Circuit Court jury convicted Edward M. Kowalski of accosting a minor for immoral purposes or encouraging a minor to commit an immoral act, MCL 750.145a, and using a computer or the Internet to accost a minor for immoral purposes, MCL 750.145d(1)(a), after he engaged in highly sexualized Internet chats with a police officer he believed was a 15-year-old girl. The court, Harvey A. Koselka, J., denied defendant's motion for a judgment of acquittal or a new trial, which was based on the insufficiency of the evidence supporting the *actus reus* element of MCL 750.145a. The Court of Appeals, M. J. KELLY, P.J., and TALBOT and WILDER, JJ., rejected defendant's challenge to the sufficiency of the evidence, but reversed defendant's convictions and remanded the case for a new trial in an unpublished opinion per curiam, issued April 27, 2010 (Docket No. 288855), concluding that the trial court had failed to instruct the jury on the *actus reus* of the offense and that the instructional error was not harmless beyond a reasonable doubt. The Supreme Court granted the prosecution's application for leave to appeal and defendant's application for leave to cross-appeal. 488 Mich 953 (2010).

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

The trial court failed to properly instruct the jury on the *actus reus* element of accosting, soliciting, or encouraging a minor to commit an immoral act under MCL 750.145a, but regardless of whether defendant waived review of the error, it did not affect his substantial rights, defendant was not deprived of the effective assistance of counsel, and there was sufficient evidence presented to support his convictions.

1. MCL 750.145a permits conviction under two alternative theories. Under the first theory, a defendant is guilty of violating the statute if he or she (1) accosted, enticed, or solicited (2) a child or an individual the defendant believed to be a child (3) with the intent to induce or force that child to commit or submit to (4) any

of various proscribed immoral acts. The statute requires a specific intent under this theory. Under the second theory, a defendant is guilty of violating the statute if he or she (1) encouraged (2) a child or an individual the defendant believed to be a child (3) to commit (4) a proscribed act. The statute requires a *mens rea* consistent with a general criminal intent under this theory.

2. The trial court's instructions were correct with respect to the elements of encouraging a minor to commit a proscribed act, but erroneously omitted the *actus reus* element of the alternative means of violating MCL 750.145a involving accosting, enticing, or soliciting a minor. That the instructions were proper with respect to encouraging did not negate the error because it would have been impossible to know under which of the alternative theories the jury convicted defendant. Because defense counsel explicitly and repeatedly approved the instruction, however, defendant waived the error.

3. The improper omission of an element of the crime from a jury instruction does not affect the defendant's substantial rights for purposes of a plain-error analysis if the evidence related to the missing element was overwhelming and uncontested. In this case, even if defendant had merely forfeited the error instead of waiving it, he would not have been entitled to a new trial because he could not establish that the error affected his substantial rights. Defendant conceded that he participated in Internet chats with someone he believed was a 15-year-old girl. Those chats were immoral, grossly indecent, delinquent, and depraved acts that constituted the *actus reus* under either prong of MCL 750.145a. There was also evidence of similar acts and evidence that demonstrated defendant's consciousness of guilt. Taking all the evidence together, the evidence of the *actus reus* under either alternative means of violating MCL 750.145a was overwhelming and uncontroverted.

Reversed; convictions reinstated.

Justice CAVANAGH, joined by Justice MARILYN KELLY, concurring in the result only, agreed that the trial court improperly instructed the jury on MCL 750.145a. However, he questioned the majority's waiver analysis as overly simplistic and noted his continuing disagreement with extending plain-error review to unpreserved constitutional errors of the sort found in this case. Waiver requires the intentional relinquishment of a known right and should not be presumed simply when defense counsel mechanically agrees with an erroneous jury instruction. Justice CAVANAGH would subject such unpreserved errors to harmless-error analysis, but concurred with the result because he agreed that defendant could not

establish entitlement to relief under the plain-error standard adopted by a majority of the Court in *People v Carines*, 460 Mich 750 (1999).

1. CRIMINAL LAW — ACCOSTING A MINOR FOR IMMORAL PURPOSES — ELEMENTS.

A defendant may be convicted of violating MCL 750.145a under two alternative theories; the defendant is guilty of violating the statute if he or she (1) accosted, enticed, or solicited (2) a child or an individual the defendant believed to be a child (3) with the intent to induce or force that child to commit or submit to (4) any of various proscribed immoral acts; the defendant is also guilty of violating the statute if he or she (1) encouraged (2) a child or an individual the defendant believed to be a child (3) to commit (4) a proscribed act; the second alternative requires a *mens rea* consistent with a general criminal intent.

2. CRIMINAL LAW — JURY INSTRUCTIONS — OMISSION OF AN ELEMENT.

The improper omission of an element of a crime from a jury instruction does not affect the defendant's substantial rights for purposes of a plain-error analysis if the evidence related to the missing element was overwhelming and uncontested.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, and *Jonathan L. Poer*, Prosecuting Attorney, for the people.

Robert L. Levi, P.C. (by *Robert L. Levi*), for defendant.

MARY BETH KELLY, J. In this case, we must determine whether defendant's convictions of accosting a minor for immoral purposes or encouraging a minor to commit an immoral act, MCL 750.145a, and using a computer or the Internet to accomplish the same, MCL 750.145d, should be overturned on the basis of erroneous jury instructions. The instructions given at trial did not properly apprise the jury of the *actus reus* of the accosting a minor statute and were therefore plainly erroneous. However, we conclude that, regardless of whether defendant waived review of the jury instructions, the instructions did not result in outcome-determinative error, defendant was not denied the

effective assistance of counsel, and sufficient evidence was produced at trial to support the jury's verdict. We therefore reverse the judgment of the Court of Appeals and reinstate the jury convictions.

I. FACTS AND PROCEDURAL HISTORY

Defendant, then aged 51, logged into a Yahoo! chat room under the screen name "mr_ltr_nmidmi_007" and engaged in a conversation with a person he believed to be a 15-year-old girl indentifying herself as "keyanagurl." Before he asked keyanagurl her age, defendant stated that he was "very horny" and asked keyanagurl if she wanted to role-play. Defendant went on to say that he enjoyed different types of sexual activities, including "role, phone, cyber" and "real!" In fact, keyanagurl was Vincent Emrick, an undercover police officer.

Upon learning that keyanagurl was supposedly a 15-year-old girl, defendant continued the chat. Defendant informed keyanagurl that he had a "great pool in the woods" with "no neighbors in sight," and asked if she had a boyfriend. Defendant told keyanagurl he was divorced, but explained that he would rather "be with someone, enjoy sharing and cuddling[.]" Defendant requested that keyanagurl send him photographs of herself, and keyanagurl agreed and sent a photograph of a 15-year-old girl. The conversation continued as follows:

> *Defendant*: I might hav too take cold shower — lol
>
> *keyanagurl*: ya me2
>
> * * *
>
> *Defendant*: you horny too?
>
> *keyanagurl*: ya

Defendant: mmm—nice

Defendant: what size chest do you hav looks awesome

* * *

keyanagurl: its 36b

Defendant: yummy

Defendant asked keyanagurl what she was wearing, and when she responded "nuthin hot," defendant exclaimed, "oh baby sweet." Defendant indicated that he was only wearing boxer shorts and repeatedly asked if the two could speak on the telephone or Internet voice chat. First, defendant asked keyanagurl, "you hav mic?" When keyanagurl responded that her microphone was broken, he asked if she had a cellular phone or whether she could enable his microphone on her computer. When that did not work, defendant asked to call her home phone. During these repeated attempts to speak with her, defendant also engaged in the following exchange:

Defendant: i lov to fantasize about young women gets me rock hard

keyanagurl: good

* * *

Defendant: i lov oral

keyanagurl: its ok

Defendant: esp [giving]

After keyanagurl refused his last attempt to speak with her on the phone, defendant conceded that he was "thinkin with wrong brain[.]" When keyanagurl asked defendant how many "brains" he had, defendant replied that he had two and that one was in his boxers and

was "gettin bigger" and "feels great[.]" He stated that when he was in school he was "always horny[.]" The chat concluded as follows:

Defendant: jus need to cyber

Keyanagurl: cyber wat

Defendant: sx

keyanagurl: ya wit who?

Defendant: someone

* * *

keyanagurl: u cyberin now

Defendant: nope . . .

* * *

Defendant: gonna stroke it soon

Over the following six days, keyanagurl chatted two more times with defendant. During the second chat, defendant stated that he was about to vacuum his pool to prepare for a party later that evening. He stated that there would be friends and alcohol at the party and exclaimed, "cant wait for hot weather for skinny dipp[ing]." Defendant also mentioned that he had a hot tub. During the third chat, keyanagurl asked defendant about his pool party. Defendant responded that "it was a blast" with "lots of partying" and explained that he was back at work. He stated, "cant wait to get home and skinny dip" and "i love being naked." Defendant explained that, during the party, "there was lots of naked bodies in my pool, big orgy[.]" He stated that he was "a touchy feely type guy[.]" When keyanagurl asked defendant if the partygoers were all drunk, defendant stated "yup" and remarked, "we needed a sexy waitress like you."

Shortly thereafter, Emrick appeared at defendant's home to execute a search warrant. Defendant denied that he owned a computer, denied that he had home Internet access, and denied that he had a Yahoo! account. However, Emrick observed a computer monitor in the home and confronted defendant with a local newspaper article that featured a story about how defendant used the Internet to collect Frisbees. Several hours after Emrick left the residence, a homeowner in the area saw defendant dump "thin strips of beige plastic" near a dirt road in a rural location. Police officers responded to the call and collected the parts.

At trial, prosecution witness Jasmine DeWeese testified that when she was 22 years old, she began an online relationship with defendant that included consensual cybersex and eventually led to physical sex. After two or three chats, defendant invited DeWeese to his home, and he offered to pay her to clean his house. DeWeese agreed and went to defendant's home on several occasions. She testified that defendant asked her to wear clothing that made her look "cute" and "young" and specifically requested that she wear a "schoolgirl" outfit. DeWeese testified that defendant suggested that she bring her underage sister along to help clean and swim in his pool, where "[s]uits were optional." DeWeese testified that defendant showed her his favorite pornographic websites and other pornography stored on his computer's hard drive. DeWeese testified that the photographs on the hard drive depicted girls that looked "extremely young" and sexually undeveloped. The trial court admitted DeWeese's testimony pursuant to MRE 404(b) to show defendant's intent and to show that defendant acted according to a common plan, scheme, or system.

Defendant did not present any evidence and instead moved for a directed verdict, which the trial court denied. During closing argument, the prosecutor stated that the accosting a minor statute, MCL 750.145a, required a finding that defendant "did accost, solicit, or entice." The prosecutor proceeded to define each of those terms and explained, "So those are the three ways you can do this. You accost, entice or solicit . . . [and] the prosecution has the burden of proving beyond a reasonable doubt all of the elements. That's one of the elements I have to prove." In her rebuttal, the prosecutor stated that "[a]ccosting a minor on the internet for the purposes I've described in the statute, that's illegal." The prosecutor noted that "[t]he law says accost, entice or solicit with a certain intent. . . . It says you accosted, enticed or solicited with the intent to result in an act." She argued that defendant had tried to entice and induce keyanagurl.

Defense counsel responded in closing argument that defendant had not accosted, enticed, solicited, or encouraged keyanagurl to commit any proscribed act, despite participating in the chats. Defense counsel argued that because defendant did not invite keyanagurl to meet him, did not ask her to have sex with him, and did not exchange obscene photographs with her, defendant could not be guilty of accosting a minor under MCL 750.145a. Rather, defense counsel asserted that a conviction under MCL 750.145a must be supported by "some kind of an action, . . . some kind of an act in furtherance — not just words."

Following closing arguments, the trial court instructed the jury on the elements of accosting a minor:

> The Defendant is charged with accosting a child for immoral purposes. To prove this charge, the Prosecutor

> must prove each of the following elements beyond a reasonable doubt. First, that the Defendant believed he was engaging with a child under the age of 16 years. Second, that the Defendant has then the intent to induce that person who he believed to be under 16 years to commit an immoral act or an act of sexual intercourse or an act of gross indecency or other acts of depravity or delinquency *or did encourage said person to engage in one of those acts*. [Emphasis added.][1]

Defense counsel stated that he did not have any objection to the instructions. While deliberating, the jury asked the court for the definition of "accost," and the court provided the following dictionary definition: "to approach and speak to, greet first before being greeted, especially in an intrusive way." Defense counsel likewise did not object to that definition.

Thereafter, the jury convicted defendant of accosting a minor, MCL 750.145a, and of using a computer or the Internet to do the same, MCL 750.145d(1)(a). Defendant moved for a judgment of acquittal or for a new trial, arguing that insufficient evidence supported a finding of the *actus reus* element of MCL 750.145a. Defendant also moved for a *Ginther*[2] hearing and argued that trial counsel was ineffective for failing to object to the trial court's jury instructions. The trial court denied both motions.

Defendant appealed as of right, and the Court of Appeals reversed his convictions and remanded the case for a new trial.[3] The Court of Appeals held that the trial court failed to properly instruct the jury on MCL 750.145a because the instruction entirely omitted the

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[1] There is no standard jury instruction for MCL 750.145a.

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

[3] *People v Kowalski*, unpublished opinion per curiam of the Court of Appeals, issued April 27, 2010 (Docket No. 288855).

actus reus of the offense.[4] The Court of Appeals concluded that the error was not harmless beyond a reasonable doubt because it was impossible to tell whether the jury would have reached the same result had it been properly instructed. However, the Court of Appeals rejected defendant's challenge to the sufficiency of the evidence. The prosecution applied for leave to appeal, and defendant applied for leave to cross-appeal. We granted both applications.[5]

II. ANALYSIS

A. ELEMENTS OF MCL 750.145a

The prosecution argues that the Court of Appeals erred by concluding that the trial court committed instructional error warranting reversal. Before determining whether the jury instructions were erroneous, we must first construe the meaning and elements of accosting a minor, MCL 750.145a. We review de novo questions of statutory interpretation.[6] The primary goal

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[4] "*Actus reus*" is defined as "[t]he wrongful deed that comprises the physical components of a crime and that generally must be coupled with *mens rea* to establish criminal liability[.]" Black's Law Dictionary (9th ed).

[5] *People v Kowalski*, 488 Mich 953 (2010). In our order, we directed the parties as follows:

> The parties shall include among the issues to be briefed: (1) whether the Court of Appeals erred when it determined (a) that the trial court's jury instructions failed to apprise the jurors of the *actus reus* of the crime of accosting, enticing, or soliciting a child for immoral purposes, MCL 750.145a, and (b) that the error was not harmless beyond a reasonable doubt; (2) whether the defendant waived the instructional error, and if so, whether his attorney provided ineffective assistance of counsel; and (3) whether, when viewed in a light most favorable to the prosecution, the evidence presented at trial was sufficient to enable a rational jury to find that the *actus reus* of the charged offense was proven beyond a reasonable doubt.

[6] *People v Lown*, 488 Mich 242, 254; 794 NW2d 9 (2011).

in interpreting the meaning of a statute is to "ascertain and give effect to the intent of the Legislature . . . ."[7] The first step in determining legislative intent is consideration of the statutory language itself.[8] Statutory language must be read in the context of the act as a whole, giving every word its plain and ordinary meaning.[9] When the language is clear and unambiguous, we enforce the statute as written.[10]

MCL 750.145a provides:

> A person who *accosts, entices, or solicits a child* less than 16 years of age, regardless of whether the person knows the individual is a child or knows the actual age of the child, or an individual whom he or she believes is a child less than 16 years of age with the intent to induce or force that child or individual to commit an immoral act, to submit to an act of sexual intercourse or an act of gross indecency, or to any other act of depravity or delinquency, *or who encourages a child* less than 16 years of age, regardless of whether the person knows the individual is a child or knows the actual age of the child, or an individual whom he or she believes is a child less than 16 years of age *to engage in any of those acts* is guilty of a felony punishable by imprisonment for not more than 4 years or a fine of not more than $4,000.00, or both. [Emphasis added.]

Reduced to its essential language, this provision states:

> A person who accosts, entices, or solicits a child . . . with the intent to induce or force that child . . . to commit an immoral act, to submit to an act of sexual intercourse or an act of gross indecency, or to any other act of depravity or delinquency, *or* who encourages a child . . . to engage in any of those acts is guilty of a felony . . . . [Emphasis added.]

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[7] *Id*. (quotation marks and citation omitted).

[8] *People v Lively*, 470 Mich 248, 253; 680 NW2d 878 (2004).

[9] *Herman v Berrien Co*, 481 Mich 352, 366; 750 NW2d 570 (2008).

[10] *People v Weeder*, 469 Mich 493, 497; 674 NW2d 372 (2004).

Because the Legislature used the disjunctive term "or," it is clear that there are two ways to commit the crime of accosting a minor.[11] A defendant is guilty of accosting a minor if the prosecution proves beyond a reasonable doubt that the defendant (1) accosted, enticed, or solicited (2) a child (or an individual whom the defendant believed to be a child) (3) with the intent to induce or force that child to commit (4) a proscribed act. Alternatively, a defendant is guilty of accosting a minor if the prosecution proves beyond a reasonable doubt that the defendant (1) encouraged (2) a child (or an individual whom the defendant believed to be a child) (3) to commit (4) a proscribed act. Taken as a whole, the statute permits conviction under two alternative theories, one that pertains to certain acts and requires a specific intent and another that pertains to encouragement only and is silent with respect to *mens rea*.

Although the latter, "encourages" prong lacks an explicit element of intent, there is no clear indication that the Legislature meant to dispense with the *mens rea* requirement. When interpreting a criminal statute that does not have an explicit *mens rea* element, we do not construe the Legislature's silence as an intention to eliminate the *mens rea* requirement.[12] Significantly, the

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[11] " 'Or' is . . . a disjunctive [term], used to indicate a disunion, a separation, an alternative." *Mich Pub Serv Comm v City of Cheboygan*, 324 Mich 309, 341; 37 NW2d 116 (1949).

[12] This rule of construction stems from United States Supreme Court precedent establishing that courts will infer an element of criminal intent when an offense is silent regarding *mens rea* unless the statute contains an express or implied indication that the legislative body intended that strict criminal liability be imposed. See *People v Tombs*, 472 Mich 446, 452-456; 697 NW2d 494 (2005), discussing *United States v X-Citement Video, Inc*, 513 US 64; 115 S Ct 464; 130 L Ed 2d 372 (1994), *Staples v United States*, 511 US 600; 114 S Ct 1793; 128 L Ed 2d 608 (1994), and *Morissette v United States*, 342 US 246; 72 S Ct 240; 96 L Ed 288 (1952). Generally, with the exception of strict liability crimes, there can be no

Legislature's use of the term "encourages" indicated its intention that the *mens rea* element of the encourages prong be the intent to do the physical act of encouraging. The verb "encourages" contemplates intentional conduct by a defendant. To "encourage" means "to inspire with courage, spirit, or confidence[,] . . . to stimulate by guidance, approval, . . . to promote; foster."[13] Thus, the act of encouragement is the evil in itself, and an accused, by completing the act, is "presumed to intend the natural consequences of his [actions] . . . ."[14] In essence, the encourages prong envisions a *mens rea* consistent with a general criminal intent.[15]

In comparison, if a defendant has committed acts of accosting, enticing, or soliciting, the statute requires the prosecution to demonstrate a specific intent to induce or force the child to commit proscribed acts; it is not enough for the prosecution to merely establish that the defendant committed acts of accosting, enticing, or soliciting. The Legislature's inclusion of alternative bases for conviction, one that requires proof of specific

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crime without a criminal intent. Inferring some type of guilty knowledge or intent is necessary when a statute is silent regarding *mens rea* because without it innocent conduct could be criminalized. See *People v Roby*, 52 Mich 577, 579; 18 NW 365 (1884).

[13] *Random House Webster's College Dictionary* (2001). Because the statute does not define the term "encourages," and because we must give undefined terms their plain and ordinary meaning, we may consider dictionary definitions to discern the Legislature's intent. *People v Denio*, 454 Mich 691, 699; 564 NW2d 13 (1997).

[14] *People v Getchell*, 6 Mich 496, 504 (1859) (distinguishing between the intent that must be shown for a specific intent crime and that for a general intent crime).

[15] " '[T]he distinction between specific intent and general intent crimes is that the former involve a particular criminal intent beyond the act done, while the latter involve merely the intent to do the physical act.' " *People v Nowack*, 462 Mich 392, 405; 614 NW2d 78 (2000), quoting *People v Beaudin*, 417 Mich 570, 573-574; 339 NW2d 461 (1983) (alteration in *Nowack*).

criminal intent and another that requires proof of a general criminal intent, demonstrated an intention to criminalize a wide range of sexually predatory actions aimed at children.

B. JURY INSTRUCTIONS

Having construed the elements of MCL 750.145a, we now consider whether the trial court's instructions regarding the crime of accosting a minor were erroneous. We review de novo claims of instructional error.[16] We must consider the instructions as a whole, rather than piecemeal, to determine whether any error occurred.[17]

A criminal defendant has a constitutional right to have a jury determine his or her guilt from its consideration of every essential element of the charged offense.[18] A defendant is thus " 'entitled to have all the elements of the crime submitted to the jury in a charge which [is] neither erroneous nor misleading . . . .' "[19] Instructional errors that omit an element of an offense, or otherwise misinform the jury of an offense's elements, do "not *necessarily* render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence."[20] Accordingly, an imperfect

[16] *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006).

[17] *People v Serra*, 301 Mich 124, 132; 3 NW2d 35 (1942) ("The charge must be read as a whole to determine whether it is prejudicial. The correctness cannot be tested by taking particular parts."); *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001).

[18] *Lively*, 470 Mich at 251, citing *United States v Gaudin*, 515 US 506; 115 S Ct 2310; 132 L Ed 2d 444 (1995).

[19] *People v Feezel*, 486 Mich 184, 203; 783 NW2d 67 (2010), quoting *People v Pepper*, 389 Mich 317, 322; 206 NW2d 439 (1973) (alteration in *Feezel*).

[20] *Neder v United States*, 527 US 1, 9; 119 S Ct 1827; 144 L Ed 2d 35 (1999).

instruction is not grounds for setting aside a conviction if the instruction fairly presented the issues to be tried and adequately protected the defendant's rights.[21]

As noted, the trial court instructed the jury on the elements of accosting a minor as follows:

> The Defendant is charged with accosting a child for immoral purposes. To prove this charge, the Prosecutor must prove each of the following elements beyond a reasonable doubt. First, that the Defendant believed he was engaging with a child under the age of 16 years. Second, that the Defendant has then the intent to induce that person who he believed to be under 16 years to commit an immoral act or an act of sexual intercourse or an act of gross indecency or other acts of depravity or delinquency *or did encourage said person to engage in one of those acts*. [Emphasis added.]

Considering this instruction as a whole, we conclude that it misinformed the jury of the elements of the offense. Although the instruction was correct with respect to the encourages prong of the offense, it erroneously omitted the *actus reus* element of the "accosts, entices, or solicits" prong of the offense. The fact that the trial court properly instructed on the encourages prong of the offense did not negate this instructional error. This is because we do not—and cannot—know whether the jury convicted defendant on the basis of the accosts, entices, or solicits prong of the offense or the encourages prong of the offense. Because the trial court omitted the *actus reus* portion of the accosts, entices, or solicits prong, the instruction was

[21] *People v Kalder*, 284 Mich 235, 241-242; 279 NW 493 (1938) (concluding that an imperfect jury instruction "taken as a whole . . . fairly presented to the jury the issues to be tried and sufficiently protected the rights of defendant"); *People v Clark*, 274 Mich App 248, 255-256; 732 NW2d 605 (2007).

erroneous and the jury was precluded from making a finding on this element of the offense.

Again, a jury instruction that improperly omits an element of a crime amounts to a constitutional error.[22] However, because defense counsel here explicitly and repeatedly approved the instruction, defendant has waived the error. This Court has defined "waiver" as "the intentional relinquishment or abandonment of a known right."[23] "One who waives his rights under a rule may not then seek appellate review of a claimed deprivation of those rights, for his waiver has extinguished any error."[24] When defense counsel clearly expresses satisfaction with a trial court's decision, counsel's action will be deemed to constitute a waiver.[25]

In this case, before jury selection, the trial court proposed to the prosecutor and defense counsel the jury instructions for accosting a minor ultimately given. After the court read the instructions, the following exchange occurred:

> *The Court*: Is there any objection to that as a preliminary instruction?
>
> *Defense Counsel*: Is that, is that taken from the statute—
>
> *The Court*: Yes.
>
> * * *
>
> *Defense Counsel*: [T]hat's where I took mine from as well so I, *I don't have an objection to that*. [Emphasis added.]

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[22] *People v Carines*, 460 Mich 750, 761; 597 NW2d 130 (1999).

[23] *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000) (quotation marks and citation omitted).

[24] *Id*. (quotation marks and citation omitted).

[25] *Id*. at 219.

After the close of proofs, the trial court dismissed the jury, and defense counsel expressed his approval of the jury instructions generally. The trial court again read the proposed instruction for accosting a minor, along with several other model jury instructions. The trial court then asked:

> *The Court*: Any objection to those instructions?
>
> *Prosecutor*: No, your Honor.
>
> *Defense Counsel*: No, your Honor, not, not at this time.

After providing the instructions to the jury, the trial court once again asked counsel if there were any objections. Defense counsel for the fourth time stated, "None by the defense, your Honor." Thus, by expressly and repeatedly approving the jury instructions on the record, defendant waived any objection to the erroneous instructions, and there is no error to review.[26]

Defendant, however, argues that defense counsel merely forfeited the error because counsel did not state that he "approved" of the instructions.[27] The distinction defendant attempts to make between counsel stating, "I

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[26] *Id*. The Court of Appeals erred when it failed to address the prosecution's claim that defendant waived the instructional error. The partial concurrence suggests that we "hastily presume that a waiver occurred in this case simply because defense counsel stated on more than one occasion that he had no objection to the instruction." *Post* at 513. However, our waiver analysis considers the entire record, which reveals that defense counsel (1) discussed the instructions with the court, (2) affirmatively approved the instructions because he thought they were identical to his own proposed instructions, and (3) then reaffirmed his approval three more times. Thus, the record clearly demonstrates waiver—an intentional relinquishment of a known right—because counsel's affirmative statements were repeated, express, and unequivocal and concerned instructions that counsel had more than ample time to fully review and consider.

[27] Unlike waiver, forfeiture is "the failure to make the timely assertion of a right." *Carter*, 462 Mich at 215 (quotation marks and citation omitted).

approve of the instructions," and counsel stating, "I have no objections," is unavailing. Counsel's statements were express and unequivocal indications that he approved of the instructions.[28] To hold otherwise would allow counsel to "harbor error at trial and then use that error as an appellate parachute . . . ."[29] Nevertheless, even if we were to accept defendant's argument that defense counsel did not waive the issue and, instead, merely forfeited it, defendant would not be entitled to reversal and a new trial.

We review unpreserved constitutional error for plain error affecting a defendant's substantial rights.[30] In order to avoid forfeiture under a plain-error analysis, defendant must establish (1) that an error occurred, (2) that the error was plain, and (3) that the plain error affected defendant's substantial rights.[31] Even if defen-

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[28] The Court of Appeals has consistently held that an affirmative statement that there are no objections to the jury instructions constitutes express approval of the instructions, thereby waiving review of any error on appeal. See *People v Chapo*, 283 Mich App 360, 372-373; 770 NW2d 68 (2009); *People v Matuszak*, 263 Mich App 42, 57; 687 NW2d 342 (2004); *People v Lueth*, 253 Mich App 670, 688; 660 NW2d 322 (2002).

[29] *People v Szalma*, 487 Mich 708, 726; 790 NW2d 662 (2010); see also *Carter*, 462 Mich at 214 ("Counsel may not harbor error as an appellate parachute.").

[30] *Carines*, 460 Mich at 764. The Court of Appeals erred by reviewing the instructional error under the harmless-error test articulated in *People v Anderson (After Remand)*, 446 Mich 392, 404-406; 521 NW2d 538 (1994). The harmless-error test applies to *preserved* constitutional errors. See *Carines*, 460 Mich at 774. In this case, defendant did not preserve his claim of constitutional error for review; rather, as we have concluded, he waived any error. Additionally, defendant improperly contends that the jury instructions amounted to structural error warranting automatic reversal under *People v Duncan*, 462 Mich 47, 52-54; 610 NW2d 551 (2000). In *Duncan*, we held that when a trial court fails to instruct on *any* of the elements of a charged offense, the error is structural in nature and warrants automatic reversal. *Id.* Unlike the court in *Duncan*, the trial court here did not fail to instruct on all the elements of MCL 750.145a.

[31] *Carines*, 460 Mich at 763.

dant could satisfy these requirements, "[r]eversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error ' "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings" independent of the defendant's innocence.' "[32]

Defendant has established that an instructional error occurred and that the error is plain and obvious on the record. However, defendant cannot establish that this error affected his substantial rights. We have previously held that jury instructions that were somewhat deficient may nonetheless, when viewed as a whole, have sufficed to protect a defendant's rights when the jury would have convicted the defendant on the basis of the evidence regardless of the instructional error.[33] If the evidence related to the missing element was overwhelming and uncontested, it cannot be said that the error affected the defendant's substantial rights or otherwise undermined the outcome of the proceedings.[34]

Here, even if the trial court had properly instructed on the accosts, entices, and solicits prong of the offense, the jury would still have convicted defendant because the Internet chats, in and of themselves, were immoral, grossly indecent, delinquent, and depraved acts that

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[32] *Id.*, quoting *United States v Olano*, 507 US 725, 736-737; 113 S Ct 1770; 123 L Ed 2d 508 (1993) (alteration in *Carines*).

[33] See, e.g., *Carines*, 460 Mich at 770-771 (holding that an instructional error omitting an element of the charged offense did not affect the defendant's substantial rights because the jury would not have convicted the defendant without concluding that the defendant committed the acts constituting the omitted element).

[34] See *Neder*, 527 US at 17 ("[W]here a reviewing court concludes beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error, the erroneous instruction is properly found to be harmless.").

constituted the *actus reus* under either prong of the offense.[35] The only acts on which the prosecution based the charge were defendant's online exchanges with keyanagurl. These chats were admitted into evidence, without any objection, and defendant, during opening and closing argument, conceded that these conversations occurred. The content of the exchanges established beyond any reasonable doubt that the chats constituted immoral, grossly indecent, depraved, or delinquent acts.[36]

At the outset, defendant invited keyanagurl to engage in role-playing or cybersex. After learning keyanagurl's age, defendant continued to guide the course of the conversation in a manner intended to heighten the sexualized nature of the chats. Defendant asked keyanagurl if she was "horny" and indicated that he

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[35] Furthermore, review of the record as a whole indicates that the jury was aware that MCL 750.145a required the prosecutor to prove that defendant committed one of the acts proscribed by the statute, which included encouraging a minor to commit an immoral or delinquent act. The trial court told the jury that defendant was charged with "accost-[ing], entic[ing], or solicit[ing]" a child. In addition, during closing arguments, both parties consistently asserted that MCL 750.145a required proof that defendant committed an act. The prosecutor informed the jury that it had to find that defendant accosted, enticed, solicited, or encouraged keyanagurl. The prosecutor stated that the statute required her to prove that defendant accosted or enticed. She explained that "accosting" was illegal, and noted that the "law says accost, entice, or solicit with a certain intent." The prosecutor argued that defendant tried to entice or induce keyanagurl. Defense counsel informed the jury that it had to find that defendant committed an act. Finally, after deliberations began, the jury requested that the trial court provide a legal definition of "accost," and the trial court honored that request.

[36] Although there is no Michigan caselaw defining these terms in the context of MCL 750.145a, this Court in *People v Lino*, 447 Mich 567, 578; 527 NW2d 434 (1994), explained that an individual's "orchestrating the conduct of [a minor] to facilitate . . . sexual arousal and masturbation in the presence of the minors would constitute the offense of procuring, or attempting to procure, an act of *gross indecency* . . . ." (Emphasis added.)

was; defendant asked keyanagurl for her photograph and upon receiving it, indicated that he was sexually aroused and referred to physical attributes of his genitalia; and defendant told keyanagurl that he enjoyed fantasizing about young women and performing oral sex. Defendant also told keyanagurl that she was "cute" and had a "yummy" chest.

Moreover, defendant sought to escalate the instant messaging conversation by repeatedly requesting or soliciting keyanagurl to talk over the telephone or using their computers' microphones, interspersing those solicitations with highly sexualized comments, including comments about how horny he was. After keyanagurl rebuffed defendant's attempts to speak with her, this first chat between defendant and keyanagurl concluded with defendant stating that he needed to have cybersex with someone and that he would soon masturbate. In subsequent chats, defendant spoke of a "big orgy," skinny-dipping, his hot tub, and how he loved to be naked; he also told keyanagurl that he needed her to be his "sexy waitress."

Additionally, DeWeese's testimony would have allowed a rational juror to conclude that defendant's acts were intended to engage keyanagurl in sexually delinquent behavior through a common plan or scheme that he had used on DeWeese. DeWeese testified that her online chats with defendant eventually led to cybersex at defendant's direction. She testified that defendant told her to dress so that she looked "young" and explained that defendant had a collection of pornographic photographs of sexually undeveloped girls. Further, a jury could have inferred from the testimony of the homeowner who lived in the area that, after Emrick questioned defendant, defendant destroyed his computer and discarded it in a secluded, rural location.

This, coupled with defendant's dishonesty about having home Internet access, would have allowed a jury to infer that defendant evinced a consciousness of guilt.[37]

Taking all this evidence together, it is clear that the evidence of the *actus reus* under either prong of the offense was overwhelming and uncontroverted. The chats constituted highly sexualized conversations, which were by themselves immoral, grossly indecent, delinquent, or depraved acts. These highly sexualized conversations between defendant (an adult stranger) and a person whom he presumed to be a child, in which the child sent the stranger her photograph, was asked for her phone number, and was continuously objectified in a sexual manner, would have given an actual child a distorted and unhealthy view of human relationships and would have involved her in a distinctly antisocial set of behaviors. As the prosecutor explained at trial, "sex talk over the internet," such as the highly sexualized conversations that undisputedly occurred between defendant and someone whom he believed to be a 15-year–old girl, "in and of itself is a delinquent act for a minor to be engaging in . . . ." We agree with the prosecutor that, according to "common everyday understanding . . . this [kind of sex talk over the Internet] is delinquent behavior . . . ." By engaging in the chats, defendant committed the *actus reus* of accosting a minor under either prong of the offense. Therefore, by admitting that he participated in the chats with a person he presumed was a 15-year-old girl, defendant

[37] See *People v Cutchall*, 200 Mich App 396, 400-401, 404-405; 504 NW2d 666 (1993) (noting that attempts to conceal involvement in a crime are probative of a defendant's consciousness of guilt), overruled in part on other grounds by *People v Gatewood*, 450 Mich 1025 (1996); *People v Unger*, 278 Mich App 210, 227; 749 NW2d 272 (2008) ("A jury may infer consciousness of guilt from evidence of lying or deception.").

cannot establish that the trial court's charge to the jury affected the outcome of the lower court proceedings.[38]

III. CONCLUSION

Defendant engaged in highly sexualized online chats with a person whom he believed to be a 15-year-old girl. In doing so, he accosted, enticed, solicited, or encouraged a child to commit an immoral, grossly indecent, delinquent, or depraved act within the meaning of those terms in MCL 750.145a. Although the trial court erred when it failed to instruct on the *actus reus* of the accosts prong of the offense, reversal is not warranted. Regardless of whether defendant waived review of the instructional error, the error did not affect his substantial rights, defendant was not denied the effective assistance of counsel, and there was sufficient evidence to support his convictions. We therefore reverse the judgment of the Court of Appeals and remand for reinstatement of the judgment of sentence pursuant to the jury convictions.

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[38] We also reject defendant's arguments related to ineffective assistance of counsel and sufficiency of the evidence. To establish that he was denied the effective assistance of counsel, "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v Washington*, 466 US 668, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Even assuming that defense counsel acted deficiently under an objective standard of reasonableness when he agreed to the jury instructions, defendant cannot establish that there is a reasonable probability that, but for defense counsel's failure to object, the result of the proceeding would have been different. For the same reasons that we conclude that defendant failed to show outcome-determinative prejudice under the plain-error standard discussed earlier in this opinion, we also conclude that defendant failed to show that there was a "reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id*. From the same evidence, we likewise conclude that sufficient evidence supported defendant's convictions under MCL 750.145a and MCL 750.145d(1)(a).

YOUNG, C.J., and MARKMAN, HATHAWAY, and ZAHRA, JJ., concurred with MARY BETH KELLY, J.

CAVANAGH, J. (*concurring in the result*). I agree with the majority's conclusion that the trial court improperly instructed the jury on the charged offense, MCL 750.145a. Although I do not believe that the evidence against defendant was "overwhelming," I concede that, under the facts of this case, defendant cannot establish that he is entitled to relief under plain-error review. Accordingly, I concur only with the result reached by the majority opinion. I write separately, however, because I question the majority's waiver analysis. I also write to reiterate my belief that this Court should not have extended the plain-error review doctrine to the type of arguably unpreserved constitutional error present in this case.

Federal caselaw suggests that the majority's waiver analysis is overly simplistic. As the majority correctly explains, the canonical definition of "waiver" is the " '*intentional* relinquishment of a *known* right.' " *People v Shahideh*, 482 Mich 1156, 1180 (2008) (CAVANAGH, J., dissenting), quoting *Bailey v Jones*, 243 Mich 159, 162; 219 NW 629 (1928) (emphasis added). Applying this definition, the United States Court of Appeals for the Third Circuit has concluded that the threshold question in determining whether an issue capable of being waived has indeed been waived is "whether the appellant who failed to object in the trial court to an error that violated his rights was *aware* of the relinquished or abandoned right." *Virgin Islands v Rosa*, 399 F3d 283, 291 (CA 3, 2005) (emphasis added). In other words, while "waiver is accomplished by intent," unpreserved, or what has been dubbed "forfeited," error "comes about through neglect." *United States v*

Cruz-Rodriguez, 570 F3d 1179, 1183 (CA 10, 2009) (quotation marks and citations omitted); see, also, *People v Grant*, 445 Mich 535, 554; 520 NW2d 123 (1994) (LEVIN, J., concurring). Accordingly, a rote statement by trial counsel that he has "no objection" to the instructions, or his expression of satisfaction with the instructions as given, may not necessarily be determinative of whether the right was in fact waived. *Rosa*, 399 F3d at 287-289, 291, 293. Instead, whether a failure to object will be deemed a waiver depends on whether the defendant had knowledge of the right, yet intentionally chose to abandon it or "consciously refrain[ed] from objecting as a tactical matter." *Id.* at 291 (quotation marks and citations omitted).[1]

Although some federal courts have concluded otherwise, see, e.g., *United States v Gonzalez*, 319 F3d 291, 298 (CA 7, 2003), in my view, the aforementioned analysis is persuasive and consistent with the generally recognized notion that waiver of a constitutional right should not be lightly presumed, see *Brookhart v Janis*, 384 US 1, 4; 86 S Ct 1245; 16 L Ed 2d 314 (1966)

[1] See, also, *Cruz-Rodriguez*, 570 F3d at 1183, 1185 (stating that "[w]aiver occurs when a party *deliberately considers* an issue and makes an *intentional decision* to forgo it" and identifying the "classic waiver" situation as occurring when "a party 'actually identified the issue,' 'deliberately considered' it, and then affirmatively acted in a manner that 'abandoned any claim' on the issue") (emphasis added) (citation omitted); *United States v Arviso-Mata*, 442 F3d 382, 384 (CA 5, 2006) (concluding that a scoring error was not waived when there was no evidence that counsel "knew of the sentencing guidelines issue," yet "consciously chose" to forgo it given defense counsel's mere statement that he had "no problem" with the presentence report); accord *People v Grimmett*, 388 Mich 590, 598, 601; 202 NW2d 278 (1972) (explaining that waiver requires both "specific knowledge of the constitutional right" and an "intentional decision to abandon the . . . right" and concluding that no waiver occurred when defense counsel was mistaken in his view of the law), overruled on other ground by *People v White*, 390 Mich 245; 212 NW2d 222 (1973), overruled on other grounds by *People v Nutt*, 469 Mich 565; 677 NW2d 1 (2004).

(explaining that "[t]here is a presumption against the waiver of constitutional rights"); *Rosa*, 399 F3d at 294 n 12 (explaining that a defendant's federal due process rights are violated if a jury instruction omits or materially misdescribes an essential element of an offense). By focusing on the definition of waiver—i.e., the *intentional* relinquishment of a *known* right—the federal caselaw discussed ensures that a defendant's right to appellate review of an instructional error is not summarily foreclosed simply because trial counsel mechanically agreed with an erroneous jury instruction when counsel was unaware of the correct rule of law or, if aware of it, did not realize that the instruction misstated the law. *Rosa*, 399 F3d at 291.

In light of this caselaw, I would not hastily presume that a waiver occurred in this case simply because defense counsel stated on more than one occasion that he had no objection to the instruction. Indeed, the facts of *Rosa* counsel against such an analysis. See *id.* at 287-289, 291, 293.[2]

Nevertheless, I concur with the majority's result because I agree with the majority's conclusion that defendant cannot establish that he is entitled to relief under the plain-error standard of review. As I have noted in the past, however, I continue to disagree with this Court's decision to extend plain-error review to

[2] In *Rosa*, the United States Court of Appeals for the Third Circuit did not find a "knowing waiver situation" despite discussions regarding the jury instructions and despite defense counsel's (1) statement that he had "looked at" the proposed instructions, that they could apply to his client, and that he had no additions to or modifications or corrections of the proposed instructions and (2) statements on at least three occasions that he was satisfied with the proposed jury instructions, including at least one acquiescence that occurred after a delay that provided the attorneys additional time to review and raise objections to the proposed instructions. *Rosa*, 399 F3d at 287-289, 291, 293.

unpreserved constitutional errors and instead would subject such errors to harmless-error analysis. See *Grant*, 445 Mich at 554-557 (LEVIN, J., concurring); *People v Carines*, 460 Mich 750, 775-783; 597 NW2d 130 (1999) (MARILYN KELLY, J., concurring in part and dissenting in part); *People v Borgne*, 483 Mich 178, 196 n 8, 202 n 17; 768 NW2d 290 (2009). Indeed, as I have previously stated, the notion that a defendant would not be entitled to relief if, despite the error seriously affecting the fairness and integrity of the trial, he could not prove prejudice "seems to be an anomaly that should not stand" and is yet another reason that I continue to disagree with the *Carines* and *Grant* framework. *Borgne*, 483 Mich at 202 n 17. I acknowledge that my position regarding unpreserved constitutional errors has yet to win the favor of this Court. Thus, as I have done in other cases, I recognize that *Carines* is the law in Michigan. For this reason, I concur only in the result reached by the majority opinion.

MARILYN KELLY, J., concurred with CAVANAGH, J.

PEOPLE v FACKELMAN

Docket No. 139856. Argued November 4, 2010 (Calendar No. 2). Decided July 28, 2011.

Charles Fackelman was found guilty but mentally ill of home invasion, two counts of felonious assault, and possession of a firearm during the commission of a felony by a jury in the Monroe Circuit Court, Joseph A. Costello, Jr., J. The charges resulted from an altercation defendant had with Randy Krell, the man he believed was responsible for the death of his teenage son in a road-rage incident, in which Krell engaged in a high speed chase that caused the fatal crash of the car in which defendant's son was a passenger. Krell was sentenced to six months in jail and probation for his actions, and never apologized to defendant. The only issue at defendant's trial was whether he was legally insane at the time of the altercation with Krell. Defendant's expert witness opined that he was, and the prosecution's expert witness opined that he was not. The experts' differing diagnoses focused on whether defendant was suffering from psychosis at the time of the altercation. During the trial, a report prepared by a nontestifying psychiatrist, Dr. Agha Shahid, who evaluated defendant shortly after the altercation, was repeatedly referred to although the document was neither authenticated nor introduced into evidence. The jury was told that Shahid had diagnosed defendant as suffering from major depression without psychosis. Defendant appealed his convictions in the Court of Appeals and moved for an evidentiary hearing concerning his claim of ineffective assistance of counsel. The Court of Appeals granted the motion. Following the evidentiary hearing, the circuit court denied defendant's motion for a new trial. The Court of Appeals, CAVANAGH, P.J., and MARKEY and DAVIS, JJ., affirmed in an unpublished opinion per curiam, issued August 27, 2009 (Docket No. 284512). The Supreme Court granted defendant's application for leave to appeal to consider whether the contents of the psychiatric report were testimonial in nature, whether the introduction of

Shahid's opinion regarding defendant's mental state constituted impermissible hearsay, and whether any error was harmless. 486 Mich 907 (2010).

In an opinion by Justice MARKMAN, joined by Justices CAVANAGH, MARILYN KELLY, HATHAWAY (except for footnote 15 and part IV), and MARY BETH KELLY, the Supreme Court *held*:

Under the Michigan and federal constitutions, defendants have the right to be confronted with the witnesses against them. Defendant was denied his right to confront Shahid, who was a witness against him and whom he was not given the opportunity to cross-examine.

1. The Confrontation Clause of the Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." Defendant was denied the right to confront Shahid, who was a true witness against him given the prosecutor's repeated use of Shahid's diagnosis that defendant was not, in fact, suffering from psychosis. Shahid did not testify at defendant's trial, thus ensuring that defendant was not afforded an opportunity to cross-examine him. Accordingly, the admission of Shahid's psychiatric diagnosis, an out-of-court testimonial statement offered to prove the truth of the matter asserted, violated defendant's right under the Sixth Amendment to be confronted with the witnesses against him.

2. Shahid's diagnosis fell within the core class of testimonial statements that are subject to the Confrontation Clause. His report expressly and repeatedly referred to defendant's alleged crime and the charges pending against him and was made under circumstances that would lead an objective person reasonably to believe that the diagnosis would be available for use at a later trial.

3. A reasonable juror evaluating the difficult issue of defendant's mental state at the time of the offense could not have overlooked the significance of Shahid's diagnosis. The parties each presented an expert witness, and these experts offered divergent opinions regarding defendant's mental state. In this context, Shahid's diagnosis constituted the tiebreaking expert opinion of the only doctor who had personal knowledge regarding whether defendant was experiencing symptoms of psychosis near the time of the offense. That defendant was not accorded

the opportunity to meet this all-important witness face to face and to subject him to cross-examination clearly resulted in prejudice.

Reversed; convictions vacated, and case remanded to the trial court.

Chief Justice YOUNG, joined by Justice ZAHRA, dissenting, would have affirmed the judgment of the Court of Appeals, but not its reasoning, and would have affirmed defendant's convictions. Defendant's trial counsel affirmatively chose not to call Shahid as a witness because he believed that Shahid would have undermined the insanity defense. Moreover, defendant first opened the door to questioning about Shahid's challenged psychiatric evaluation when his expert relied on that evaluation in forming his own expert opinion. Defendant subsequently transformed these conscious strategic decisions into an appellate parachute by raising a claim of ineffective assistance of counsel premised on a Confrontation Clause violation, and such harboring of error should not be sanctioned. Moreover, as a medical report created for treatment purposes, the Shahid psychiatric evaluation to which defendant objected on appeal was not testimonial because it was not created for the purpose of investigating or prosecuting a crime. Therefore, it did not implicate the rights guaranteed by the Confrontation Clause. Furthermore, even if the evaluation were to be considered testimonial, the prosecution used it to impeach defendant's expert, a purpose that falls outside the purview of the Confrontation Clause. Finally, the evaluation was admissible under the business records exception to the hearsay rule. Defendant's counsel did not provide ineffective assistance.

CONSTITUTIONAL LAW — CRIMINAL LAW — CONFRONTATION CLAUSE — PSYCHIATRIC DIAGNOSES.

The Confrontation Clause of the Sixth Amendment guarantees the accused the right to be confronted with the witnesses against him; when the prosecutor elects to introduce a diagnosis of a nontestifying psychiatrist and use that diagnosis as substantive evidence against the accused, the psychiatrist becomes a witness against the accused whom the accused has the right to confront; a psychiatric diagnosis made under circumstances that would lead an objective witness reasonably to believe that the diagnosis would be available for use at a later trial falls within the core class of testimonial statements that are subject to the Confrontation Clause.

Bill Schuette, Attorney General, *John J. Bursch*, 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.

Cramer & Minock, PLC (by *John Minock*), for defendant.

MARKMAN, J. Defendant was found guilty but mentally ill of home invasion, felonious assault, and felony-firearm, charges that resulted from an altercation he had with Randy Krell, the man who defendant believed had caused the death of his teenage son, Charlie, in an episode of road rage. Defendant perceived Krell to have been unremorseful about his role in the tragedy and antagonistic towards defendant's family during subsequent legal proceedings in which Krell was convicted of only a misdemeanor for his involvement in Charlie's death. The only issue at defendant's trial was whether he was legally insane at the time of the incident. The prosecutor's expert witness opined that he was not, while defendant's expert opined that he was. Although these expert witnesses were the only doctors who testified at defendant's trial, their opinions regarding defendant's sanity were not the only expert opinions before the jury. Rather, defendant's jury was repeatedly told about the diagnosis of a third expert who was conspicuously absent from defendant's trial—a psychiatrist unaffiliated with either the prosecution or the defense, and the only doctor to have examined defendant within days of the incident, who, in a report that was reviewed by the other experts but never authenticated and offered into evidence, diagnosed defendant as suffering from "[m]ajor depression, single episode, severe without psychosis." We conclude that the use of this power-

ful, tiebreaking diagnosis as substantive evidence of defendant's sanity compromised his constitutional right to be confronted with the witnesses against him. Accordingly, we reverse the judgment of the Court of Appeals, vacate defendant's convictions, and remand for further proceedings.

I. FACTS AND PROCEEDINGS

On June 16, 2006, defendant's teenage son, Charlie, was killed in an automobile accident. Defendant describes the accident as a road rage incident, in which a car driven by Randy Krell allegedly engaged in a high-speed chase that resulted in the crash of another car in which Charlie was a passenger, killing Charlie and rendering another teenage passenger in the same car a paraplegic. The drivers of both vehicles were charged with vehicular manslaughter. The driver of the car in which Charlie was a passenger pleaded guilty to a lesser offense and apologized to defendant's family. Krell opted to go to trial, claiming his innocence. He was convicted of negligent homicide, a misdemeanor, and was sentenced to six months in jail and probation. During the proceedings, defendant perceived Krell as insulting and antagonizing to his family. Krell never apologized.

According to his relatives, friends, and colleagues, defendant experienced a significant change in his mood and behavior after Charlie was killed. Defendant saw a psychologist and was prescribed an antidepressant (Prozac) and an antianxiety medication (Xanax). On March 27, 2007, defendant watched his son's school baseball team play what would have been the first game of Charlie's varsity season. Witnesses described defendant as depressed and uncommunicative at the time. There were several indications that he was thinking of suicide.

The next day, defendant drove to Krell's house with a gun. Krell testified that he saw defendant get out of his car with a gun in his hand and that defendant pointed the gun at his chest and said that the two men had to talk. Krell ran across the street to the home of a neighbor, Thomas Williams, who let Krell in. Defendant kicked in the door and told Williams, "I'm not here for you" but for "him." Krell ran out the back of the house. Someone else called 911. Defendant left in his car and drove to his mother's home in Toledo, Ohio, where he hid the gun in a register and then left.

The police and defendant's family and friends looked for defendant after he left Williams's house. Attorneys who had represented defendant's family were also involved in the search and were in frequent contact with the Monroe County Prosecutor and the police. Eventually, a family friend found defendant at a gas station, approximately 20 miles away near Toledo, Ohio, and drove him to Flower Hospital in Toledo. Defendant was arrested en route to the hospital. One of the lawyers arranged for defendant's admission to the hospital and declined to allow the police to interview him because of his condition. Defendant was taken to a crisis center, where he spent the night.

The next day, defendant was admitted to the psychiatric intensive care unit at Flower Hospital. There, he was examined by Dr. Agha Shahid, who prepared a three-page report on defendant's psychiatric condition on March 30, 2007, two days after the incident. Defendant was prescribed Seroquel, an antipsychotic medication, and remained at Flower Hospital for approximately two weeks.

Defendant claimed to have little recollection of what he did on the day of the incident. He remembered sitting in his car at work in the morning,

crying. Witnesses saw defendant curled up in a fetal position in his car, rocking back and forth. The next thing he remembered was a red plastic couch at the crisis center in Toledo. He did not remember going to his mother's home, he did not remember the first couple days of his hospitalization, and he did not remember being interviewed by Dr. Shahid.

Defendant was charged with first-degree home invasion, MCL 750.110a(2), two counts of felonious assault with a dangerous weapon, MCL 750.82, and felony-firearm, MCL 750.227b. He claimed that he was legally insane at the time of the incident on March 28, 2007. The prosecutor presented the expert testimony of Dr. Jennifer Balay, a psychologist who examined defendant at the Michigan Center for Forensic Psychiatry in May 2007. Dr. Balay said that defendant was mentally ill, but she did not think that he was legally insane at the time of the offense. Specifically, she concluded that defendant "was not psychotic at anytime during this depression." Defendant presented the expert testimony of Dr. Zubin Mistry, a clinical psychologist who interviewed defendant on September 4, 2007. Dr. Mistry disagreed with Dr. Balay's assessment. He testified that defendant was legally insane at the time of the offense, concluding that defendant had experienced a "major depressive episode with psychotic features" or a "brief reactive psychosis."

Both Dr. Mistry and Dr. Balay reviewed Dr. Shahid's report in making their determinations regarding defendant's mental state. As the first witness presented by defendant, Dr. Mistry provided the requisite testimony needed for defendant to raise his insanity defense. Dr. Mistry testified that Dr. Shahid's report was one of many sources he had reviewed in reaching his opinion that defendant was legally insane at the time of the

incident.[1] In his direct testimony, he never referenced Dr. Shahid's diagnosis, never discussed any other doctor's diagnosis, and testified only as to his own diagnosis.

On cross-examination, the prosecutor's questioning of Dr. Mistry was largely focused on Dr. Shahid, bringing out details about Dr. Shahid's professional credentials ("He's an M.D., psychiatrist, correct?") and Dr. Shahid's prior relationship to Dr. Mistry ("Do you know Dr. Shahid?" "You respect his opinion, correct?"). At the end of this cross-examination, the prosecutor squarely placed Dr. Shahid's diagnosis before the jury:

> *Q.* At the end of that report did you read Dr. Shahid's diagnosis?
>
> *A.* Yeah.
>
> *Q.* You read where it says major depression, single episode,--
>
> *A.* Yes.
>
> *Q.* --severe, without psychosis?

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[1] Dr. Mistry explained:

> You'll typically interview the individual, extensively observing their behaviors, their mannerisms, their patterns of behavior. You'll talk to individuals involved as witnesses and oftentimes you will talk to spouses, et cetera, people familiar with their functioning and their level of functioning. You'll do an assessment of their pre-morbid functioning, which is the way that they responded and functioned in a time frame . . . prior to the event you're dealing with. . . . You'll review medical records from individuals who have been treating, practioners, hospital records. You'll also review any prior records of . . . mental conditions. You'll take some family history as to mental conditions. And you do a broad range of assessment of the individual. . . .
>
> * * *
>
> I reviewed records from Flower Hospital, Dr. Shahid's records, Dr. Indurti had provided some records. . . . [And] at least a couple of other counselors.

A. Yes.

Q. But you don't agree that the Defendant did not have a psychosis, do you?

A. No. My opinion is different as to the diagnosis.

The prosecutor later referred to Dr. Shahid's report in his examination of his own expert, Dr. Balay, again referring to Dr. Shahid's diagnosis, and asking if Balay agreed with Dr. Shahid's diagnosis. She answered yes. He also repeatedly mentioned Dr. Shahid and his diagnosis in closing arguments, telling the jury that "it's real important to look at what Dr. Shahid had to say, even though he did not testify here before you."[2] Defense counsel did not object to the questioning of the witnesses on the basis of Dr. Shahid's report and diagnosis or to the prosecutor's arguments.

The jury found defendant guilty but mentally ill of the charged offenses. He was sentenced to 45 months to 20 years in prison for the home invasion conviction, 1 to

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[2] In addition, the prosecutor also referred to Dr. Shahid in the following excerpts from his closing arguments:

> Dr. Shahid is the one at Flower Hospital who talked to [defendant] the day after this happened . . . . And . . . Dr. Shahid wrote a report that became a very important part of what Dr. Balay later did as far as her report is concerned. . . .
>
> * * *
>
> Dr. Shahid was told a lot of things about what happened . . . by [defendant]. . . . And Dr. Shahid reached the conclusion at the end [of] his examination that [defendant] was depressed, he had severe depression, but that there was no psychosis involved. . . .
>
> * * *
>
> And I submit to you from what you've heard from Dr. Mistry, from what you've heard from Dr. Balay, and the references you've heard to Dr. Shahid's report . . . .

4 years for each of the felonious-assault convictions, and 2 years for the felony-firearm conviction.

Defendant appealed in the Court of Appeals and moved for an evidentiary hearing regarding his claim of ineffective assistance of counsel.[3] The Court of Appeals granted defendant's motion. Following an evidentiary hearing, the trial court denied defendant's motion for a new trial. The Court of Appeals affirmed. *People v Fackelman*, unpublished opinion per curiam of the Court of Appeals, issued August 27, 2009 (Docket No. 284512). The court rejected defendant's challenges to the use of Dr. Shahid's report at his trial, concluding that the prosecutor had proceeded properly in his use of the report in all instances except in his direct examination of Dr. Balay and that defendant could not show outcome-determinative prejudice with respect to that error. We granted defendant's application for leave to appeal. *People v Fackelman*, 486 Mich 907 (2010).

II. STANDARD OF REVIEW

Whether the admission of Dr. Shahid's opinion regarding defendant's mental state violated defendant's Sixth Amendment right of confrontation is a question of constitutional law that this Court reviews de novo. *People v Jackson*, 483 Mich 271, 277; 769 NW2d 630 (2009).

III. ANALYSIS

A. RIGHT OF CONFRONTATION

The Confrontation Clause of the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted

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

with the witnesses against him . . . ." US Const, Am VI. Since its birth as a state, Michigan has also afforded a criminal defendant the right to "be confronted with the witnesses against him," adopting this language of the federal Confrontation Clause verbatim in every one of our state constitutions. Const 1839, art 1, § 10; Const 1850, art 6, § 28; Const 1908, art 2, § 19; Const 1963, art 1, § 20. These constitutional provisions are underscored by MCL 763.1, which provides a criminal defendant the express right to "meet the witnesses who are produced against him face to face." These exact words have been codified in Michigan law since 1846. 1846 RS, ch 151, § 1; 1857 CL 5704; 1871 CL 7503; How Stat 9068; 1897 CL 11796; 1915 CL 15623; 1929 CL 17129.

"These constitutional and statutory provisions are not accidental. They were incorporated in the jurisprudence of this country by reason of the universal condemnation of the inquisitorial methods of the star chamber which had been in force in England." *People v Saccoia*, 268 Mich 132, 135; 255 NW 738 (1934). Specifically, the right to a face-to-face meeting with one's accusers described in MCL 763.1 is deeply rooted in the common-law right of confrontation. It can be directly traced back to the paradigmatic violation of this right, *The Trial of Sir Walter Raleigh for High Treason, 1603*, 2 Cobbett's Complete Collection of State Trials 1 (T. B. Howell, ed, 1809), in which Sir Walter Raleigh was convicted of treason after being denied the opportunity to confront his alleged accomplice and accuser, Lord Cobham, who had implicated him in a letter that was read to the jury. On trial for his life, Raleigh urged, "If there be but a trial of five marks at Common Law, a witness must be deposed. Good my lords, let my Accuser come face to face, and be deposed." *Id.* at 19.

This was the notorious example of unfairness that the Framers had in mind and wished to avoid when they guaranteed every criminal defendant the right to be confronted with the witnesses against him. To John Adams, who later drafted the Massachusetts Confrontation Clause, the contours of this right were quite clear: "Every Examination of Witnesses ought to be in open Court, in Presence of the Parties, Face to Face." 30 Wright & Graham, Federal Practice & Procedure, Evidence, § 6345, pp 521-522 (quotation marks and citation omitted). The great virtue of confrontation and cross-examination, repeatedly emphasized in founding-era documents, is that these mechanisms advance the pursuit of truth in criminal trials better than any others. See 3 Blackstone, Commentaries on the Laws of England (Jones, ed, 1976), p 373:

> This open examination of witnesses *viva voce*, in the presence of all mankind, is much more conducive to the clearing up of truth, than [a] private and secret examination . . . [given that] a witness may frequently depose that in private which he will be ashamed to testify in a public and solemn tribunal. . . . Besides, the occasional questions of the judge, the jury, and the counsel, propounded to the witnesses on a sudden, will sift out the truth much better than a formal set of interrogatories previously penned and settled; and the confronting of adverse witnesses is also another opportunity of obtaining a clear discovery, which can never be had upon any other method of trial.

See also Hale, The History of the Common Law of England (6th ed, 1820), p 345:

> [O]ftentimes witnesses will deliver [in private] that, which they will be shamed to testify publicly. . . . [M]any times the very MANNER of delivering testimony, will give a probable indication, whether the witness speaks truly or falsely. . . . [Cross-examination] beats and boults out the

> truth much better . . . . [A]nd [is] the best method of searching and sifting out the truth . . . .

Our country's Sixth Amendment jurisprudence has never lost sight of the truth-seeking function of the right of confrontation. See, e.g. *Mattox v United States*, 156 US 237, 242-243; 15 S Ct 337; 39 L Ed 409 (1895);[4] *California v Green*, 399 US 149, 158; 90 S Ct 1930; 26 L Ed 2d 489 (1970);[5] *Crawford v Washington*, 541 US 36, 61; 124 S Ct 1354; 158 L Ed 2d 177 (2004).[6] This historical understanding underscores that "the con-

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[4] In *Mattox*, 156 US at 242-243, the United States Supreme Court explained that

> [t]he primary object of the constitutional provision in question was to prevent depositions or *ex parte* affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which gives his testimony whether he is worthy of belief.

[5] *Green*, 399 US at 158, listed several specific ways in which confrontation advances the truth:

> (1) [It] insures that the witness will give his statements under oath—thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury; (2) forces the witness to submit to cross-examination, the "greatest legal engine ever invented for the discovery of truth"; (3) permits the jury that is to decide the defendant's fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility. [Citation omitted.]

[6] *Crawford*, 541 US at 61, emphasized that

> [t]o be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.

frontation guarantee serves not only symbolic goals. The right to confront and to cross-examine witnesses is primarily a functional right that promotes reliability in criminal trials." *Lee v Illinois*, 476 US 530, 540; 106 S Ct 2056; 90 L Ed 2d 514 (1986).

In pursuit of the Clause's truth-seeking purpose, our criminal jurisprudence is clear, then, that "[a] person accused of a crime has a right, at his trial, to be confronted, face to face, with the witnesses against him." *People v Nutter*, 255 Mich 207, 215; 237 NW 384 (1931). We also know that the Confrontation Clause applies only to statements used as substantive evidence. Cf. *Tennessee v Street*, 471 US 409, 413-414; 105 S Ct 2078; 85 L Ed 2d 425 (1985) (holding that evidence admitted solely for impeachment purposes did not violate the Confrontation Clause); see also *People v McPherson*, 263 Mich App 124, 133; 687 NW2d 370 (2004). And we understand from the constitution that the right of confrontation is concerned with a specific type of out-of-court statement, i.e., the statements of "witnesses," those people who bear testimony against a defendant. *Crawford*, 541 US at 51.

In light of these venerable legal principles, it is clear that defendant was denied his constitutional right of confrontation. Dr. Shahid did not appear at defendant's trial, and defendant was not afforded "the privilege to confront [him] and cross-examine [him] face to face . . . ." *Snyder v Massachusetts*, 291 US 97, 106; 54 S Ct 330; 78 L Ed 674 (1934), overruled on other grounds by *Malloy v Hogan*, 378 US 1; 84 S Ct 1489; 12 L Ed 2d 653 (1964). Defendant was not given a prior opportunity to cross-examine Dr. Shahid, nor was it shown that the doctor was unavailable to testify at trial so that his absence could be excused for purposes of the right of confrontation. See 1 Cooley, Constitutional Limitations

(8th ed), p 664, articulating one of the few exceptions to the confrontation rule: "If the witness was sworn . . . , and the accused had an opportunity then to cross-examine him, . . . it seems allowable to make use of his [testimony] . . . if the witness has since deceased, or has left the State, or is insane, or sick and unable to testify . . . ."[7]

Moreover, our review of the record leads inescapably to the conclusion that Dr. Shahid was a true "witness against" defendant. The ultimate issue at trial was not whether defendant had actually engaged in the conduct that led to the criminal charges; instead, it was whether he was legally insane at the time.[8] At trial, the medical term that both testifying experts used as shorthand for describing legal insanity was "psychosis," which, as the prosecutor's expert explained to the jury, is "when a person loses touch with reality." Repeatedly, the jury's attention was focused on this particular mental state.

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[7] The fact that defendant had the power to subpoena Dr. Shahid and call him as a witness is immaterial to this analysis. This Court long ago rejected this argument. *People v Perrin*, 223 Mich 132, 135-136; 193 NW 888 (1923). The United States Supreme Court has likewise consistently rejected this argument. See, e.g., *Melendez-Diaz v Massachusetts*, 557 US 305, 324; 129 S Ct 2527; 174 L Ed 2d 314 (2009) ("[T]he Confrontation Clause imposes a burden on the *prosecution* to present its witnesses, not on the defendant to bring those adverse witnesses into court.") (emphasis added); *Briscoe v Virginia*, 559 US ___; 130 S Ct 1316; 175 L Ed 2d 966 (2010) (vacating the judgment of the Virginia Supreme Court, which held that a defendant's failure to timely notify the commonwealth of his desire to confront a forensic analyst at trial constituted a waiver of that right); *Bullcoming v New Mexico*, 564 US ___, ___; 131 S Ct 2705, 2718; 180 L Ed 2d 610 (2011) ("The prosecution . . . bears the burden of proof. Hence, the obligation to propel retesting when the original analyst is unavailable is the State's, not the defendant's.") (citation omitted).

[8] "An individual is legally insane if, as a result of mental illness . . . , that person lacks substantial capacity either to appreciate the nature and quality or the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of the law." MCL 768.21a(1).

The experts defined "psychosis," described the symptoms of a person in a "psychotic state," debated whether a person "could slip in and out of [psychosis] at various time frames," offered their opinions regarding the effect of psychosis on memory, and rendered their own diagnoses in terms of whether defendant was experiencing psychosis, with the defense expert, Dr. Mistry, concluding that he was and the prosecution's expert, Dr. Balay, concluding that he was not. In this context, the prosecutor's improper introduction and repeated use of Dr. Shahid's diagnosis that defendant was not, in fact, experiencing psychosis fully rendered the doctor a witness against defendant. "In short, when the State elected to introduce [the statement of a nontestifying scientific expert], [that expert] became a witness [the defendant] had the right to confront." *Bullcoming v New Mexico*, 564 US __, __; 131 S Ct 2705, 2716; 180 L Ed 2d 610 (2011).

Our review of the record also makes clear that Dr. Shahid's diagnosis of "[m]ajor depression, single episode, severe without psychosis" was used as substantive evidence for "the truth of the matter asserted." MRE 801(c).[9] Its admission for this purpose was barred by the Confrontation Clause. Cf. *Street*, 471 US at 413-414. The prosecutor went well beyond the scope of the direct examination and placed Dr. Shahid's diagnosis before the jury in his cross-examination of Dr. Mistry, who, very significantly, had not referred to Shahid's critical diagnosis in his direct testimony. Then, the prosecutor explicitly used Dr. Shahid's diagnosis in his examination of both experts and in closing arguments. On each

[9] As "a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted," Dr. Shahid's report, including his diagnosis, clearly constituted hearsay. MRE 801(c).

occasion, the obvious use of the diagnosis was as substantive evidence for its truth—that defendant was not experiencing psychosis as a result of the circumstances of his son's death and his perception of Krell's conduct. The prosecutor did not use Dr. Shahid's opinion to impeach his own witness, Dr. Balay, who agreed with Dr. Shahid's diagnosis. Nor does it make sense to suggest that Dr. Shahid's opinion impeached Dr. Mistry's credibility, except insofar as it provided an independent piece of substantive evidence weighing in favor of the competing view of Dr. Balay.[10] Dr. Shahid's diagnosis of no psychosis could only impeach or support the other experts' opinions if it was taken as true, something the prosecutor made clear in his closing arguments when he told the jury that "it's real important to look at what Dr. Shahid had to say, even though he did not testify here before you" and then proceeded to rely on Dr. Shahid's opinion as a third expert's vote on defendant's sanity:

> And then I went to the conclusion part and said: Well, Dr. Mistry, why is it then that Dr. Shahid says here that there's no psychosis and you say there was a psychosis. And

[10] Any other view would make the protections of the Confrontation Clause illusory. Indeed, the prosecutor would not even have to produce his own expert if he could place before the jury absent medical experts' testimonial diagnoses through the examination of testifying experts. "The Court [has] made clear . . . that it will not permit the testimonial statement of one witness to enter into evidence through the in-court testimony of a second[.]" *Melendez-Diaz*, 557 US at 334 (Kennedy, J., dissenting). Moreover, we would not require juries to engage in the mental gymnastics necessary to conclude that Dr. Shahid's opinion was not meant to be taken as "true," but only to "impeach" a contrary opinion. How can an opinion, if not actually true, effectively impeach a contrary opinion? Just as Dr. Mistry's diagnosis was being used as substantive evidence that defendant was insane, Dr. Shahid's diagnosis was being used as substantive evidence that he was not. As Dr. Mistry himself noted, the only difference between their opinions was that they were "different as to the diagnosis."

> the most he could say was: Well, different people have different opinions. Well, that's true, different people can have different opinions.
>
> . . . And I submit to you from what you've heard from Dr. Mistry, from what you've heard from Dr. Balay, and the references you've heard to Dr. Shahid's report, there aren't any real reasons behind Dr. Mistry's conclusion that the Defendant was suffering from a psychosis, not any real reason at all.

Finally, we conclude that Dr. Shahid's diagnosis unquestionably falls within the "core class of 'testimonial' statements" that are subject to the Confrontation Clause. *Crawford*, 541 US at 51. The report memorialized defendant's medical history and the events that led to his admittance to the hospital, provided the all-important diagnosis, and outlined a plan for treatment.[11] It was Dr. Shahid's "testimony" regarding defendant's mental illness, his " 'solemn declaration or affirmation made for the purpose of establishing or proving some fact.' " *Id.*, quoting 2 Webster, An American Dictionary of the English Language (1828).

And Dr. Shahid's report was " 'made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial[.]' " *Id*. at 52 (citation omitted); see also *Melendez-Diaz v Massachusetts*, 557 US 305, 310; 129 S Ct 2527; 174 L Ed 2d 314 (2009) (quoting *Crawford* and employing this test to ascertain that the statement at issue was testimonial). Specifically, the following indications, taken together, are highly probative in this respect: (1) defendant's admittance to the hospital was arranged by lawyers, (2) defendant was arrested en route to the hospital, (3) the

[11] The report is on hospital letterhead, is headed "Psychiatric Evaluation," and is signed and dated by Dr. Shahid.

report noted that the Monroe County Sheriff requested notification before defendant's discharge, (4) defendant referred to a trial and to a gun in his responses related in the report, and, perhaps most significantly, (5) at its very beginning and ending, in which its overall context is most clearly identified, the report expressly focused on defendant's alleged crime and the charges pending against him. In the introductory paragraph, Dr. Shahid stated:

> 47-year-old Caucasian married male was referred by Rescue Crisis Mental Health Services with an emergency application indicating that the patient's son was killed eight months ago in a traffic accident, and the patient drove to the man's home with a gun who patient felt was responsible for the death of his son. Patient has severe depression and had suicidal thoughts to overdose. The emergency application also indicated that the Monroe County sheriff wants to be called when the patient is discharged to home.

Then in the very last paragraph, Dr. Shahid again referred to the criminal charges pending against defendant, listing these charges in precise legal language: "Patient also has legal charges against him through the State of Michigan 38th Judicial Circuit, and count one is home invasion, first degree, and count two is assault with a dangerous weapon (felonious assault)." Under these circumstances, an " 'objective [psychiatrist would] reasonably [be led] to believe that [his statements] would be available for use at a later trial.' " *Crawford*, 541 US at 52 (citation omitted); *Melendez-Diaz*, 557 US at 310.[12] Accordingly, in

[12] We do not overlook other post-*Crawford* cases in which the United States Supreme Court has further developed the meaning of "testimonial statements" within its Confrontation Clause jurisprudence. Rather, we find that these cases are inapposite. See *Davis v Washington*, 547 US 813; 126 S Ct 2266; 165 L Ed 2d 224 (2006) (concerning statements made in

our judgment, the admission in evidence of Dr. Shahid's diagnosis, an out-of-court, testimonial statement offered for its truth, violated defendant's constitutional right to be confronted with the witnesses against him.

B. EVIDENTIARY ERRORS

There are other reasons why the use of Dr. Shahid's report at defendant's trial was improper. First, MRE 703 provides that "[t]he facts or data in the particular case upon which an expert bases an opinion or inference *shall be in evidence*." (Emphasis added.) This rule permits "an expert's opinion only if that opinion is based exclusively on evidence that has been introduced into evidence in some way other than through the expert's hearsay testimony." 468 Mich xcv, xcvi (staff comment to the 2003 amendment of MRE 703).

It is undisputed that both Dr. Mistry and Dr. Balay reviewed Dr. Shahid's report in making their determinations regarding defendant's mental state. Indeed, Dr. Balay specifically testified that Dr. Shahid's report constituted a "big part" of her opinion. It is understandable why the testifying doctors would rely heavily on Dr. Shahid's report, given that he was the only doctor to evaluate defendant shortly after the offense. Thus, the facts and data documented in his report provided distinctive insight into defendant's state of mind at the time of the offense. Because the facts and data in Dr. Shahid's report were essential to the testifying experts' opinions, they were required to have been admitted into evidence under MRE 703.

However, Dr. Shahid's report contained more than just "facts" and "data"; it also contained the doctor's

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an ongoing domestic-violence emergency); *Michigan v Bryant*, 562 US ___; 131 S Ct 1143; 179 L Ed 2d 93 (2011) (concerning statements made in an ongoing non-domestic-violence emergency).

all-important diagnosis. Under MRE 703, only the facts and data contained in the report were admissible. As previously discussed, Dr. Shahid's actual *diagnosis*, a testimonial statement offered for its truth, was barred by the Confrontation Clause. In addition to this constitutional barrier, the diagnosis itself was inadmissible under MRE 703 because it constituted an "opinion," and thus did not fall within the ambit of MRE 703, which renders admissible only the "*facts* or *data* . . . upon which an expert bases an opinion or inference . . . ." (Emphasis added.)[13] Thus, because the diagnosis was inadmissible, under the United States Constitution, the Michigan Constitution, and MRE 703, the report should have been redacted before it was admitted into evidence, and the jury should have been instructed that the proper and limited purpose of the report was to allow them to consider the facts and data on which the testifying experts based their opinions.[14]

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[13] Dr. Shahid, who did not appear at trial and thus was never qualified as an expert, could not, of course, have provided "opinion" testimony. See MRE 702 (requiring that a witness must be qualified as an expert before he or she may "testify . . . in the form of an opinion"). Although the jury heard much praise of Dr. Shahid—including that he is the "senior psychiatrist . . . on staff at Flower [Hospital]," has an "M.D.," and "is a fantastic doctor"—he was never subjected to voir dire and was not qualified as an expert under MRE 702.

[14] The jury was given the following instruction:

> Experts are allowed to give their opinions in court about matters which they are experts on. However, you do not have to believe an expert's opinion. Instead, you should decide whether you believe it and how important you think it is. When you decide whether you believe an expert's opinion, think carefully about the reasons and facts that he or she gave for his or her opinion and whether those facts are true.

Although this instruction was proper, because the jury never actually received Dr. Shahid's report as required by MRE 703, the jury was unable to fulfill the court's charge.

Second, contrary to the prosecutor's contention, Dr. Shahid's report, including his diagnosis, was not admissible at defendant's trial under the business records exception to the hearsay rule, MRE 803(6). As a "report . . . [of] opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge," Dr. Shahid's report may well have fallen within the scope of the business records exception, but the rule requires that its elements "all [be] shown by the testimony of the *custodian or other qualified witness* . . . ." *Id*. (emphasis added).[15] Thus, a recordkeeper or other qualified witness from Flower

[15] Under the dissent's application of the business records exception, the requirement that the record must be authenticated would essentially be stricken from the rule. The dissent concludes that "defendant cannot receive relief on the basis of authentication error." *Post* at 597. We disagree. There can be no doubt that had the prosecutor moved to admit Dr. Shahid's report under the business records exception, and had defendant objected because no "custodian or other qualified witness" was present to testify to the elements of MRE 803(6), the report could not have been admitted. See *Moncrief v Detroit*, 398 Mich 181, 189; 247 NW2d 783 (1976) (explaining the "first principle" that "the proponent of the [hearsay] evidence must lay a foundation which establishes an exception to the hearsay rule").

Even more importantly, we do not accept the dissent's conclusion that the lack of authentication was harmless. Had the prosecutor sought to admit the report as a business record (which he did not), and had the court required the prosecutor to comply with MRE 803(6) (which under the rule, it must), then a "custodian or *other qualified witness*" from Flower Hospital would have been present at defendant's trial. Far and away, the witness from Flower Hospital *most* qualified to authenticate the report would have been Dr. Shahid himself, and, at least in our judgment, defendant suffered serious prejudice because of his absence at trial. See part III(C) of this opinion. However, even if the authenticating witness was merely a hospital recordkeeper, the dissent fails to appreciate that this witness still might well have provided meaningful information to the jury. For instance, this witness could have answered some basic questions that were never properly answered at defendant's trial, such as: Who is Dr. Shahid? Is his report the kind of record that is kept in the regular course of business at Flower Hospital? Do doctors in making such

Hospital would have had to testify for the report to have been properly admitted. This was not done.

Finally, we note that even if the prosecutor had sought to admit the entire report pursuant to the procedures required by MRE 803(6), any testimonial statements contained in the report offered for their truth would have been inadmissible under the business records exception. See *Crawford*, 541 US at 61 ("Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence . . . ."). Because, as we have already determined, Dr. Shahid's diagnosis constituted a testimonial statement offered for its truth, it could not have been admitted under the business records exception to the hearsay rule.

C. PLAIN ERROR

Because defense counsel did not object to the use of Dr. Shahid's report, we review these constitutional and evidentiary errors for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).[16] We conclude that defendant is entitled to relief under this standard. The violations of defendant's right of confrontation and the evidentiary errors were clear and obvious. In addition,

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reports often refer to a patient's pending criminal charges? And do doctors typically review other materials, such as police reports, when they create their reports?

[16] We believe that defendant is entitled to relief under either the plain error standard articulated in *Carines*, or the ineffective assistance of counsel standard set forth in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). We proceed under the former only because it requires the *higher* showing, which, in our judgment, defendant has made.

defendant can show that the errors resulted in outcome-determinative prejudice. *Id*. at 763. As discussed previously, the ultimate issue at trial was whether defendant was legally insane at the time of the incident, or, in the parlance used at trial, whether he was experiencing psychosis. In assessing the effect of Dr. Shahid's diagnosis on the jury's determination regarding this issue, three facts strike us as significant. First, Dr. Shahid's diagnosis of no psychosis provided a tiebreaking expert opinion in a trial that is fairly characterized as a battle of two experts. Second, Dr. Shahid was the only expert unaffiliated with either party. Third and most importantly, he was the only doctor to have examined defendant within days of the incident, at a time when defendant may still have been experiencing a psychotic episode. The other experts did not interview defendant until months later, when defendant had been on antipsychotic medication for some time. Thus, both the defense and prosecutor's experts were necessarily trying to re-create defendant's mental state at the time of the crime. Dr. Shahid was the only doctor who had personal knowledge concerning this dispositive issue.

In sum, a reasonable juror evaluating the difficult issue of defendant's mental state at the time of the offense could not have overlooked the significance of Dr. Shahid's diagnosis, which constituted the tiebreaking, neutral expert opinion of the only doctor who had personal knowledge regarding whether defendant was experiencing symptoms of psychosis near the time of the offense. That defendant was not accorded the opportunity to meet this all-important witness "face to face" and to subject him to cross-examination clearly resulted in prejudice. Even a surface review of this record leaves one with many questions for Dr. Shahid's empty witness chair. For instance, what precisely were

the reasons for his diagnosis? How did he reconcile his diagnosis with certain objective indicators of the severity of defendant's mental illness documented in the report, such as the fact that Dr. Shahid assigned defendant a Global Assessment of Functioning score of 20 out of 100, which Dr. Mistry opined indicated a "significant level of impairment or likelihood to harm oneself or . . . others"; that defendant was prescribed an antipsychotic medication; that defendant had attempted suicide; that defendant had been admitted to the psychiatric intensive care unit for his safety; and that, although defendant was "denying auditory or visual hallucinations" at the time of the examination, defendant stated that, after his son's death, " 'I was smelling things and I felt things crawling under my skin' "? Moreover, did defendant actually make the statements attributable to him in Dr. Shahid's report, or did Dr. Shahid obtain the statements from another source, such as a police report?[17] As Dr. Mistry stated when the prosecutor asked him this exact question, "That would be a question for Dr. Shahid." Indeed, *all* these questions are questions for Dr. Shahid, and they went unanswered because he did not testify at defendant's trial.

The evidentiary errors that occurred at defendant's trial compounded the prejudice caused by the violation of his right of confrontation. In contravention of the mandate in MRE 703 that the report be "in evidence," and in spite of the fact that a juror, whose curiosity was understandably piqued by the frequent references to Dr. Shahid's report, expressly requested to see the "reports that the attorneys were speaking of and the

[17] The possibility that Dr. Shahid was relying on a police report when he prepared his report is supported by the report's final sentence, which lists the charges pending against defendant in precise legal detail as a police report would.

doctors were speaking [of] too," the jury was never allowed to examine the report for itself. This error was especially prejudicial to defendant because the prosecutor had imprecisely characterized the contents of Dr. Shahid's report. Specifically, in closing, the prosecutor discussed the statements attributable to defendant in the report and told the jury that defendant "seemed to remember a lot of things" about his altercation with Krell.[18] In actuality, however, the report consistently documented defendant's inability to remember all but a few details of the incident.[19] Because the report was not "in evidence" as required by MRE 703, the jury was unable to assess the accuracy of the prosecutor's statements against the facts and data contained in the report and was more likely to have accepted the prosecutor's characterizations.

Moreover, because the prosecutor never attempted to satisfy the foundational requirements of the business records exception and to authenticate the report, the jury was not given the most basic information it needed to properly consider this document. That is, it was never established that the report was what the prosecu-

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[18] More fully, the prosecutor said:

> On March 29th of 2007, Dr. Shahid was told a lot of things about what happened on March 28th, the day before, by Mr. Fackelman. He seemed to remember a lot of things. He remembered going to the place where Randy Krell lived. He remembered seeing Randy Krell and threatening him with a gun. He remembered going in the house, breaking the door down. He remembered seeing the person that [he] encountered once he was in that house. In other words, he remembered just about everything when he talked to Dr. Shahid the next day.

[19] What Dr. Shahid's report, in fact, says is: "Patient states, 'I do not remember driving to Michigan and driving to his house. I do not remember what happened, and the only thing I remember is that I saw a terrified look on that man's face and at that time I felt I just woke up and started apologizing to [Williams].' "

tor asserted it to be—a report (1) that contained "information transmitted by . . . a person with knowledge [Dr. Shahid]," (2) that was "kept in the course of a regularly conducted business activity," and (3) that it was "the regular practice of [Flower Hospital] to make . . . ." MRE 803(6).

In summary, Dr. Shahid did not appear at trial, he was not subject to cross-examination, and his report was neither in evidence nor authenticated. We have little difficulty concluding that the principal error here—the violation of defendant's right of confrontation—was outcome-determinative. *Carines*, 460 Mich at 763. As discussed, Dr. Shahid was the only doctor to examine defendant within days of the incident and, thus, the only expert with personal knowledge of defendant's mental state immediately after the offense. In this way, the trials of defendant and Sir Walter Raleigh, though separated by centuries and factually unrecognizable, were fundamentally deficient in the same way: at the public trial at which their guilt or innocence was determined, neither man was confronted "face to face" with the most important witness against him. This constitutional error was compounded by the multiple evidentiary errors that resulted from the haphazard manner in which Dr. Shahid's report was handled at trial. The effect of these errors gave the prosecutor the best of all possible worlds and defendant the worst of these. The prosecutor was able to employ Dr. Shahid's diagnosis as substantive evidence that defendant was not experiencing psychosis at the time of the incident, without Dr. Shahid having to explain his diagnosis on cross-examination; able to err in his description of the contents of Dr. Shahid's report without the report being in evidence; and able to rely on a hearsay report without having to prove its authenticity and accuracy in the manner prescribed by MRE 803(6).

Once a defendant demonstrates outcome-determinative plain error, an appellate court must exercise its discretion in deciding whether to reverse. *Carines*, 460 Mich at 763. "Reversal is warranted only when the plain, forfeited 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 independent of the defendant's innocence." *Id.* (quotation marks and citations omitted). Both of these considerations move us in our discretion to vacate defendant's convictions. Defendant's guilt or innocence under the law depends on whether he was legally sane at the time of the offense and thus may be held criminally responsible. It was not only the understandable grief caused by the loss of a child that defined defendant's mental state at the time of the offense, but also his feelings of being abused both by the man he believed was responsible for his son's death and by the legal system that treated this man's actions as a mere misdemeanor. Considering this background, it is imperative that defendant have the opportunity to be confronted with the most powerful witness against him before his guilt or innocence is decided. In this process, defendant was denied an ancient right in our criminal system, one on which our adversarial system is premised. If not redressed, this error would, in our judgment, seriously affect the fairness, integrity, or public reputation of the proceedings.

IV. RESPONSE TO DISSENT

It is necessary to respond more fully to the disagreements between this opinion and the dissent, specifically with regard to the dissent's sua sponte argument that defendant somehow waived his right to confront Dr. Shahid, and with respect to our differing perspectives on the Confrontation Clause.

A. WAIVER

The dissent would hold that "defendant affirmatively waived his right to confront Dr. Shahid because he chose, as a matter of trial strategy, not to call him as a witness." *Post* at 574. As the prosecutor understood, but the dissent does not, this argument is indefensible.[20] Waiver has been defined as "the 'intentional relinquishment or abandonment of a known right.' " *Carines*, 460 Mich at 762 n 7, quoting *United States v Olano*, 507 US 725, 733; 113 S Ct 1770; 123 L Ed 2d 508 (1993). The dissent does not claim that defendant affirmatively waived his constitutional right when his counsel expressed satisfaction with a court ruling allowing the prosecutor's use of Dr. Shahid's diagnosis, because no such ruling was made. Cf. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000). Nor does the dissent claim that defendant affirmatively waived his constitutional right because his counsel was aware of the confrontation violation at trial but knowingly stood silent, because it is clear this is not what occurred. Specifically, at the *Ginther* hearing, counsel expressly testified that he did not object to the prosecutor's use of Dr. Shahid's report only because he did not recognize it as a confrontation violation; thus, he could not, and did not, *intentionally* relinquish a *known* right. Nor does the dissent claim that defendant affirmatively waived his constitutional right by himself placing Dr. Shahid's diagnosis in evidence because this also did not take place.

Instead, as noted earlier, the dissent claims that defendant waived his constitutional right to confronta-

[20] The prosecutor himself never argued that defendant waived his confrontation right, with no mention of waiver either in his brief or at oral argument. Rather, he properly considered the issue forfeited and fully addressed the merits of the confrontation issue.

tion because "he chose, as a matter of trial strategy, not to call him as a witness." *Post* at 574. Not only is the dissent's waiver argument incompatible with the traditional understanding of waiver, but it also violates several first-principles of criminal law: (1) insanity is an affirmative defense with respect to which a defendant carries the burden of proof, (2) rules of evidence cannot trump the constitution, and (3) the prosecutor bears the ultimate burden of proof in criminal cases. The dissent misapprehends and misapplies each of these first-principles.

First, "it is an affirmative defense to a prosecution for a criminal offense that the defendant was legally insane when he or she committed the acts constituting the offense," MCL 768.21a(1), and the defendant "has the burden of proving the defense of insanity by a preponderance of the evidence." MCL 768.21a(3). In accord with this framework, defendant's expert, Dr. Mistry, testified first on the issue of defendant's mental state at the time of the offense. In his testimony, Dr. Mistry referenced Dr. Shahid's report, as well as other reports, but he never mentioned Dr. Shahid's diagnosis. Thus, the dissent's insight, on which it bases its waiver argument—that "it was *defendant* who first raised the issue of his insanity and who first opened the door to questioning about Dr. Shahid's evaluation"—is considerably less remarkable than the dissent believes it to be, because there is simply no other way in which a defendant in these circumstances could conceivably have raised an insanity defense other than through the testimony of a credible expert witness. *Post* at 573. No such witness could have neglected altogether to mention the existence of the report of the only person who actually interviewed defendant in the immediate wake of his conduct.

Second, the rules of evidence do not trump the Confrontation Clause. See *Crawford*, 541 US at 61 ("Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence . . . ."). Thus, although parts of Dr. Shahid's report should have been in evidence under MRE 703 because they constituted "the facts or data . . . upon which an expert bases an opinion,"[21] and although under MRE 106's 'rule of completeness' the whole document may sometimes be admitted,[22] these rules necessarily give way to the requirements of the Confrontation Clause. Though parts of the report may have been admissible under the rules of evidence, the rules of evidence cannot override the Sixth Amendment and cannot be used to admit evidence that would otherwise implicate the Sixth Amendment.[23]

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[21] See *supra* at 534. The dissent concludes that MRE 703 required *defendant* to admit Dr. Shahid's report into evidence. However, the rule is silent as to which party must ensure that "[t]he facts or data in the particular case upon which an expert bases an opinion or inference shall be in evidence." Both parties' experts relied on the report.

[22] MRE 106 provides:

> When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

Thus, in making what is clearly a discretionary decision, the trial court would have had to assess the "fairness" of admitting the entire report in this case in light, *inter alia*, of the fact that defendant's expert had not testified in any way as to the substance of the report and in view of the fact that there might be constitutional implications to requiring defendant to introduce an expert's report adverse to his affirmative defense. The dissent misinterprets MRE 106 by asserting that this discretionary rule "would have required" that the entire psychiatric evaluation be introduced into evidence in these circumstances. *Post* at 595 n 80.

[23] To be clear, we believe that Dr. Shahid's diagnosis was inadmissible under MRE 703 and MRE 106, irrespective of the Confrontation Clause. See *supra* at 534-535 and n 22.

The dissent's indignation over Dr. Mistry's "selective" use of the report illustrates its confusion on this point. *Post* at 573. Without a doubt, Dr. Mistry used the report "selectively." That is precisely our point. On direct, he testified that he relied on the report, which contained facts and data that formed the basis of his opinion, but he never mentioned Dr. Shahid's actual diagnosis, an *opinion* that is neither a "fact" nor "data," and which did not form the basis of Dr. Mistry's contrary opinion.[24] Such direct testimony regarding the report was entirely proper. Because this testimony defined the permissible scope of cross-examination and, more fundamentally, because the report contained the testimonial statement of a witness defendant had the right to confront, the prosecutor had to either: (1) proceed narrowly, employing the facts and data in the report on which the experts relied in forming their own opinions, but *not* Dr. Shahid's opinion; or (2) call Dr. Shahid to testify as to his opinions.[25] Yet, the prosecutor did neither and instead placed Dr.

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[24] The dissent fails to recognize that Dr. Shahid's report is comprised of many statements, only one of which concerns Dr. Shahid's diagnosis, and that it was the prosecutor's introduction of *this* statement which violated defendant's right of confrontation. The dissent's determination not to differentiate among statements within the report and consider each on its own merits strains its analysis from the start. The out-of-court statement on which the proper confrontation analysis is focused is Dr. Shahid's *diagnosis*, and defendant never used *that* statement, selectively or otherwise.

[25] The dissent misunderstands this opinion in suggesting that "the majority believes that no impeachment of the defense expert could have occurred under these circumstances unless the prosecutor called Dr. Shahid as it own witness," and in asserting that we "hamstring the impeachment of an expert witness . . . ." *Post* at 601-602. To the contrary, what this opinion concludes is that the statement at issue—Dr. Shahid's diagnosis—was clearly *not* being used for impeachment. We also note that the prosecutor had many avenues of proper impeachment, including the utilization of the facts and data contained in Dr. Shahid's report relied on by the defense expert.

Shahid's diagnosis before the jury during his cross-examination of Dr. Mistry; employed this same diagnosis in the examination of his own expert; and repeatedly referred to this same diagnosis in closing arguments, all without calling Dr. Shahid as a witness.[26]

Third, the ultimate burden of proof rests with the prosecutor, and thus the obligation to bring to trial "witnesses against" the accused is the state's, not the defendant's.[27] The dissent would turn on its head this principle by holding that "defendant affirmatively waived his right to confront Dr. Shahid because *he*

[26] We reiterate our view that the prosecutor's use of Dr. Shahid's diagnosis on each of these occasions was clearly for the truth of the matter asserted. See *supra* at 530-532. The dissent disagrees, and goes to lengths to explain how the report was used for impeachment purposes. See *post* at 589-594. The problems with the dissent's analysis are threefold. First, it is not focused on the *diagnosis* as implicating the Confrontation Clause, but rather lumps together the entirety of the report. Second, the dissent never even attempts to explain how a diagnosis such as Dr. Shahid's could impeach another expert's opinion if it is not taken as true. Finally, the dissent again never even attempts to explain how the prosecutor could have used this diagnosis to impeach his own expert, who *agreed* with it. Like the Court of Appeals, we think it is evident that during the prosecutor's direct examination of Dr. Balay, he used the remarks from Dr. Shahid's report as substantive evidence "to prove the truth of the matter asserted . . . ." *Fackelman*, unpub op at 6. We do, however, agree with the dissent's impeachment discussion in one respect: we too conclude that the prosecutor's repeated reference to Dr. Shahid's report and diagnosis during his closing argument, including his statement urging that "it's real important to look at what Dr. Shahid had to say, even though he didn't testify here before you," was for the truth of the matter asserted. Unlike the dissent, though, we find these arguments prejudicial and entirely indicative of how the prosecutor employed the report and diagnosis throughout trial.

[27] Because defendant bore the burden on the affirmative defense of insanity, he had to initiate the presentation of evidence that he was legally insane at the time of the offense. He was *not* required, however, to bring to trial "witnesses against" himself, a burden which rested with the prosecutor.

chose, as a matter of trial strategy, not to call him as a witness."[28] *Post* at 574 (emphasis added).

The dissent can only arrive at its conclusion that defendant waived his right to confront Dr. Shahid by transforming first-principles of criminal law and creating a constitutional environment in which: (1) a criminal defendant must choose between raising an affirmative defense and his right of confrontation, (2) the rule of completeness is on par with the Sixth Amendment, and (3) the burden of proof may sometimes shift from the state to the accused to call witnesses against himself.

B. *MELENDEZ-DIAZ*

Next, we must address the differing perspectives on the Confrontation Clause that exist between this opinion and that of the dissent. These differences are perhaps best understood by comparing the quotation that the dissent appears to believe lends the most support for its analysis—footnote 2 of *Melendez-Diaz*—

[28] As for the dissent's discussion of trial strategy, it suffices to say that it asks an irrelevant question of the wrong party. In this discussion, the dissent explores the reasons why *defense counsel* may have chosen not to call Dr. Shahid, and contends that this decision is entitled to deference under *Strickland*. We do not disagree with this; we just believe that the reasons for counsel's decision are irrelevant because defendant can be under no obligation to call "witnesses against" himself. The question—"Why didn't you call Dr. Shahid as a witness?"—would be better directed toward the prosecutor, who *is* under such obligation. But even though one may be curious about the prosecutor's answer to this question—especially because Dr. Shahid worked at a hospital only 30 minutes away—his answer is also irrelevant. The only thing relevant is that the prosecutor *did not* call Dr. Shahid to testify at trial and made no showing regarding his unavailability, as he was required to do under the Confrontation Clause. In sum, counsel's strategic decision concerning which witnesses to call had no bearing on the clause. Rather, what implicated the clause was the prosecutor's substantive use of Dr. Shahid's diagnosis without calling him to testify.

with the quotation that we believe lends the most support for ours—the Confrontation Clause itself, which states: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." We respectfully believe that our analysis is on far surer constitutional footing than that of the dissent.

First, it is necessary to provide some context to the quotation highlighted by the dissent—"[M]edical reports created for treatment purposes . . . would not be testimonial under our decision today"—which is the dissent's summarization of footnote 2 of *Melendez-Diaz*. The question presented in that case was whether affidavits reporting the results of laboratory analyses, admitted at trial to show that a substance seized by police was cocaine, violated the defendant's right of confrontation. Justice Kennedy in dissent responded that the "Court [was] sweep[ing] away an accepted rule governing the admission of scientific evidence," and offered cases in support of this claim in two appendices. *Melendez-Diaz*, 557 US at 330, 357-363. Footnote 2 of the majority opinion sought to distinguish the cases cited by Justice Kennedy:

> Other[] [cases] are simply irrelevant, since they involved medical reports created for treatment purposes, which would not be testimonial under our decision today. See, *e.g.*, *Baber* v. *State*, 775 So. 2d 258, 258-259 (Fla. 2000); *State* v. *Garlick*, 313 Md. 209, 223-225, 545 A. 2d 27, 34-35 (1988). [*Id*. at 312 n 2.]

In comparing the actual footnote with the dissent's quotation, one discovers two highly relevant omissions. When these omissions are considered, and when this quotation is placed in context, it hardly serves as authority to sustain the dissent's sweeping proposition.

First, the dissent fails to account for the final phrase of the sentence it finds so all-important—"under our decision today." *Id*. Contrary to the suggestion of the dissent, the Supreme Court did not expressly state that a medical report created for treatment purposes is not a testimonial statement within the meaning of the Sixth Amendment's Confrontation Clause. What *Melendez-Diaz* actually stated was far narrower and more limited—that the cases collected by Justice Kennedy were "irrelevant" because they involved "medical reports created for treatment purposes," whereas *Melendez-Diaz* involved an affidavit made for the purpose of providing testimony at trial. *Id.* Thus, *Melendez-Diaz* accurately stated that the medical reports cited by the dissent "would not be testimonial under our decision today" because *that* decision did not involve a medical report created for treatment purposes. *Id*. Determining the circumstances under which a medical report created for treatment purposes could be considered testimonial was simply left for another day.[29] That *Melendez-Diaz* did not hold what the dissent contends it held is supported by the fact that *Melendez-Diaz* did not in any way involve a medical report created for treatment purposes. Accordingly, the footnote is not only dictum, but it is dictum that in no way supports the dissent's assertion that "*none* of the nine justices who served on the *Melendez-Diaz* Court would have included medical reports created for treatment purposes in the definition of testimonial statements." *Post* at 566. This assertion has no basis because the Supreme Court was never

[29] We emphasize that we do not disagree that Dr. Shahid's report is a medical report created for treatment purposes. However, it is also a particular kind of medical report—one involving a *psychiatric* opinion, and one prepared for a *legal* as well as a treatment purpose—both factors being relevant in assessing the implications of the report under the Confrontation Clause.

presented with this question in *Melendez-Diaz*, and it has not been presented with this question in any subsequent case.

Second, the dissent omits any reference to the two citations that directly follow its quotation, *Baber v State* and *State v Garlick*. Read in the context of these two cases, the footnote communicates a critical distinction that courts have made concerning medical records. This distinction is evidenced by even a cursory review of these two cases. Both *Baber* and *Garlick* involved hospital records of results of laboratory tests administered for medical treatment purposes, a blood alcohol test and a drug test, respectively. In each case, although the laboratory technicians did not testify at trial, other witnesses from the hospital did. In *Baber*, the hospital's medical records custodian laid a foundation under the business records exception to the hearsay rule, and the head of the hospital's chemistry department testified. *Baber*, 775 So 2d at 259. In *Garlick*, the emergency room physician who treated the defendant and ordered the drug screening testified. *Garlick*, 313 Md at 212.[30] In these circumstances, *Baber* and *Garlick* determined that the defendants' right of confrontation had not been violated, and by their citations of these cases, both opinions in *Melendez-Diaz* suggested their agreement with that conclusion.

However, neither *Baber* nor *Garlick* applied the "two-part test," see part IV(C) of this opinion, that the dissent believes *Melendez-Diaz* adopted to arrive at a per se rule that the admission of a medical report created for treatment purposes can never violate the

[30] These facts alone make the instant case distinguishable because (1) *no one* from the hospital testified at defendant's trial and (2) the missing witness was not a laboratory technician who had worked in conjunction with a primary treating doctor, but the primary doctor himself.

Confrontation Clause. Indeed, after recognizing the traditional understanding of "the concept of confrontation as a device to advance the search for truth," *Garlick* expressly qualified its holding in a passage that is particularly relevant to the instant case:

> This is not to say, however, that there have not been some hospital records (or more precisely some entries within those records) that have been objectionable or found to have been inadmissible. For example, in *Gregory* v. *State*, 40 Md. App. 297, 325, 391 A.2d 437, 454 (1978), the medical staff conference summary containing the opinions of several psychiatrists was not admissible without their testimony. The court stated:
>
> "The mere fact that a document is part of a hospital record made in the ordinary course of the hospital's business, and may therefore be admissible under the hearsay rule, does not *ipso facto* make its admission comply with the confrontation requirement. . . .
>
> "We have here not the routine record of a person's birth, or death, or body temperature, not any other similar statement of fact or condition objectively ascertained, generally reliable and normally undisputed, and free from any motive to record falsely. We are dealing with the opinions of supposed expert witnesses, who, in this document, are giving testimony not only as to appellant's mental condition, but, more importantly, as to whether or not he is criminally responsible." [*Garlick*, 313 Md at 214, 220-221 (quotation marks and citation omitted).][31]

It is sufficient to observe that we too "are dealing with the opinions of a supposed expert witness[], who, in this document, [was] giving testimony not only as to appellant's mental condition, but, more importantly, as to whether or not he [was] criminally responsible." *Id*. at 221.

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[31] *Baber* cited *Garlick* favorably and quoted extensively from it.

Other courts have also recognized that not all hospital records can be treated in the same manner for purposes of the confrontation requirement and that psychiatric opinions, in particular, deserve special consideration. See, e.g., *Phillips v Neil*, 452 F2d 337, 347 (CA 6, 1971) (holding that admission of psychiatric hospital records opining on the sanity of the defendant violated the Confrontation Clause and noting the "danger which inheres in the introduction of records containing psychiatric diagnoses").[32] Having never addressed this issue, the Supreme Court has never

[32] The dissent contends that "[t]here is simply no principled distinction for applying the Confrontation Clause differently when analyzing psychiatric medical treatment than when analyzing medical treatment for 'physical' illnesses . . . ." *Post* at 586. Other courts, including those cited favorably in *Melendez-Diaz*, disagree. See, e.g., *Garlick*, 313 Md at 220-221. We think that the distinction these courts discern is both plain and principled. For instance, see *New York Life Ins Co v Taylor*, 79 US App DC 66, 73-74; 147 F2d 297 (1945), in which the court articulated how psychiatric diagnoses are distinctive for purposes of confrontation:

> It is no reflection upon the profession of psychiatry to say that it necessarily deals in a field of conjecture. Even in the diagnosis of actual insanity, cases are rare in which trained psychiatric witnesses do not come to opposite conclusions. . . . It is difficult to conceive of records in which the right of cross-examination is more important than the conjectures of a psychiatrist on a psychoneurotic condition.

See also *Gregory*, 40 Md App at 326 ("Psychiatry—particularly the forensic branch of it—is an inexact science. . . . Considering the less-than-certain and ever shifting state of the art, these opinions, given their ultimate potential effect, cry out for cross-examination."); *Phillips*, 452 F2d at 347 (explaining that the "danger" inherent in the introduction of psychiatric diagnoses without cross-examination is especially present when "the reports consist of opinions and conclusions which are stated without a detailed explication of either the facts or reasoning processes on which they are based"); *State v Cosgrove*, 181 Conn 562, 575 n 10; 436 A2d 33 (1980) (noting that "the best reasoned" cases that have held medical reports inadmissible "include those whose ratio decidendi appears to be that the opinions at issue in the reports are of kind which are frequently subject to varying interpretations").

expressly adopted this approach to the admission of medical records for purposes of confrontation, but it certainly has never rejected it, and, as observed, several cases cited approvingly in *Melendez-Diaz* recognize this distinction.[33] Thus, contrary to the dissent, footnote 2 does not set forth a per se rule regarding the admissibility of medical records under the Confrontation Clause. If anything, such footnote suggests an altogether different legal standard when it is viewed in context and, in particular, when it is understood in light of the two cases which the Court in *Melendez-Diaz* selected from among the some 80 cases in Justice Kennedy's appendixes as the prime examples of medical reports that would not be testimonial within the meaning of the Sixth Amendment under its decision.

C. DISSENT'S TEST

It is also important to comment on the dissent's test for determining whether an extrajudicial statement is testimonial. The dissent recognizes that the Supreme Court in *Crawford* "did not delineate the scope of testimonial statements" and that *Crawford* articulated several formulations of this concept. *Post* at 577. Nonetheless, the dissent proceeds to articulate its own test:

> In reviewing *Crawford* and its progeny, it becomes clear that the Court considers two related factors above all others when deciding whether an extrajudicial statement is testimonial, and therefore within the parameters of the Confrontation Clause: the *formality* of the statement within a criminal investigation or prosecution and the *purpose* of the statement. [*Post* at 577-578.]

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[33] In addition to *Baber* and *Garlick*, see, e.g., *United States v Oates*, 560 F2d 45, 81 (CA 2, 1977); *Henson v State*, 332 A2d 773, 776 n 8 (Del, 1975); *Manocchio v Moran*, 919 F2d 770, 780 n 17 (CA 1, 1990); *Reardon v Manson*, 491 F Supp 982, 986 (D Conn, 1980); *Cosgrove*, 181 Conn at 575 n 10; *State v Henderson*, 554 SW2d 117, 118 (Tenn, 1977).

While the dissent's test, in our judgment, constitutes a not-unreasonable attempt to synthesize several very-difficult-to-synthesize Confrontation Clause decisions of the Supreme Court, the test must be recognized for what it is—an attempt to accord meaning to some very tortuous jurisprudence. The absence of any citation for the dissent's test underscores this reality. The dissent does not cite any Supreme Court decision in support of its "two-part test," because no such decision exists.

The Court's recent decision in *Bullcoming* does not alter this fact. In *Bullcoming*, 564 US at __; 131 S Ct at 2710, 2713, the Court affirmed the central holding of *Melendez-Diaz*—that the right to confrontation applies to analysts who claim to have certified evidence from a machine or other objective scientific test—and rejected the argument that the testimony of a "surrogate" expert was a constitutionally permissible substitute for the testimony of the individual who had actually conducted the test. Questions regarding the Court's confrontation clause jurisprudence persist after *Bullcoming*. See *id*. at __; 131 S Ct at 2725 (Kennedy, J., dissenting) ("Today's majority is not committed in equal shares to a common set of principles in applying the holding of *Crawford*."). However, at the very least, *Bullcoming* clearly reconfirmed that the Confrontation Clause bars the admission of a scientific report, prepared in connection with a criminal investigation or prosecution absent the testimony of the expert himself, regardless of the report's facial reliability and "even if [the scientists] possess the scientific acumen of Mme. Curie and the veracity of Mother Teresa." *Id*. at __; 131 S Ct at 2715 (majority opinion) (quotation marks and citation omitted.) In our judgment, Dr. Shahid's psychiatric opinions, which are necessarily grounded in subjective interpretations of the vagaries of the human mind, are at least as deserving of the constitution's

guaranteed protections of confrontation and cross-examination as the analyst's certification of a blood alcohol analysis in *Bullcoming*. See *supra* at 552-554.[34]

To be clear, we agree with the dissent that "some meaning can—and must—be given to [the Supreme Court's confrontation] decisions." *Post* at 578 n 40. We too have parsed these cases to discern principles, and have come to what is, in our judgment, a reading that more accurately synthesizes the various holdings and that also adheres more closely to the actual language of the Confrontation Clause. The dissent disagrees. Specifically, it faults this opinion for "substitut[ing] an inquiry into the mere *foreseeability* of a statement's use at trial for an inquiry into the primary purpose for which the statement was created[, which] is simply contrary to the mandates of *Davis*, *Melendez-Diaz*, and most recently *Michigan v Bryant*." *Post* at 582. However, what the dissent disparages as "an inquiry into the mere *foreseeability* of a statement's use at trial," *post* at 582 is what *Crawford* expressly offered as one of three "formulations of [the] core class of 'testimonial' statements"—statements that were made "under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial[.]" *Crawford*, 541 US at 51-52. *Melendez-Diaz*, 557 US at 310, reiterated and applied this exact language to determine that the statement at issue in that case was

[34] Indeed, even the dissent in *Bullcoming*, which states that "the danger [to which the confrontation clause is addressed] is that innocent defendants may be convicted on the basis of unreliable, untested statements by those who observed—or claimed to have observed—preparation for or commission of the crime," seems more compatible with the result reached by this opinion than with that reached by the dissent. *Bullcoming*, 564 US at ___; 131 S Ct at 2726 (Kennedy, J., dissenting).

testimonial. And no subsequent case has renounced this definition of a core testimonial statement.[35]

In place of such explicit direction, the dissent contends that it has been able to divine from Supreme Court decisions an alternative, exclusive test to determine whether a statement is testimonial—"an inquiry into the primary purpose for which the statement was created." *Post* at 582. According to the dissent, this test is mandated by a proper application of *Davis*, *Melendez-Diaz*, and *Bryant*. See *post* at 582. Our reading of these cases is very different. As explained earlier, *Melendez-Diaz* definitely mandated no such thing. The words "primary purpose" are found nowhere in the opinion, and that opinion expressly reiterated and relied on *Crawford's* formulation of "testimonial."[36] And while

[35] The dissent asserts that this formulation, taken directly from *Crawford* and reiterated in *Melendez-Diaz*, does not resolve our case "because *Crawford*'s various potential definitions of 'testimonial' do not lead to a clear result one way or the other . . . ." *Post* at 588 n 69. We respectfully believe the dissent misreads *Crawford*. This decision cannot be read to require that a statement must fall within *all* of its " '[v]arious formulations of this core class of 'testimonial statements' " in order to be considered testimonial. *Crawford*, 541 US at 51. Indeed, the very statements at issue in *Crawford* hardly satisfied *all* the formulations because Sylvia Crawford's statements to the police in the course of an interrogation were clearly not, for example, " 'extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions[.]' " *Id*. at 51-52. The fact that a particular formulation does not apply to Dr. Shahid's report is hardly fatal to defendant's case because the Supreme Court does not require that, after we have identified that a statement is testimonial under an accepted formulation, we continue to apply *all* other formulations in sequence. To be clear, we do not treat as controlling any particular *Crawford* formulations. Rather, we simply recognize that the Court has expressly declined to adopt a single controlling definition of "testimonial," thereby leaving *all* of its formulations viable, one of which squarely applies to Dr. Shahid's report.

[36] The words that actually appear in *Melendez-Diaz*, 557 US at 311, are "sole purpose." Specifically, the Supreme Court explained that

Davis and *Bryant* both employed a primary purpose inquiry to determine whether statements made to the police in the very specific context of an *ongoing emergency* were testimonial, those cases did not mandate that this was the exclusive test to be applied generally in Confrontation Clause cases. In fact, for the following reasons, we read *Davis* and *Bryant* as endorsing a quite different approach.

The primary purpose test was specifically crafted in *Davis* for the purpose of determining whether statements made in an ongoing-emergency context violated a defendant's right of confrontation. *Davis*, 547 US at 822. The test is relevant in that context, because generally the declarant is speaking to authorities *either* to obtain assistance in what is an ongoing emergency *or* "to establish or prove past events potentially relevant to later criminal prosecution." *Id*. Thus, the test is critical in the ongoing-emergency context because proper characterization of such statements will *always* prove decisive as to whether these statements are testimonial or not.

Apart from the fact that the "primary purpose" test has never been applied beyond the ongoing-emergency context, the specific "primary purpose" test articulated by the dissent is considerably different from the actual "primary purpose" test applied in *Davis*, 547 US at 822, which was as follows:

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the

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"under Massachusetts law the *sole purpose* of the affidavits was to provide 'prima facie evidence of the composition, quality, and the net weight' of the analyzed substance, Mass. Gen. Laws, ch. 111, § 13." *Id*. We address the relevance of these words later in this opinion.

> primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

This test obviously makes sense in the context for which it was specifically designed, emergency circumstances in which there is often ambiguity concerning the objectives or purposes of the declarant's utterances. However, outside that context, in more ordinary circumstances, the questions posed by the test are largely irrelevant, and the either/or characterization inherent in the limited context of the test is absent.[37] It is utterly unclear how a court would apply the "primary purpose" test outside the *Davis* context to a case in which no emergency is alleged—what alternative "purposes" would be considered, and how would the resolution of which of these is "primary" bear in any meaningful way on the principles inherent in the Confrontation Clause?[38] A "primary purpose" test removed from its moorings would have little in common with the "primary purpose" test of *Davis* except for its nomenclature.

We find support for our decision not to extend the "primary purpose" test beyond the ongoing-emergency

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[37] *Melendez-Diaz* illustrates this point. In the context in which the statements in *Melendez-Diaz* were made, which involved state laboratory analysts preparing affidavits whose "sole purpose" was for use at a criminal trial, the Court did not engage, and could not, have engaged, in a "primary purpose" inquiry. Such an inquiry would have made no sense in that context since the affidavits in controversy had only one obvious and undisputed purpose.

[38] We are not persuaded by *State v Stahl*, 111 Ohio St 3d 186; 855 NE2d 834 (2006), or the cases from other jurisdictions relied on by the dissent. Not only does each of these concern sexual assault examinations, but it also appears that they represent the minority view. See *Hernandez v State*, 946 So 2d 1270, 1284-1285 (Fla App, 2007) (surveying the authority regarding whether a sexual assault victim's statement to a medical professional was testimonial and deciding, in conformity with the "weight of authority in other jurisdictions that have decided cases involving similar facts," that it was).

context for which it was created and apply it as the exclusive, controlling test in this new context in the very Supreme Court caselaw that the dissent claims "mandates" that we apply its test. In fact, one principle clearly emerging from *Davis* and *Bryant* is that the circumstances and context in which the statement was made are highly relevant, if not determinative, in deciding whether its admission offends the Confrontation Clause. See *Davis*, 547 US at 822, 827-830 (repeatedly emphasizing that statements are "testimonial when *the circumstances* objectively indicate that there is no such ongoing emergency") (emphasis added); *Bryant*, 562 US at ___; 131 S Ct at 1156 (explaining how a "new context" and circumstances "confront[ed] for the first time" affected its ruling). Indeed, the one thing that does seem clear from recent Confrontation Clause decisions is that the Supreme Court has very explicitly not adopted a bright-line test for determining whether a statement is testimonial, and instead has developed its jurisprudence on a case-by-case basis. See, e.g., *Crawford*, 541 US at 68 ("We leave for another day any effort to spell out a comprehensive definition of 'testimonial.' "); *Davis*, 547 US at 823 n 2 ("[O]ur holding today makes it unnecessary to consider whether and when statements made to someone other than law enforcement personnel are 'testimonial.' "); *id.* at 830 n 5 ("We have acknowledged that our holding is not an 'exhaustive classification of all conceivable statements—or even all conceivable statements in response to police interrogation,' but rather a resolution of the cases before us . . . .") (citation omitted); *Bryant*, 562 US at ___; 131 S Ct at 1158 (stating that whether a statement is testimonial requires a "highly context-dependent inquiry").[39]

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[39] In his dissent in *Bryant*, Justice Scalia had further words concerning what he described as the " 'highly context-dependent inquiry,' "

For these reasons, we find little merit in the dissent's contention that *Davis*, *Melendez-Diaz*, and *Bryant* mandate that we exclusively rely on a primary purpose inquiry to determine whether use of Dr. Shahid's diagnosis, absent his testimony, implicated defendant's right of confrontation.[40] In examining recent Supreme Court cases on which the dissent rests its decision, it is apparent that the dissent's reading of these cases is hardly mandated. No Supreme Court decision has articulated the dissent's allegedly controlling "two-part test," and there is much language in each of the decisions relied on by the dissent to suggest that it is a test made out of whole cloth.

D. CONFRONTATION CLAUSE

We are not unsympathetic to the dissent's inability to fashion a single all-purpose Confrontation Clause test from recent Supreme Court decisions. These decisions seem not entirely consistent, they employ varying constitutional tests and formulations for discerning Confrontation Clause violations, they are lengthy and susceptible to having their language taken out of context,

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which the majority employed. See *Bryant*, 562 US at ___; 131 S Ct at 1175-1176 (Scalia, J., dissenting) ("[T]he admissibility of a statement now turns on 'a highly context-dependent inquiry' into the type of weapon the defendant wielded; the type of crime the defendant committed; the medical condition of the declarant; if the declarant is injured, whether paramedics have arrived on the scene; whether the encounter takes place in an 'exposed public area'; whether the encounter appears disorganized; whether the declarant is capable of forming a purpose; whether the police have secured the scene of the crime; the formality of the statement; and finally, whether the statement strikes us as reliable.") (citations omitted).

[40] Further, with regard to the dissent's second prong, the "*formality* of the statement within a criminal investigation or prosecution," *post* at 577-578, see n 11 of this opinion. We do not think that the report is lacking in formality sufficient to exclude it from being considered "testimonial" under the Confrontation Clause.

and the justices are sharply divided in these decisions, making it sometimes difficult to know which propositions of constitutional law have garnered the support of a majority of the Court.

Nonetheless, we believe that the dissent has erred in its deconstruction of a clause taken from a footnote in a sharply divided opinion of the Supreme Court and that, as a result, it has also erred in fashioning its own "exclusive" test synthesized from Supreme Court decisions, none of which has actually articulated that test and each of which has articulated language incompatible with that test. However difficult an exercise, this majority has also sought to abide by the direction of the Supreme Court and reached a very different result than the dissent.

We believe, though, that our analysis would be incomplete if we did not respond to the dissent's "two-part test" with an alternative analysis of our own. This analysis is drawn from the actual language of the Sixth Amendment of the United States Constitution. As the "supreme Law of the Land," US Const, art VI, cl 2, it seems appropriate to consult the actual language of the Constitution when Supreme Court caselaw is not altogether clear.

The Confrontation Clause of the Sixth Amendment of the United States Constitution reads, "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." By its straightforward terms, the Confrontation Clause directs inquiry into two questions: (1) Does the person in controversy comprise a "witness against" the accused under the Confrontation Clause; and (2) if so, has the accused been afforded an opportunity to "confront" that witness under the Confrontation Clause?

First, for the reasons set forth in part III(A) of this opinion, we believe the accused here has satisfied the first inquiry by demonstrating that Dr. Shahid constituted a "witness against" him. Indeed, we believe that Dr. Shahid was, by far, the most important "witness against" him. Dr. Shahid's diagnosis that defendant was not experiencing psychosis was employed by the prosecutor as substantive evidence that defendant was not, in fact, experiencing psychosis—a psychosis, incidentally, that any member of the jury could probably have easily understood as having arisen as a function of a parent perceiving that a criminal perpetrator who had caused the needless death of his teenage child was unremorseful and unrepentant about the occurrence and that the legal system was satisfied to punish this perpetrator with a six-month misdemeanor. Dr. Shahid's report went to the heart of the ultimate issue at trial, upon which defendant's guilt or innocence under the law entirely turned, and it was relied on by every other significant expert witness testifying on behalf of the prosecution.

Second, for the reasons set forth in part III(A) of this opinion, we believe the accused here has satisfied the second inquiry by demonstrating that he had no opportunity to confront Dr. Shahid. The accused was never afforded the opportunity to cross-examine Dr. Shahid, therefore ensuring that the accused would be unable to question Dr. Shahid; that the accused would be unable to require that Dr. Shahid look him in the eye in open court, face-to-face, in the presence of the judge and jury and respond to questions; and that the judge and jury would never be required to assess the demeanor, the assuredness, the expertise, and the credibility of Dr. Shahid.[41]

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[41] The application of the plain error standard leads us to inquire into what Dr. Shahid might have said had he testified. What if, when asked to

The use of Dr. Shahid's report against defendant absent any opportunity for cross-examination is exactly what the words of the Confrontation Clause prohibit—however finely the dissent chooses to parse footnote 2 of *Melendez-Diaz*. By guaranteeing that "the accused shall enjoy the right . . . to be confronted with the witnesses against him," the Framers of the Confrontation Clause sought to guarantee that what happened at defendant's trial would not happen within our criminal justice system.

V. CONCLUSION

Because we believe that defendant has been deprived of his right of confrontation under the Sixth Amendment, and because we believe he has suffered considerable prejudice as a result, we reverse the judgment of the Court of Appeals, vacate defendant's convictions, and remand this case to the trial court for further proceedings.

CAVANAGH, MARILYN KELLY, HATHAWAY (except for footnote 15 and part IV), and MARY BETH KELLY, JJ., concurred with MARKMAN, J.

YOUNG, C.J. (*dissenting*). The question posed by this case is: Can an out-of-court statement selectively used by a defendant in support of his principal defense serve

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explain his diagnosis, he could not articulate his reasons? What if his rationale was not viewed as compelling? What if he had explained that his diagnosis of "no psychosis" did not necessarily mean that defendant was not legally insane at the time of the incident and that the prosecutor's expert had misinterpreted his diagnosis? What if, on the basis of new research or upon further reviewing defendant's medical files, he had modified his diagnosis? Or what if, on cross-examination standing face to face with defendant, he simply told the jury that he harbored some *doubts* about whether defendant *was* experiencing "psychosis," or might have lost touch with reality at the time of the incident? What if he was just an ineffectual witness? These hardly exhaust the list of "what ifs," the answer to any one of which might have altered the outcome of defendant's trial.

as a predicate for a Confrontation Clause claim after the prosecutor has used the statement to impeach the defendant's expert? Defendant and the majority answer this question in the affirmative. I believe that the answer is unquestionably no and therefore dissent.

In this case, defendant's trial counsel declined to call as a witness the author of the out-of-court statement—a psychiatric evaluation—because he believed that the author would be a bad witness for the defense and would undermine the proffered insanity defense. This defense trial strategy proved partially successful; the jury found defendant guilty but mentally ill. On appeal, defendant now attempts to transform this conscious trial strategy into an "appellate parachute" by raising an ineffective assistance of counsel claim premised on an alleged Confrontation Clause violation because the author of the out-of-court statement, which defendant's own expert relied on and referred to, did not testify at defendant's trial. Although our jurisprudence abhors sanctioning such appellate parachutes,[1] the majority here blesses this artful appellate strategy. I cannot.

These uncontested facts notwithstanding, United States Supreme Court caselaw is equally inconvenient to the majority's conclusion. Apart from the appellate parachute problem, the psychiatric evaluation that defendant claims violated his Confrontation Clause rights was not a testimonial out-of-court statement and therefore *did not even implicate the rights guaranteed by the Confrontation Clause*. The United States Supreme Court has made this perfectly clear: in *Melendez-Diaz v Massachusetts*, the Court expressly stated that "medical reports created for treatment purposes . . . would not be testimonial" statements within the meaning of

[1] See *People v Carter*, 462 Mich 206, 214; 612 NW2d 144 (2000) ("Counsel may not harbor error as an appellate parachute.").

the Sixth Amendment's Confrontation Clause.[2] Missed by the majority in this case is the fact that *none* of the nine justices who served on the *Melendez-Diaz* Court would have included medical reports created for treatment purposes in the definition of testimonial statements.[3] The psychiatric evaluation at issue in this case falls within that category of evidence considered to be nontestimonial because it was created to evaluate and treat defendant during his two-week hospitalization in a psychiatric intensive care unit.

Moreover, even if the psychiatric evaluation at issue were to be considered testimonial within the meaning of the Confrontation Clause, the prosecutor's purpose in referring to Dr. Shahid's evaluation was to impeach defendant's expert, a purpose that falls outside the purview of the Confrontation Clause.[4] Because neither the facts nor the law supports the majority's decision in this case, I would affirm the decision of the Court of Appeals, albeit for different reasons than the Court of Appeals articulated, and affirm defendant's convictions.

I. FACTS AND PROCEDURAL HISTORY

This case involves defendant Charles Fackelman's

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[2] *Melendez-Diaz v Massachusetts*, 557 US 305, 312 n 2; 129 S Ct 2527; 174 L Ed 2d 314 (2009).

[3] Justice Scalia's majority opinion, written on behalf of five justices, expressly stated that "medical reports created for treatment purposes . . . would not be testimonial under our decision today." *Id.* Justice Kennedy's dissenting opinion, written on behalf of the remaining four justices, would have limited testimonial statements to those " 'produced by, or with the involvement of, adversarial government officials responsible for investigating and prosecuting crime.' " *Id.* at 346 (Kennedy, J., dissenting), quoting Comment, *Toward a definition of "testimonial": How autopsy reports do not embody the qualities of a testimonial statement*, 96 Cal L R 1093, 1118 (2008).

[4] *Crawford v Washington*, 541 US 36, 60 n 9; 124 S Ct 1354; 158 L Ed 2d 177 (2004).

emergency hospitalization at a Toledo, Ohio, psychiatric intensive care unit, beginning on March 29, 2007. Specifically, we are concerned with a psychiatric evaluation prepared by defendant's treating physician, Dr. Agha Shahid, during his hospitalization.

Defendant suffered from severe depression, including a suicide attempt, following the death of his teenage son in June 2006. Defendant's depression became particularly acute in the days leading up to his March 2007 hospitalization because it was the beginning of the baseball season for his son's high school team. While watching the team's game on March 27, 2007, defendant "began to cry" and "wave[d] . . . off" parents of his son's teammates from talking to him. Instead, he jogged to his car, drove home, and locked himself in his room, which was something he did "occasionally when [he] didn't want to be seen."

The next day, defendant drove from his home in northern Ohio to confront the Monroe County man he believed responsible for his son's death, Randy Krell.[5] Defendant testified that he did not remember the incident. According to Krell, defendant arrived at Krell's home wielding a pistol.[6] He pointed the gun at Krell's chest and told Krell, "We're gonna talk." Defendant then directed Krell toward

[5] Defendant's son was a passenger in a vehicle that was involved in a single-car accident. Krell was the driver of a second automobile that had been chasing the vehicle in which defendant's son was a passenger. Krell was convicted of negligent homicide for the death of defendant's son in that accident. Defendant testified that he was angry with Krell and that he "wanted to see him live in a cardboard box [for] the rest of his life." Defendant also admitted that, long before the March 2007 events resulting in his conviction, he harbored thoughts of confronting Krell and causing him physical pain. Krell testified that defendant had previously "lunged" at him during Krell's criminal trial.

[6] Although defendant testified that he did not remember what occurred on the afternoon and evening of March 28, 2007, he did not dispute the testimony of Krell or Krell's neighbor.

Krell's garage, all the while continuing to tell Krell that "we're gonna talk and end this all in about a minute." When defendant loaded the chamber of his pistol for firing, Krell ran across the street into his neighbor's house and asked his neighbor to call 911, which the neighbor did. Before the neighbor completed his 911 call, the neighbor heard "a loud crash" and his "entire doorframe came flying in and landed in . . . the entranceway . . . ." Still brandishing the weapon, defendant knocked the telephone out of the neighbor's hand and looked through the house for Krell, spending about $3^1/_2$ or 4 minutes inside the house before leaving.

Defendant returned to his car without again confronting Krell.[7] Later that evening, defendant arrived at his mother's house in Toledo, walked over to a heat register, and placed the gun in the air duct. He also called his brother and asked him to "come and get it and get rid of it."[8] After he left his mother's house, defendant's family and friends became worried for his safety, and they began searching for him. Eventually, a family friend found defendant at a gas station in Bowling Green, Ohio. At the request of the family's attorney, the friend drove defendant to Flower Hospital in Toledo. Just outside the hospital, and apparently while the family attorney was finalizing defendant's admission into the hospital, police arrested defendant. Defendant was searched but then released from police custody for his hospitalization.

After spending the night of March 28-29, 2007, at Rescue Crisis Mental Health Services in Toledo, defen-

[7] Krell testified that, after leaving his neighbor's house and calling 911 himself, he watched defendant enter his car, back out of Krell's driveway, and drive away from Krell's house.

[8] Defendant's brother and mother subsequently drove to a nearby quarry, and his brother threw the pistol into deep water at the quarry.

dant was transferred back to Flower Hospital to be admitted into the psychiatric intensive care unit. Defendant was placed under the care and supervision of Dr. Shahid.

After interviewing and observing defendant, Dr. Shahid prepared a three-page "Psychiatric Evaluation" on Flower Hospital letterhead, which Dr. Shahid signed and dated March 31, 2007. The evaluation described defendant's history of present illness, past psychiatric history, medical history, family history, social history, mental status examination, strengths and limitations, estimated length of hospitalization, diagnosis, and plan of treatment. Dr. Shahid concluded in this evaluation that defendant suffered from "[m]ajor depression," that it was a "single episode," and that it was "severe without psychosis."

Defendant was charged with first-degree home invasion,[9] two counts of felonious assault with a dangerous weapon,[10] and felony-firearm.[11] Defendant raised an insanity defense at his three-day jury trial. Defendant testified that he did not know how he ended up at Krell's house, that he did not remember chasing Krell, and that he did not remember knocking down the door of the neighbor's house. Furthermore, he testified that he did not remember going to his mother's house, hiding his gun, or talking to Dr. Shahid at Flower Hospital.

While presenting his case-in-chief, defendant called an expert witness, Dr. Zubin Mistry, who testified that defendant was legally insane at the time of the crime.[12]

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[9] MCL 750.110a(2).

[10] MCL 750.82.

[11] MCL 750.227b.

[12] The prosecutor presented no expert witness in his case-in-chief and had rested when defendant began his case-in-chief and presented his expert witness.

The prosecutor called a rebuttal expert witness, Dr. Jennifer Balay, who testified that defendant was legally sane. Both experts testified that they relied in part on Dr. Shahid's evaluation in forming their opinions about defendant's mental state. However, neither party called Dr. Shahid as a witness, nor did either party formally introduce his evaluation into evidence.

The jury found defendant guilty but mentally ill of all the charged offenses. On appeal, the Court of Appeals remanded this case to the trial court for a *Ginther* hearing on defendant's claim of ineffective assistance of counsel.[13] At the hearing, defendant's trial counsel testified that he did not object to the prosecutor's use of Dr. Shahid's evaluation because he thought the prosecutor was using the evaluation solely to impeach defendant's expert. Moreover, he explained, it did not occur to him that the use of the evaluation could violate the Confrontation Clause.[14] More important, he also testified that he "didn't want to call attention to" the evaluation and that he feared Dr. Shahid "would have been a bad witness if everything in that report would have come out . . . ."[15] The trial court concluded that

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

[14] As the *first* proponent of the evaluation at trial, defense counsel's reaction to the Confrontation Clause claim advanced here is entirely understandable. The attempt to convert the use of this evaluation advanced by defendant himself into a Confrontation Clause violation seems plausible only to the majority.

[15] Not to be overlooked is the fact that defense counsel concluded that the entire evaluation, when considered as a whole, undermined the insanity defense that he was presenting and that Dr. Shahid probably would not have supported defendant's legal insanity defense. Defense counsel's trial strategy, therefore, was to minimize the importance of the evaluation, notwithstanding that his own expert selectively relied on it in formulating his opinion that defendant was legally insane.

Under the circumstances, it was entirely understandable why defense counsel would choose to rely on his own expert's opinion rather than

defendant did not receive constitutionally ineffective assistance of counsel and affirmed defendant's convictions. The Court of Appeals affirmed on the grounds that, although counsel had erred by allowing the prosecutor to use extrajudicial testimonial statements for the truth of the matter asserted, the error did not prejudice defendant. We granted defendant's application for leave to appeal.

II. STANDARD OF REVIEW

Defendant claims that he received ineffective assistance of counsel after counsel failed to object to the use of Dr. Shahid's psychiatric evaluation. "Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law. A judge first must find the facts, and then must decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel."[16] We review a trial court's findings of fact for clear error, while we review any underlying questions of constitutional law de novo.[17]

III. ANALYSIS

A. INEFFECTIVE ASSISTANCE OF COUNSEL

This appeal is presented to us as a claim of ineffective assistance of counsel. Defendant claims that his trial

jeopardize that opinion *and* the insanity defense by calling Dr. Shahid as a witness merely to authenticate his evaluation or to comply with MRE 703. Nor, for similar reasons, would defense counsel want to insist that the prosecutor call Dr. Shahid as a witness: once on the stand, Dr. Shahid would be subject to examination by the prosecutor and would undermine the insanity defense. The majority is apparently unconcerned about this very obvious trial strategy choice. The question is why.

[16] *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

[17] *Id.*

counsel was constitutionally deficient for failing to object when the prosecutor questioned two expert witnesses about Dr. Shahid's psychiatric evaluation and referred to the evaluation in his closing statement.

The Sixth Amendment of the United States Constitution guarantees a criminal defendant the right "to have the Assistance of Counsel for his defence."[18] "[T]he [United States Supreme] Court has recognized that 'the right to counsel is the right to the effective assistance of counsel.' "[19]

The United States Supreme Court has articulated two requirements for a defendant to establish that he is entitled to a new trial on the basis of ineffective assistance of counsel:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.[20]

Defendant now claims that his trial counsel erred by allowing the prosecutor to question his expert and the

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[18] US Const, Am VI. The Michigan Constitution's parallel provision uses nearly identical language. Const 1963, art 1, § 20 ("In every criminal prosecution, the accused shall have the right . . . to have the assistance of counsel for his or her defense . . . ."). This Court has held that the Michigan Constitution "does not afford greater protection than federal precedent with regard to a defendant's right to counsel when it involves a claim of ineffective assistance of counsel." *People v Pickens*, 446 Mich 298, 302; 521 NW2d 797 (1994).

[19] *Strickland v Washington*, 466 US 668, 686; 104 S Ct 2052; 80 L Ed 2d 674 (1984), quoting *McMann v Richardson*, 397 US 759, 771 n 14; 90 S Ct 1441; 25 L Ed 2d 763 (1970).

[20] *Strickland*, 466 US at 687.

prosecutor's rebuttal expert about Dr. Shahid's evaluation and to refer to Dr. Shahid's evaluation in his closing argument. This is an absurd proposition because it was *defendant* who first raised the issue of his insanity and who first opened the door to questioning about Dr. Shahid's evaluation because his defense expert selectively relied on the evaluation during the defense's case-in-chief and because *defendant considered, but decided against, calling Dr. Shahid to the witness stand*. The majority does not explain why it would allow the defendant to rely on Dr. Shahid's evaluation without his being called as a witness, but preclude the prosecutor from using that same evaluation for impeachment and in rebuttal without calling Dr. Shahid as a witness.

Today's majority decision, thus, says in effect that a prosecutor is constitutionally required to call a particular witness—the author of an out-of-court statement—on the basis of the defense's selective use of that statement and conscious strategic decision *not* to call the author as a witness. The result of the majority's decision will be to promote trial and appellate gamesmanship.

The majority's decision flies in the face of the fact that a criminal defendant can waive his confrontation rights[21] and "[c]ounsel may waive an accused's constitutional rights for tactical reasons when the circumstances are not exceptional."[22] Counsel can also waive confrontation rights when he "purposefully and explic-

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[21] *Illinois v Allen*, 397 US 337, 342-343; 90 S Ct 1057; 25 L Ed 2d 353 (1970), quoting *Snyder v Massachusetts*, 291 US 97, 106; 54 S Ct 330; 78 L Ed 674 (1934).

[22] *United States v Lee*, 374 F3d 637, 650 (CA 8, 2004), citing *Loggins v Frey*, 786 F2d 364, 368 (CA 8, 1986). "Circumstances are exceptional when a defendant has not personally waived nor acquiesced in an attempted waiver by counsel." *Lee*, 374 F3d at 650.

itly opens the door on a particular (and otherwise inadmissible) line of questioning" because "such conduct operates as a limited waiver allowing the government to introduce further evidence on that same topic."[23]

Under the circumstances of this case, it is no surprise that defendant's trial counsel failed to object to the prosecutor's use of Dr. Shahid's evaluation to rebut defendant's insanity defense. I would hold that defendant affirmatively waived his right to confront Dr. Shahid because he chose, as a matter of trial strategy, not to call him as a witness.[24] Therefore, he cannot now claim that the *prosecutor's* failure to call Dr. Shahid as a witness on an issue for which the prosecutor bore no burden of proof violated his confrontation rights.[25]

Notwithstanding the issue of waiver, defendant claims that the prosecutor's use of Dr. Shahid's evaluation violated his Sixth Amendment right to confront the witnesses against him and the evidentiary rules regarding the introduction of hearsay. I will discuss defendant's legal claims seriatim.

B. CONFRONTATION CLAUSE

The Sixth Amendment to the United States Constitution provides, in relevant part, "In all criminal pros-

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[23] *United States v Lopez-Medina*, 596 F3d 716, 731 (CA 10, 2010). I do not concede that the prosecutor's rebuttal was an "otherwise inadmissible" line of questioning; however, this decision provides further support for the conclusion that defendant affirmatively waived cross-examination of Dr. Shahid.

[24] There is no evidence that defendant disagreed with his attorney's strategy. To the contrary, trial counsel admitted at the *Ginther* hearing that "[w]e had a discussion as to whether or not to . . . present Dr. Shahid" as a witness.

[25] For the reasons stated in part III(D) of this opinion, this trial strategy was objectively reasonable.

ecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." This right has been incorporated to the states under the Fourteenth Amendment.[26]

The Confrontation Clause seeks to prevent "the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused."[27] In its seminal Confrontation Clause decision, *Crawford v Washington*, the Supreme Court concluded that "the Framers would not have allowed admission of *testimonial* statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had a prior opportunity for cross-examination."[28] While previous cases interpreting the Confrontation Clause emphasized the truth-seeking function of the right of confrontation,[29] the *Crawford* Court reoriented Confrontation Clause jurisprudence toward confrontation's procedural safeguards to ensure that "reliability be assessed in a particular manner: by testing in the crucible of cross-examination."[30]

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[26] *Pointer v Texas*, 380 US 400, 406; 85 S Ct 1065; 13 L Ed 2d 923 (1965). The Michigan Constitution's parallel provision uses nearly identical language. Const 1963, art 1, § 20 ("In every criminal prosecution, the accused shall have the right . . . to be confronted with the witnesses against him or her . . . .").

[27] *Crawford*, 541 US at 50.

[28] *Id.* at 53-54 (emphasis added).

[29] For example, in *Ohio v Roberts*, the Supreme Court explained the Confrontation Clause as follows: "Reflecting its underlying purpose to augment accuracy in the factfinding process by ensuring the defendant an effective means to test adverse evidence, the Clause countenances only hearsay marked with such trustworthiness that 'there is no material departure from the reason of the general rule.' " *Ohio v Roberts*, 448 US 56, 65; 100 S Ct 2531; 65 L Ed 2d 597 (1980), overruled by *Crawford*, 541 US 36, quoting *Snyder*, 291 US at 107.

[30] *Crawford*, 541 US at 61. In abrogating the *Roberts* test, the *Crawford* Court explained that *Roberts* "departs from the historical principles" of

The majority helpfully summarizes this conclusion in articulating what it styles an "alternative analysis"[31] for determining whether a Confrontation Clause violation has occurred: "(1) Does the person in controversy comprise a 'witness against' the accused under the Confrontation Clause; and (2) if so, has the accused been afforded an opportunity to 'confront' that witness under the Confrontation Clause?"[32] Far from being an alternative analysis, these two questions simply assert uncontested constitutional first principles. Thus, the majority's alternative analysis does not answer the difficult and fact-intensive inquiry required to review this case.

As the majority's test illustrates, and as the *Crawford* Court held, the Confrontation Clause "applies to 'witnesses' against the accused—in other words, those who 'bear testimony.' "[33] *Crawford* emphasized the qualitative distinction between testimonial statements and nontestimonial statements for purposes of applying the Confrontation Clause:

> Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law . . . . Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination.[34]

Therefore, any case that applies the Confrontation Clause must determine, as a threshold matter, whether the statement at issue is testimonial.

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the Confrontation Clause because it "admits statements that . . . consist of *ex parte* testimony upon a mere finding of reliability." *Id.* at 60.

[31] *Ante* at 562.

[32] *Ante* at 562.

[33] *Crawford*, 541 US at 51, quoting 2 Webster, An American Dictionary of the English Language (1828).

[34] *Crawford*, 541 US at 68.

1. WHAT CONSTITUTES "TESTIMONY"?

> "[*M*]*edical reports created for treatment purposes . . . would not be testimonial under our decision today.*"
>
> —*Melendez-Diaz v Massachusetts* (2009)[35]

"Testimony" is " '[a] *solemn* declaration or affirmation made for the purpose of establishing or proving some fact.' "[36] The Court explained that "[a]n accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not," and concluded that "[t]he constitutional text, like the history underlying the common-law right of confrontation, thus reflects an especially acute concern with a specific type of out-of-court statement."[37]

Although it did not delineate the scope of testimonial statements, the *Crawford* Court acknowledged that "[v]arious formulations of this core class of 'testimonial' statements exist,"[38] and instead of choosing one, it "[left] for another day any effort to spell out a comprehensive definition of 'testimonial.' "[39] In reviewing *Crawford* and its progeny, it becomes clear that the Court considers two related factors above all others when deciding whether an extrajudicial statement is testimonial, and therefore within the parameters of the Confrontation Clause: the *formality* of the statement within a criminal investigation or prosecution and the *purpose* of the

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[35] *Melendez-Diaz*, 557 US at 312 n 2.

[36] *Crawford*, 541 US at 51, quoting 2 Webster, An American Dictionary of the English Language (1828) (alteration in *Crawford*) (emphasis added).

[37] *Crawford*, 541 US at 51.

[38] *Id.*

[39] *Id.* at 68.

statement.[40] Formal statements created as part of the investigative or judicial process—such as statements that are "quite plainly affidavits"—are testimonial.[41] Similarly, statements that are made for the express purpose of investigating and prosecuting crimes—such as a statement "the *sole purpose* of [which] was to provide 'prima facie evidence of the composition, quality, and the net weight' of the analyzed substance"—are likewise testimonial.[42] Contrarily, statements made for some other primary purpose—such as responses to interrogations in order "to enable police assistance to meet an ongoing emergency"[43] or "medical reports created for treatment purposes"[44]—are not testimonial.

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[40] Notwithstanding the majority's characterization to the contrary, this articulation is less a strict " 'two-part test,' " *ante* at 555, than a summation of factors that the United States Supreme Court has considered most relevant in determining whether a statement is testimonial for confrontation purposes. The majority is correct that this summation is an "attempt to synthesize several very-difficult-to-synthesize Confrontation Clause decisions of the Supreme Court," *ante* at 555, but as the analysis in this opinion indicates, I believe that those decisions contain a consistent pattern and that, as a result, some meaning can—and must—be given to those decisions.

[41] *Melendez-Diaz*, 557 US at 310. And even if formality "is not the sole touchstone" in the inquiry into whether a statement is testimonial, *Michigan v Bryant*, 562 US ___, ___; 131 S Ct 1143, 1160; 179 L Ed 2d 93 (2011), "a statement's formality or informality can shed light on whether a particular statement has a primary purpose of use at trial," *Bullcoming v New Mexico*, 564 US ___, ___; 131 S Ct 2705, 2721; 180 L Ed 2d 610 (2011) (Sotomayor, J., concurring).

[42] *Melendez-Diaz*, 557 US at 311, quoting Mass Gen Laws, ch 111, § 13; see also *Bullcoming*, 564 US at ___; 131 S Ct at 2716 (stating that "[t]he same purpose [as the certificate in *Melendez-Diaz*] was served by the certificate in question here"); accord *id.* at ___; 131 S Ct at 2722 (Sotomayor, J., concurring) ("[T]his is not a case in which the State suggested an alternate purpose, much less an alternate *primary* purpose, for the [blood alcohol concentration] report.").

[43] *Davis v Washington*, 547 US 813, 822; 126 S Ct 2266; 165 L Ed 2d 224 (2006); see also *Bryant*, 562 US ___; 131 S Ct 1143.

[44] *Melendez-Diaz*, 557 US at 312 n 2.

This last example, specifically referenced in *Melendez-Diaz*, is particularly relevant to the instant case.

In deconstructing this reference in *Melendez-Diaz*, the majority claims that this dissent fails to account for the final phrase of footnote 2—" 'under our decision today' "[45]—and it argues that, instead, "the circumstances under which a medical report created for treatment purposes could be considered testimonial was simply left for another day."[46] In fact, the *Melendez-Diaz* majority was responding to Justice Kennedy's concern that the core holding of *Melendez-Diaz* would create unintended consequences.[47] Moreover, while the context of the *Melendez-Diaz* majority's decision supports the interpretation that this opinion attaches to footnote 2, *all* the caselaw applying *Crawford* and its progeny attaches great significance to the broader proposition that the footnote applies: a statement's *primary purpose* is accorded great weight in the determination whether the statement is testimonial in nature.[48] In the end, while the facts of this case were not squarely before the Court in *Melendez-Diaz*, the *Melendez-Diaz* majority's statement that "medical reports created for treat-

[45] *Ante* at 550, quoting *Melendez-Diaz*, 557 US at 312 n 2.

[46] *Ante* at 550.

[47] *Melendez-Diaz*, 557 US at 335 (Kennedy, J., dissenting) ("It is difficult to confine at this point the damage the Court's holding will do in other contexts.").

[48] The majority itself affirms this proposition in its discussion of the recent decision in *Bullcoming*, stating that the *Bullcoming* Court "clearly reconfirmed that the Confrontation Clause bars the admission of a scientific report, *prepared in connection with a criminal investigation or prosecution* . . . ." *Ante* at 555 (emphasis added). The majority, however, reads *Bullcoming* too broadly when it would apply *Bullcoming*'s analysis to statements prepared for purposes *other than* to aid a criminal investigation or prosecution. *Bullcoming* simply does not apply to cases like defendant's.

ment purposes . . . would not be testimonial under our decision today" is highly instructive regarding how to apply Confrontation Clause principles to the facts of the instant case.

There are also a number of instructive state supreme court cases that illustrate the *Melendez-Diaz* Court's recognition that "medical reports created for treatment purposes" are not testimonial.[49] For instance, in *People v Cage*, the California Supreme Court held that a victim's statement to his doctor at a hospital was not testimonial because it was made for the purpose of "immediate acute treatment"[50] and not to bear testimony against the defendant. Alternatively, in *Hartsfield v Commonwealth*, the Kentucky Supreme Court held that a statement made to a sexual assault nurse examiner was testimonial because the purpose of the questioning was to "elicit[] evidence of past offenses with an eye toward future criminal prosecution," making the nurse "an active participant in the formal criminal investigation."[51]

The Ohio Supreme Court's decision in *State v Stahl* perhaps most fully explained a court's inquiry into the purpose of a statement.[52] It held that, although a forensic nurse working in an emergency room "serves a prosecutorial function by collecting evidence," that function is "at best secondary to the . . . primary motivation, the care of [the unit's] patients."[53] The court went on to explain:

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[49] *Melendez-Diaz*, 557 US at 312 n 2.

[50] *People v Cage*, 40 Cal 4th 965, 986; 56 Cal Rptr 3d 789; 155 P3d 205 (2007).

[51] *Hartsfield v Commonwealth*, 277 SW3d 239, 244 (Ky, 2009).

[52] *State v Stahl*, 111 Ohio St 3d 186; 2006-Ohio-5482; 855 NE2d 834 (2006).

[53] *Id.* at 196-197.

> [The defendant] asserts that [the nurse's] taking of evidence, which included swabbing for DNA with the help of ultraviolet light, taking pictures of [the victim's] mouth, and taking a napkin that [the victim] used after the incident, demonstrates the . . . unit's prosecutorial purpose and renders [the victim's] statements testimonial. Emergency rooms routinely perform these procedures, and a witness in this situation could reasonably believe that the . . . unit's medical examination, including the incident history statement, serves primarily a medical function.[54]

In distinguishing an emergency room nurse's "primary" and "secondary" functions, the *Stahl* court answered the majority's concern that "[i]t is utterly unclear how a court would apply the 'primary purpose' test outside the *Davis* context to a case in which no emergency [requiring immediate police assistance] is alleged" and its questions regarding "what alternative 'purposes' would be considered, and how would the resolution of which of these is 'primary' bear in any meaningful way on the principles inherent in the Confrontation Clause[.]"[55]

These cases and others reiterate the United States Supreme Court's acknowledgment in *Melendez-Diaz* that statements made for the purposes of diagnosing and treating medical emergencies are not testimonial, while recognizing statements that carry an investigative purpose and that turn medical professionals into "active participant[s] in the formal criminal investigation" can create testimonial statements, even if they are created by medical professionals.[56] The majority has not

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[54] *Id.* at 198.

[55] *Ante* at 559.

[56] *Hartsfield*, 277 SW3d at 244. While these cases from other courts apply the purpose analysis to victims' treatment for injuries, rather than to defendants' treatment, this distinction is without a difference because courts are required to examine the declarant's purpose when determin-

followed this line of analysis. Instead, it substitutes an inquiry into the mere *foreseeability* of a statement's use at trial for an inquiry into the primary purpose for which the statement was created. The majority's analysis is simply contrary to the mandates of *Davis*, *Melendez-Diaz*, and most recently *Michigan v Bryant*.[57] Thus, the majority of this Court continues to misapply the Confrontation Clause caselaw of the United States Supreme Court.[58]

2. APPLICATION

In light of the foregoing analysis of Confrontation Clause jurisprudence, the statement at issue in this case was not testimonial because it was neither formal nor created for the primary purpose of investigating or prosecuting crimes.[59] As stated, the declarant, Dr. Sha-

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ing whether the statement was made for the purposes of medical treatment. *Davis*, 547 US at 823 n 1 ("[I]t is in the final analysis the declarant's statements, not the interrogator's questions, that the Confrontation Clause requires us to evaluate."). A declarant-victim telling a doctor what occurred so the doctor can treat her is in no different a position than a declarant-doctor documenting a medical evaluation so he can treat a criminal defendant.

[57] *Bryant*, 562 US ___; 131 S Ct 1143.

[58] The majority criticizes this opinion for not limiting inquiry into the primary purpose of a statement to the narrow question "whether statements made to the police in the very specific context of an *ongoing emergency* were testimonial . . . ." *Ante* at 558. However, the majority's narrow approach ignores the fact that cases in addition to *Davis* and *Bryant* have considered a statement's purpose in determining whether its introduction violates the Confrontation Clause. Indeed, in *Melendez-Diaz*, it was not just the "primary" purpose of the affidavits identifying the tested substance that they be used at trial, but it was their "sole purpose." *Melendez-Diaz*, 557 US at 311 (emphasis omitted).

[59] Formality in the confrontation context corresponds to a statement's specific role within the investigative or prosecutorial process. Justice Thomas perhaps articulated this principle most clearly in his separate

hid, treated defendant during his hospitalization in Flower Hospital's psychiatric intensive care unit for an acute psychiatric episode.[60] In rendering emergency psychiatric treatment to a patient who had already attempted suicide once before and who continued to exhibit severe depression, Dr. Shahid created a detailed evaluation that outlined defendant's medical condition and determined the most appropriate course of emergency treatment.

Because the context and contents of the entire evaluation are essential to determining whether it is testimonial, the Appendix to this opinion contains the evaluation with minor redactions.[61] In order to treat

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Melendez-Diaz opinion, wherein he explained that " 'the Confrontation Clause is implicated by extrajudicial statements only insofar as they are contained in formalized *testimonial materials*, such as affidavits, depositions, prior testimony, or confessions.' " *Melendez-Diaz*, 557 US at ___; 129 S Ct at 2543 (Thomas, J., concurring) (emphasis added), quoting *White v Illinois*, 502 US 346, 365; 112 S Ct 736; 116 L Ed 2d 848 (1992) (Thomas J., concurring).

[60] In concluding that Dr. Shahid's evaluation was testimonial, the Court of Appeals operated under the presumption that *defendant*, and not Dr. Shahid, was the declarant. "[L]ike a statement taken by a police officer during a custodial interrogation, the statements attributed to defendant by Dr. Shahid appear to be responses to questions posed by Dr. Shahid for purposes of defendant's psychiatric examination." *People v Fackelman*, unpublished opinion per curiam of the Court of Appeals, issued August 27, 2009 (Docket No. 284512), p 2. The Court of Appeals erred in presuming that defendant was the "declarant" for the purposes of his Confrontation Clause challenge. Dr. Shahid was the declarant whose diagnosis of defendant is at issue in this appeal.

[61] I agree with the majority that "the circumstances and context in which the statement was made are highly relevant, if not determinative, in deciding whether its admission offends the Confrontation Clause." *Ante* at 560. This is precisely why the purpose of a statement's creation matters so much to the inquiry into whether a statement is testimonial, and why this dissent's analysis focuses on the context and contents of Dr. Shahid's evaluation. By contrast, the majority opinion focuses on how that evaluation, once produced for any reason unrelated to litigation, might likely be used in a future criminal prosecution.

defendant, Dr. Shahid had to understand his patient's medical and psychiatric history, particularly in a situation in which his patient had previously attempted to commit suicide, had been admitted on an emergency basis in a severely depressed state, and continued to express suicidal ideation.

Thus, Dr. Shahid interviewed defendant regarding every aspect of his illness, in particular, its origin in the death of defendant's son and the continuing effect of that death on defendant's mental state. This required Dr. Shahid to ask defendant, not only about his son's death generally, but also, more specifically, what he remembered about the incident with Krell. Dr. Shahid determined that defendant "feels helpless, hopeless and worthless" but is "[o]riented to time, place and person." In short, the evaluation documented defendant's mental and physical state at the time of the evaluation—his mood, affect, temperature, pulse, respiration, and blood pressure—and provided a diagnosis and plan of treatment for the periods during and after defendant's hospitalization.

Important for our analysis is the fact that Dr. Shahid's evaluation did not end with his diagnosis of defendant; rather, it followed that diagnosis with a *plan of treatment*. After diagnosing defendant's depression as "severe without psychosis," Dr. Shahid concluded that defendant should "[c]ontinue Prozac" and "add Seroquel," a drug used to "help patient with sleep, agitation and his complaint that he cannot shut his mind." Dr. Shahid also determined that defendant should continue with psychotherapy after his discharge.

All these facts lead inexorably to the conclusion that Dr. Shahid's primary purpose in undertaking and documenting defendant's psychiatric evaluation was to provide medical care and treatment, not to serve as "an

active participant in the formal criminal investigation" or prosecution.[62] The evaluation was, therefore, created not in anticipation of litigation, but in anticipation of continued treatment.

The majority emphasizes that Dr. Shahid's evaluation noted that "the Monroe County sheriff want[ed] to be called when [defendant] is discharged to home" and that defendant "ha[d] legal charges against him through the State of Michigan 38th Judicial Circuit . . . ." The fact that Dr. Shahid was aware of the pending criminal charges against defendant does not alter Dr. Shahid's primary purpose in preparing his evaluation: to render emergency psychiatric treatment to defendant. Moreover, there was no indication that his treatment was handled any differently because of the pending charges, and the acknowledgment of the charges constitutes a legitimate part of the patient's history that is a customary part of psychiatric evaluations. Indeed, it would be passing strange for the evaluating psychiatrist to fail to note the conditions under which the patient was referred to the psychiatric emergency room in the first instance. This is essentially a passing reference in an evaluation that is otherwise entirely devoted to recording and treating defendant's psychiatric emergency, including an emphasis on defendant's suicidal ideation. Significantly, and undercutting the majority's foreseeability analysis, there is no evidence, other than being aware that defendant had been arrested for assaulting Krell, that Dr. Shahid had any other contact with the police or the prosecutor in this case.

The majority itself quotes the evaluation's introductory statement that defendant " 'had suicidal

[62] *Hartsfield*, 277 SW3d at 244.

thoughts.' "[63] Dr. Shahid emphasized the suicidal ideation later in his evaluation, repeating that defendant had attempted suicide by drug overdose and stating that defendant continued to exhibit suicidal ideation—defendant "stated that he thinks about suicide 'all the time.' " Moreover, Dr. Shahid explained that defendant "was transferred to the psychiatric intensive care unit for his safety since the patient was thinking intensely about suicide, and he just does not want to live anymore."

Also, the majority distinguishes the psychiatric treatment that defendant received from other medical treatment and suggests that this distinction is determinative in confrontation cases.[64] This distinction confuses the *purpose* of documenting a psychiatric evaluation with its potential *effect* on future proceedings. Not only has the United States Supreme Court "never addressed" this issue,[65] at least one state court that considered it after *Crawford* (albeit in dicta) made no distinction between psychiatric treatment and other medical treatment.[66] There is simply no principled distinction for applying the Confrontation Clause differently when analyzing psychiatric medical treatment than when analyzing medical treatment for "physical" illnesses—particularly because courts must examine the *purpose* for which an out-of-court medical statement was created. As stated, Dr. Shahid explained in his evaluation that defendant was admitted to the psychiatric intensive care unit "for his safety" because he "was thinking

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[63] *Ante* at 533.

[64] See *ante* at 552-554.

[65] *Ante* at 553.

[66] *Commonwealth v Baumhammers*, 599 Pa 1, 60 n 28; 960 A2d 59 (2008) (explaining that statements made to an expert witness by the defendant's former psychologist, among other statements, were "not 'testimonial' hearsay as contemplated by the Court in *Crawford*").

intensely about suicide . . . .” Thus, the purpose of Dr. Shahid’s emergency care and treatment of defendant was no different than an emergency room physician’s treatment of a person with life-threatening physical injuries: the immediate stabilization of the patient.

The majority’s determination that Dr. Shahid’s evaluation was testimonial runs contrary to the United States Supreme Court’s Confrontation Clause caselaw on the matter. **The Court stated in *Melendez-Diaz* that “medical reports created for treatment purposes” are not testimonial, a position to which the *entire* Court subscribed.**[67] In holding to the contrary, the majority places great weight on the fact that, because Dr. Shahid was aware of and acknowledged the pendency of charges against defendant, an “ ‘ “objective [psychiatrist] would reasonably [be led] to believe that [his statements] would be available for use at a later trial.” ’ ”[68] Notwithstanding the fact that the standard that the majority quotes is not the standard of law that is binding on our decision today,[69] the majority

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[67] See n 3 *supra*.

[68] *Ante* at 533, quoting *Crawford*, 541 US at 51.

[69] The majority treats as controlling a standard that the United States Supreme Court has not adopted, applying one of the three *possible* formulations that the *Crawford* Court noted had been used to define testimonial statements. However, the *Crawford* Court *expressly declined* to choose one of the three methods as controlling, noting only that “interrogations by law enforcement officers fall squarely within” the class of testimonial statements, however it is defined. *Crawford*, 541 US at 53. Moreover, one of the other formulations that the *Crawford* Court identified as a potential definition of “testimonial”—“ ‘extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions,’ ” *id.* at 51-52, quoting *White*, 502 US at 365 (Thomas, J., concurring)—leads to the result of this dissenting opinion, not the majority’s result. Contrary to the majority’s observation, see *ante* at 557 n 35, the *Crawford* majority, including Justice Thomas, concluded that this narrowest definition of “testimonial” included the statements at issue in *Crawford*. Thus, if it is “hardly fatal” to the majority’s position that this

fails to give appropriate credence to Dr. Shahid's efforts to diagnose defendant's medical problem and to create a treatment plan, efforts that were clearly articulated in the evaluation. The evaluation itself acknowledged that defendant would be hospitalized for "10-14 days" and would be receiving both prescription medications and psychotherapy during and after his hospitalization. In reading Dr. Shahid's entire evaluation, it is hard to conclude, as the majority does, that Dr. Shahid was *primarily* concerned with anything other than defendant's mental health.

As stated, the *Melendez-Diaz* Court affirmed the nontestimonial nature of medical reports created for treatment purposes. *Melendez-Diaz* emphasized that reviewing courts must examine the *primary purpose* of the statement's creation when determining whether it runs afoul of the Confrontation Clause. The majority has not provided any indication that Dr. Shahid did anything other than treat defendant for his severe depression.

3. IMPEACHMENT

Even if, contrary to my conclusion above, Dr. Shahid's evaluation was testimonial in nature, the Con-

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alternative formulation would result in the conclusion that the statement at issue in this case was not testimonial, *ante* at 557 n 35, then it is equally nonfatal to this dissent's position that the majority's preferred formulation would lead to the conclusion that the statement at issue in this case was testimonial. In short, because *Crawford*'s various potential definitions of "testimonial" do not lead to a clear result one way or the other regarding how to apply the Confrontation Clause in this case, we must examine how the Court has applied and refined its understanding of the Confrontation Clause after *Crawford*.

The majority claims that *Melendez-Diaz* employed its preferred test "to ascertain that the statement at issue was testimonial[.]" *Ante* at 532. However, like the *Crawford* Court, the *Melendez-Diaz* Court reiterated the fact that " '[v]arious formulations of this core class of testimonial statements exist,' " without expressly adopting one. *Melendez-Diaz*, 557 US at 310, quoting *Crawford*, 541 US at 51.

frontation Clause "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted."[70] Accordingly, notwithstanding the majority's suggestion that we should not engage in what it terms "mental gymnastics" in determining whether the prosecutor's use of Dr. Shahid's evaluation was to prove the truth of the matter asserted,[71] that is just the type of analysis that the United States Supreme Court's Confrontation Clause jurisprudence requires.

In order to meet his burden of proving by a preponderance of the evidence that he was legally insane at the time of the crimes,[72] defendant presented the testimony of Dr. Mistry. On direct examination, Dr. Mistry admitted that he reviewed "records from Flower Hospital, Dr. Shahid's records . . . ." Dr. Mistry's admission that he reviewed Dr. Shahid's records opened the door to inquiry about how Dr. Shahid's records influenced Dr. Mistry's expert opinion, including any points of disagreement between his opinion and the information contained in Dr. Shahid's evaluation.

Far from "[going] well beyond the scope of the direct examination," the prosecutor appropriately sought to undermine the opinion proffered by defendant's expert, that the defendant was legally insane, by using Dr. Shahid's evaluation to impeach that opinion.[73] And Dr. Shahid's evaluation was a powerful tool for impeachment because Dr. Shahid concluded that defendant did not suffer from psychosis when he evaluated him

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[70] *Crawford*, 541 US at 60 n 9, citing *Tennessee v Street*, 471 US 409, 414; 105 S Ct 2078; 85 L Ed 2d 425 (1985).

[71] *Ante* at 531 n 10.

[72] MCL 768.21a(3).

[73] *Ante* at 530.

shortly after the crimes were committed.[74] Having read Dr. Shahid's evaluation and records in reaching his own opinion, Dr. Mistry was properly compelled by the prosecutor's impeachment to explain how he came to an entirely different conclusion than the treating physician concerning the defendant's mental status at the time of the crimes.

The majority's extensive quotations from the trial transcripts indicate nothing to the contrary: Dr. Mistry confirmed that he reviewed Dr. Shahid's evaluation, including Dr. Shahid's diagnosis of defendant, and indicated that he disagreed with that diagnosis because of his review of the entire record, including information that Dr. Shahid did not have at his disposal. And yet, notwithstanding these extensive quotations, the majority does not provide sufficient context to understand the nature of the prosecutor's cross-examination.[75] That

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[74] In order to prove legal insanity, MCL 768.21a(1) requires a showing that the defendant "lacks substantial capacity either to appreciate the nature and quality or the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of the law." I agree with the majority's observation that "[a]t trial, the medical term that both testifying experts used as shorthand for describing legal insanity was 'psychosis . . . .' " *Ante* at 529. See also 2 *Shorter Oxford English Dictionary* (6th ed), p 2392 (defining "psychosis" as "severe mental illness, derangement, or disorder involving a loss of contact with reality").

[75] Importantly, the prosecutor's entire cross-examination did not involve Dr. Shahid's evaluation; rather, the entire cross-examination was focused on impeaching Dr. Mistry's opinion. The prosecutor raised other points completely unrelated to Dr. Shahid's evaluation in an effort to show that Dr. Mistry's opinion did not incorporate relevant data. For instance, the prosecutor elicited testimony from Dr. Mistry that he did not view the video captured by a home-surveillance system that "shows, at least partially, what the Defendant was actually doing at the time of the crime," although Dr. Mistry admitted that review of that video "would be helpful" to any conclusion regarding defendant's state of mind at the time of the crime. The prosecutor also questioned Dr. Mistry regarding defendant's behavior at his mother's house, including defendant's actions to conceal the gun in his mother's heat register. Dr. Mistry

context shows that the prosecutor initially sought to use factual information contained in Dr. Shahid's evaluation that conflicted with Dr. Mistry's own observations and proves the impeachment purpose of questioning Dr. Mistry about the evaluation.

One of the points of conflict between Dr. Mistry's testimony and Dr. Shahid's evaluation was the extent to which defendant remembered what occurred on the afternoon of March 28, 2007. As part of his inquiry into defendant's mental state, Dr. Mistry interviewed defendant, who explained that "[h]e had no recollection of the events of that time[,] only what he heard from other people." It was in challenging this point that the prosecutor first discussed the substance of Dr. Shahid's evaluation. After confirming that Dr. Mistry had read Dr. Shahid's evaluation, the prosecutor asked Dr. Mistry whether he was aware that defendant had explained to Dr. Shahid "that on the day that this happened he wanted [Krell] to feel my pain" and that defendant stated "that he remembers stopping his car and seeing that person who [defendant] believes was responsible for his son's death, and stated that that person took off in the street and, quote: I followed him across the street."

The prosecutor sought to impeach Dr. Mistry's credibility as an expert on the basis of these conflicting statements by defendant. This is evident from the prosecutor's suggestion that defendant had "a motivation not to tell the full truth [to Dr. Mistry] about his memory" because Dr. Mistry could help defendant's case "if he reaches a certain conclusion . . . ." While Dr.

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explained that, while he had not interviewed defendant's mother, he was aware that defendant "put the gun at his mother's house" and explained that a "deliberate effort to conceal" the gun would be a significant fact in evaluating defendant's mental status at the time of the crimes.

Mistry denied that defendant had lied to him regarding his lack of memory, he admitted that part of his diagnosis required him "to develop an opinion as to whether [defendant] is being sincere or whether [he's] misconstruing things or lying in order to paint a picture to you of [himself] in a certain way."

It was only after this point that the prosecutor cross-examined Dr. Mistry regarding Dr. Shahid's diagnosis. Thus, after raising the *factual* differences between Dr. Shahid's psychiatric evaluation session with defendant at the hospital and Dr. Mistry's later pretrial interview with defendant, the prosecutor sought to link those factual differences to the different diagnoses themselves. Indeed, the prosecutor asked Dr. Mistry whether he could "point to anything specific in [Dr. Shahid's evaluation] where you . . . can say he made a mistake," and Dr. Mistry could not. Rather, Dr. Mistry "[didn't] disagree with Dr. Shahid on his observations," only "as to the diagnosis."

In short, the prosecutor's use of Dr. Shahid's evaluation during his cross-examination of Dr. Mistry was for the purpose of impeaching Dr. Mistry's expert opinion, not to prove the truth of Dr. Shahid's evaluation.

However, the prosecutor did not just refer to Dr. Shahid's evaluation during his cross-examination of Dr. Mistry. The prosecutor also referred to the evaluation during his direct examination of his rebuttal expert witness, Dr. Balay. As with his cross-examination of Dr. Mistry, the prosecutor highlighted the differences between Dr. Shahid's psychiatric session with defendant and Dr. Balay's psychiatric interview of defendant. Dr. Balay explained that defendant "claimed to basically have no memory of any of the events" that occurred on the afternoon of March 28, 2007, even though she acknowledged that defendant had described to Dr. Sha-

hid some memories from that afternoon. Dr. Balay then explained to the prosecutor that defendant could either be suppressing the memories or "just be lying," but that she "[had] no way of knowing one way or the other." In the end, Dr. Balay indicated that she agreed with Dr. Shahid's conclusion that defendant was not psychotic. She also stated that she disagreed with Dr. Mistry's conclusion and explained her reasons for doing so. In particular, she determined that defendant had acted methodically in pursuit of his stated motive—that he "was furious at this man who he believed had caused the death of his son"—and that such methodical behavior is "the most relevant" factor in determining whether a person is able to conform his conduct to the requirements of the law. As with the cross-examination of Dr. Mistry, the purpose of the direct examination of Dr. Balay was to impeach Dr. Mistry's credibility and not necessarily to assert that Dr. Shahid's diagnosis was true.

Finally, the prosecutor referred to Dr. Shahid's evaluation during his closing argument, explaining that "it's real important to look at what Dr. Shahid had to say, even though he didn't testify here before you" and emphasizing that Dr. Shahid "reached the conclusion at the end [of] his examination that Mr. Fackelman was depressed, he had severe depression, but that there was no psychosis involved." However, this does not change the fact that during defendant's case-in-chief, the prosecutor used Dr. Shahid's evaluation for a proper impeachment purpose rather than to prove the truth of the matter asserted. Moreover, the trial court explained that "lawyers' statements and arguments are not evidence" and that "[e]vidence includes only the sworn testimony of witnesses, the exhibits which were admitted into evidence, and anything else I told you to

consider as evidence."[76] Because Dr. Shahid's evaluation meets none of these criteria, and because "jurors are presumed to follow their instructions,"[77] I cannot conclude that the prosecutor's closing argument prejudiced defendant. The trial court's cautionary instruction properly insulated the jury from any inappropriate use of Dr. Shahid's evaluation during closing argument.

Because the majority seriously errs in applying United States Supreme Court Confrontation Clause precedent to the instant case, I respectfully dissent and would hold that Dr. Shahid's medical evaluation was not testimonial and, therefore, not subject to the Confrontation Clause. Moreover, even if Dr. Shahid's evaluation were testimonial, it was primarily used not to prove the truth of the matter asserted, but to impeach defendant's expert witness. Accordingly, defendant's trial counsel did not err by failing to raise a Confrontation Clause objection to Dr. Shahid's evaluation.

C. HEARSAY

Even if Dr. Shahid's evaluation is not subject to the Confrontation Clause, it is still subject to the Michigan Rules of Evidence, including our evidentiary rules regarding hearsay. However, because counsel is not ineffective for failing to raise futile objections,[78] we must determine whether any objection to Dr. Shahid's evaluation on evidentiary grounds would have been successful.

As a preliminary matter, it is undisputed that Dr. Shahid's evaluation, among other facts and data, provided a basis for the testimony of the two expert witnesses in

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[76] See CJI2d 3.5(2) and (5).

[77] *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

[78] *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000) ("Trial counsel is not required to advocate a meritless position."); see also *People v Riley (After Remand)*, 468 Mich 135, 142; 659 NW2d 611 (2003).

this case.[79] Furthermore, MRE 703 provides, "The facts or data in the particular case upon which an expert bases an opinion or inference shall be in evidence."[80] However, even though such facts and data "shall be in evidence," they might be subject to our evidentiary rules regarding hearsay.[81]

"Hearsay is not admissible except as provided by" our evidentiary rules,[82] which define "hearsay" as "a

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[79] It is also undisputed that the two expert witnesses in this case were qualified to give testimony pursuant to the requirements of MRE 702. These requirements would only be relevant to Dr. Shahid if he were "a witness" who "testif[ied] . . . in the form of an opinion . . . ." MRE 702. Because I conclude that Dr. Shahid's evaluation was not testimonial, MRE 702 is inapplicable to whether his *evaluation* would be admissible under our hearsay rules.

[80] Contrary to the majority's conclusion, an expert may form his opinion "on historical data, *including* information and *opinions* contained in prior competency evaluations, when forming an opinion regarding a defendant's criminal responsibility." *People v Dobben*, 440 Mich 679, 698; 488 NW2d 726 (1992) (emphasis added). Thus, the fact of Dr. Shahid's diagnosis was one of several pieces of data contained within his evaluation and would not have to be redacted under MRE 703, as the majority suggests. Moreover, even if Dr. Shahid's diagnosis that defendant did not suffer from psychosis had not been a basis for the defense expert's witness, the rule of completeness, MRE 106, would have required that the entire evaluation be introduced into evidence because it "ought in fairness . . . be considered contemporaneously with" the rest of the evaluation.

[81] Although the *Dobben* Court ruled that "[a]n expert witness may also base his opinion on hearsay information," *id.* at 695-696, I note that this Court last interpreted the intersection of our hearsay rules with MRE 703 before the 1995 and 2003 amendments of MRE 703. Before these amendments, MRE 703 provided, in relevant part, "The court *may require* that underlying facts or data essential to an opinion or inference be in evidence." 402 Mich cx (1978) (emphasis added). Thus, before the amendments, MRE 703 gave the trial court discretion whether to require that the facts and data underlying an expert opinion be admitted into evidence. Because I conclude that an exception to the hearsay rules allows for the introduction of Dr. Shahid's evaluation, I need not determine whether that portion of *Dobben* remains viable in light of the amendments of MRE 703, and I would leave that determination to another day.

[82] MRE 802.

statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."[83] It is uncontested that Dr. Shahid's evaluation is "a statement, other than the one made by the declarant while testifying at the trial or hearing . . . ."[84]

Assuming for the sake of argument that the prosecutor's purpose for referring to Dr. Shahid's evaluation in closing was, in substantial part, to use it to prove the truth of the matter asserted,[85] MRE 803(6), the business records exception, nevertheless, allows introduction of "[a] memorandum, report, record, or data compilation, in any form, of acts, transactions, occurrences, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge . . . ." As a diagnosis of defendant's psychiatric condition, Dr. Shahid's evaluation falls squarely within this exception and therefore was admissible into evidence.

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[83] MRE 801(c).

[84] However, defendant's statements contained within Dr. Shahid's evaluation are not hearsay-within-hearsay because they are defendant's *own* statements. MRE 801(d)(2)(A). Moreover, even if they are hearsay, they are "[s]tatements made for purposes of medical treatment," MRE 803(4), and are therefore not excluded by the hearsay rule.

[85] Although the prosecutor asserted in closing argument that "it's real important to look at what Dr. Shahid had to say," the prosecutor's initial use of Dr. Shahid's evaluation was to impeach the credibility of defendant's expert witness and the prosecutor's direct examination of his expert witness sought to explain the foundation of his expert's opinion. As stated earlier in this opinion, even if the prosecutor sought to use the evidence to prove the truth of the matter asserted in his closing argument, the trial court's instruction to the jury that "[t]he lawyers' statements and arguments are not evidence," that "[t]hey're only meant to help you understand the evidence and each side's legal theories," and that the jury "should only accept things the lawyers say that are supported by the evidence or by your own common sense and general knowledge" properly insulated the jury from any inappropriate use of Dr. Shahid's evaluation during closing argument.

The majority correctly observes that MRE 803(6) also requires authentication by "the testimony of the custodian or other qualified witness . . . ."[86] However, the majority entirely overlooks the fact that *defendant* was required to admit Dr. Shahid's evaluation into evidence in the first instance, since defendant's expert admitted that Dr. Shahid's evaluation comprised, in significant part, the "facts and data" on which he based his opinion.[87] Moreover, defendant does not dispute the authenticity of Dr. Shahid's evaluation, even on appeal. Since his own expert first relied on the evaluation, defendant can hardly (certainly not legitimately) claim that when it was used in rebuttal, the evaluation became inauthentic. Thus, this case does not even present a situation in which defendant simply failed to object to the authenticity of Dr. Shahid's evaluation; rather, defendant *affirmatively endorsed* its authenticity because his own expert relied on it in forming his opinion, which was the foundation of the insanity defense. Under such circumstances, defendant cannot receive relief on the basis of authentication error.[88]

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[86] MRE 803(6) refers to the custodian's role to testify regarding whether the business record was "kept in the course of a regularly conducted business activity" and whether it "was the regular practice of that business activity to make the memorandum, report, record, or data compilation . . . ." It does not refer to additional questions that the majority raises, such as those questions regarding the substance of Dr. Shahid's evaluation: whether psychiatric evaluations compiled in the regular practice of treating patients "often refer to a patient's pending criminal charges" or whether doctors creating those evaluations "typically review other materials, such as police reports . . . ." *Ante* at 536-537 n 15. These questions appear to be outside the scope of what a custodian of records would be expected to know and certainly beyond the scope of MRE 803(6).

[87] MRE 703.

[88] This dissent does not suggest that the authentication requirement must "be stricken from" MRE 803(6), *ante* at 536 n 15. Rather, this dissent concludes that any failure to authenticate Dr. Shahid's evaluation

D. TRIAL STRATEGY

Even if I were to conclude that trial counsel erred by failing to raise a Confrontation Clause or hearsay objection to Dr. Shahid's evaluation (which I do not), before granting defendant relief, the Court must also determine whether that failure constituted an error "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment."[89] In undertaking this inquiry, *Strickland* made clear that a defense counsel's trial strategy must be given deference because "[e]ven the best criminal defense attorneys would not defend a particular client in the same way."[90] The Court explained:

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.[91]

Instead, reviewing courts must "evaluate the conduct from counsel's perspective at the time," and defendants must "overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' "[92]

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cannot inure to defendant's benefit because his own expert admitted using Dr. Shahid's evaluation in forming his own expert opinion and, therefore, the evaluation was required to be placed into evidence by *defendant* pursuant to MRE 703. Simply put, defendant cannot benefit from his own failure to introduce the evaluation.

[89] *Strickland*, 466 US at 687.

[90] *Id.* at 689.

[91] *Id.*

[92] *Id.*, quoting *Michel v Louisiana*, 350 US 91, 101; 76 S Ct 158; 100 L Ed 83 (1955).

To begin with, defendant's trial strategy was to raise the defense of insanity rather than contest the factual elements of the charged crimes. Although the prosecutor must prove the factual elements of the charged crimes beyond a reasonable doubt, the *defendant* bears the burden of proving insanity by a preponderance of the evidence.[93] In this case, defendant's trial counsel stated at the *Ginther* hearing that he did not object when the prosecutor first cross-examined defendant's expert witness about Dr. Shahid's evaluation because he "didn't want to call attention to" it, which would have undermined the insanity defense. Moreover, counsel also stated that he "had a discussion as to whether or not to even present Dr. Shahid" but explained that "the concern was that he would have been a bad witness if everything in that [evaluation] would have come out, and it would have hurt rather than helped" defendant's insanity defense.[94]

Defense counsel thus had a dilemma: his own expert had relied on portions of Dr. Shahid's evaluation to establish his own opinion that defendant was legally insane, but the *entire* evaluation was harmful to the insanity defense. According to the defense expert, he agreed with all of Dr. Shahid's evaluation *except* his conclusion that the defendant had not suffered a break with reality when he committed the crimes. Accordingly, counsel, after apparent consultation with defen-

[93] MCL 768.21a(3).

[94] Presumably, this potentially damaging testimony would have included issues that the majority is curious about, such as whether Dr. Shahid's "rationale [would not be] viewed as compelling," whether "his diagnosis of 'no psychosis' did not necessarily mean that defendant was not legally insane at the time of the incident," whether "the prosecutor's expert had misinterpreted his diagnosis," or whether "he . . . just [would have been] an ineffectual witness[.]" *Ante* at 563-564 n 41. Notwithstanding the majority's curiosity, one thing is certain: defense counsel did not want the jury to hear Dr. Shahid's answers to these questions.

dant, made a *conscious decision to downplay Dr. Shahid's evaluation*. Given that the evaluation contained information detrimental to his client's defense—particularly the conclusion that defendant was not suffering from psychosis and was thus legally sane—I cannot conclude that this trial strategy was objectively unreasonable. To the contrary, defendant's strategy may have represented the best strategy possible: defendant was allowed to rely on favorable portions of Dr. Shahid's statement as the basis for his insanity defense while avoiding having Dr. Shahid take the stand to explain his finding of "no psychosis," which could have completely undercut defendant's proffered defense. Indeed, this defense trial strategy proved partially successful; the jury found defendant guilty but mentally ill. The majority ought to explain why this strategy should not be given the deference *Strickland* requires.

Defendant now claims that the failure to call Dr. Shahid to the witness stand violated his rights under the Confrontation Clause, and the majority treats this failure as if it were an omission. It has been made clear that this was not an omission, but a conscious strategy that defendant's trial counsel employed.[95] When properly considered as a conscious decision to avoid calling as a witness an expert that counsel reasonably thought would have been "a bad witness," defendant's claim of error seems to be the very danger that the *Strickland* Court warned against: allowing defendant to "second-

[95] The majority makes much of defense counsel's claim at the *Ginther* hearing that he did not consider the references to Dr. Shahid's evaluation a confrontation violation. To begin with, counsel did not err in failing to recognize a confrontation violation *because there was no confrontation violation to recognize*. But even if defendant had a right to confront Dr. Shahid, defense counsel's unequivocal trial strategy sought to downplay Dr. Shahid's opinion of defendant's mental state and in fact resulted in the affirmative decision *not* to call Dr. Shahid as a witness.

guess counsel's assistance after conviction or adverse sentence . . . ."[96] The majority compounds this problem by "examining counsel's defense after it has proved unsuccessful, [and] conclud[ing] that a particular act or omission of counsel was unreasonable."[97] Because I do not believe that this Court should reward defendants for pursuing a reasonable trial strategy then using it as an appellate parachute, I also dissent on this alternative basis from the majority's conclusion that defense counsel rendered objectively unreasonable assistance of counsel.[98]

The majority explains that, because "insanity is an affirmative defense with respect to which a defendant carries the burden of proof,"[99] defendant had no choice but to open the door to questioning about his mental state through expert testimony. Moreover, the majority explains that "[n]o such [expert] witness could have neglected altogether to mention the existence of the report of the only person who actually interviewed defendant in the immediate wake of his conduct."[100] Precisely! These observations prove just how completely the majority fails to understand basic impeachment and reinforce just how appropriately strategic was defense counsel's decision *not* to call Dr. Shahid as a witness. It would appear that the majority believes that

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[96] *Strickland*, 466 US at 689.

[97] *Id.*

[98] Because I conclude that defense counsel did not render constitutionally deficient assistance of counsel by failing to object to the use of Dr. Shahid's evaluation on Confrontation Clause grounds, I need not engage in the second prong of the *Strickland* ineffective assistance analysis: the potential prejudicial effect of the claimed error. Accordingly, I neither agree nor disagree with the majority's analysis regarding whether the alleged confrontation error resulted in prejudice requiring reversal.

[99] *Ante* at 544; see also MCL 768.21a(3).

[100] *Ante* at 544.

no impeachment of the defense expert could have occurred under these circumstances unless the prosecutor called Dr. Shahid as his own witness. If the Confrontation Clause can properly be read to require this result, then *Crawford* will seem a tiny shift compared to the seismic destruction that this new majority rule will require.

There is no question that Dr. Shahid's evaluation contained statements that any expert would have had to take into account when forming an opinion regarding defendant's mental state. As explained previously, the evaluation also revealed inconsistencies concerning what defendant remembered about the afternoon in question, inconsistencies that *any* expert witness would have had to resolve. Yet precisely because the defense expert was silent about these inconsistencies, the prosecutor cross-examined him regarding his selective use of the evaluation. The majority would raise this strategic silence to a constitutional level and insulate the expert from such cross-examination. I would not hamstring the impeachment of an expert witness in such a way.

IV. CONCLUSION

Because Dr. Shahid's evaluation was initially used by the defense as a part of its legitimate trial strategy to establish its insanity defense, the prosecutor's use of that same evaluation in rebuttal cannot constitute a Confrontation Clause violation. The majority's conclusion to the contrary rewards a clever appellate parachute strategy.

Secondarily, Dr. Shahid's evaluation was a "medical report[] created for treatment purposes . . . ."[101] United

[101] *Melendez-Diaz*, 557 US at 312 n 2.

States Supreme Court precedent could not be clearer that the Confrontation Clause did not prohibit introduction of the evaluation into evidence. The majority's failure to apply the Supreme Court's Confrontation Clause doctrine can only cause further confusion in an already confusing area of law. Accordingly, I would hold that the prosecutor's use of Dr. Shahid's evaluation did not violate defendant's constitutional right to confront the witnesses against him. Furthermore, the evaluation was admissible under the business records hearsay exception, and defense counsel's failure to object to the prosecutor's use of the evaluation did not render his assistance constitutionally ineffective, nor was his trial strategy to downplay Dr. Shahid's evaluation objectively unreasonable. Accordingly, I would affirm the judgment of the Court of Appeals and affirm defendant's convictions.

ZAHRA, J., concurred with YOUNG, C.J.

APPENDIX

47-year-old Caucasian married male was referred by Rescue Crisis Mental Health Services with an emergency application indicating that the patient's son was killed eight months ago in a traffic accident, and the patient drove to the man's home with a gun who patient felt was responsible for the death of his son. Patient has severe depression and had suicidal thoughts to overdose. The emergency application also indicated that the Monroe County sheriff wants to be called when the patient is discharged to home.

HISTORY OF PRESENT ILLNESS: Patient stated that he had been feeling down and depressed since June of 2006 after his 17-year-old son was killed in an auto accident. Patient stated that his son was riding

with other individuals in the car and somebody chased his son's car, and as a result there was an accident and his son was killed in that accident. Patient complains of feeling sad, blue, down and depressed. Complains of poor sleep, poor appetite, poor concentration and low energy. Feels worthless and has feelings of guilt. Patient states he just feels empty inside. Has feelings of hopelessness. Patient stated that he thinks about suicide "all the time." At the present time, patient does not have any active plan of killing himself. Patient stated that after his son was killed, he took an overdose of pills that he had over-the-counter. The patient stated at that time, he informed his primary care physician and was started on Prozac 20 mg daily that was later on increased to 40 mg daily. Patient stated that prior to this admission, he went to the person who he believes was responsible for his son's death and, "I wanted him to feel my pain." Patient states that during the legal trial and otherwise, the person who patient believes was responsible for the death of his son has not shown any remorse, and this makes patient very angry. The patient stated that he remembers stopping his car and seeing that person who the patient believes was responsible for his son's death and stated that that person took off in the street and, "I followed him across the street." Patient states, "I do not remember driving to Michigan and driving to his house. I do not remember what happened, and the only thing I remember is that I saw a terrified look on that man's face, and at that time I felt I just woke up and started apologizing to that man." The patient stated that he went back to his car and drove away and stated that he stopped at his mother's house, and he believes that he left the gun that he had with him at his mother's house. Patient stated that he had a handgun for years and years that he kept in a dressing drawer in his bedroom. The patient states he

does not remember taking the gun out of the drawer when he went to that person's house in Michigan. When I asked him about if there were bullets in the gun, patient states he does not remember, but he thought that he had bullets in his pocket and stated that he believes that he flushed the bullets down the toilet or he believes that he threw his bullets away.

Patient stated that since the death of his son on June 5, 2006, "My whole life has been torn apart," then patient went on to say that on Tuesday he went to his son's school, Whitmer High School, where his friends were playing baseball and states that he watched the baseball game, but all the time when he was watching the baseball he missed his son and stated the school team won, and when he left the playground he was just in tears and he was feeling sad, and then he believes that while going to the game, brought a lot of memories back to him and his feeling of loss got more intensified.

PAST PSYCHIATRIC HISTORY: Denies previous psychiatric treatment. As mentioned above, patient did take an overdose after the death of his son, then he was started on Prozac by his primary care physician.

MEDICAL HISTORY: [Redacted.]

FAMILY HISTORY: [Redacted.]

SOCIAL HISTORY: [Redacted.] Denies abusing drugs or alcohol, except since the death of his son he had been drinking more heavily "to numb myself." Patient described his spiritual life that he used to believe in God but "not anymore. If there is a God, why did he give me my son and then took it away. I used to pray but not anymore." Patient stated that he goes to church to support his wife.

MENTAL STATUS EXAMINATION: Patient looks of his stated age, not in any acute physical distress.

Mood is dysphoric, and affect is depressed. Temperature 97.7. Pulse 85. Respirations 16. Blood pressure 126/79 on admission. Today, patient's temperature is 97.2. Pulse 81. Respirations 18. Blood pressure 141/95. Patient feels helpless, hopeless and worthless. The patient has suicidal thoughts but denies any active plans of hurting himself. Initially, patient was admitted to the adult closed unit but was transferred to the psychiatric intensive care unit for his safety since the patient was thinking intensely about suicide, and he just does not want to live anymore. Patient feels hopeless, helpless and worthless. Has marked feelings of anger and guilt. Oriented to time, place and person. Recent and remote memory is intact, and intelligence is normal. Speech is relevant and goal-oriented. During most part of this interview, patient was crying and sobbing. He is denying auditory or visual hallucinations but states that after the death of his son, "I was smelling things and I felt things crawling under my skin, but not anymore." Attention and concentration are extremely poor. Patient states, "My mind is going all the time. I cannot shut up my mind. I am thinking about my son all the time." At the present time, patient is denying any homicidal thoughts or plans. I specifically asked the patient if he wants to kill the person that he feels is responsible for the death of his son, and patient stated, "I just feel sorry for him. I am not thinking of killing him." Patient has suicidal thoughts but does not have any active plan of hurting himself. Patient has been admitted to the psychiatric intensive care unit for his safety.

STRENGTHS AND LIMITATIONS: Patient has supportive family and is employed, which is a strength. Loss of son is the limitation.

ESTIMATED LENGTH OF STAY: 10-14 days.

DIAGNOSIS:

Axis I: Major depression, single episode, severe without psychosis.

Axis II: Deferred.

Axis III: Hyperlipidemia.

Axis IV: Severe (loss of son).

Axis V: GAF 20.

PLAN:

Continue Prozac, and I will add Seroquel. Off-label use of Seroquel was discussed with the patient. Seroquel is added to help patient with sleep, agitation and his complaint that he cannot shut his mind. Side effects, risks versus benefits of treatment with psychotropics and alternatives to the treatment were discussed with the patient. Risk of not receiving any treatment was also discussed with the patient. After discussion, we mutually decided to continue with the current treatment.

Supportive psychotherapy.

Unit milieu.

After discharge, patient to follow at the Community Mental Health Center or a psychiatrist of his choice.

Patient also has legal charges against him through the State of Michigan 38th Judicial Circuit, and count one is home invasion, first degree, and count two is assault with a dangerous weapon (felonious assault).

[signed] Agha Shahid, M.D., 3/31/7

ORDERS IN CASES

ORDERS ENTERED IN CASES BEFORE THE SUPREME COURT

Summary Disposition March 18, 2011:

BOWENS v ARY, INC, No. 140296; Court of Appeals No. 282711. Leave to appeal having been granted, and the briefs and oral arguments of the parties having been considered by the Court, we hereby reverse in part the September 24, 2009 judgment of the Court of Appeals, and we reinstate the December 4, 2007, summary disposition order of the Wayne Circuit Court.

After ten years of litigation—during which time this case has been summarily dismissed, reversed and remanded to the trial court for additional discovery, summarily dismissed for a second time, and reversed and remanded yet again—our review of this matter is limited to plaintiffs' one remaining claim. Specifically, plaintiffs allege that defendants violated Michigan's eavesdropping statutes, MCL 750.539a *et seq*., which prohibit "[a]ny person who is present or who is not present during a *private conversation* [from] willfully us[ing] any device to eavesdrop upon the conversation without the consent of all parties thereto . . . ." MCL 750.539c (emphasis added). " '[P]rivate conversation' means a conversation that a person reasonably expects to be free from casual or hostile intrusion or surveillance." *People v Stone*, 463 Mich 558, 563 (2001). After considering all the evidence of record in the light most favorable to plaintiffs, the nonmoving parties, *Quinto v Cross & Peters Co*, 451 Mich 358, 362 (1996), we conclude that no genuine issue of material fact exists to warrant a trial concerning whether the conversation at issue constituted a "private conversation."

As the Court of Appeals dissenting opinion correctly asserted, under the circumstances presented, "no reasonable juror could conclude that plaintiffs had a reasonable expectation of privacy in the recorded conversation" at issue. The following evidence compels this conclusion: (1) the general locale of the meeting was the backstage of the Joe Louis arena during the hectic hours preceding a high-profile concert, where over 400 people, including national and local media, had backstage passes; (2) the concert-promoter defendants were not receptive to the public-official plaintiffs' requests and, by all accounts, the parties' relationship was antagonistic; (3) the room in which plaintiffs chose to converse served as defendants' operational headquarters with security personnel connected to defendants controlling the open doors; (4) there were at least nine identified people in the room, plus unidentified others who were free to come and go from the room, and listen to the conversation, as they pleased; (5) plaintiffs were aware that there were multiple camera crews in the vicinity, including a crew from MTV and a crew specifically hired by defendants to record backstage matters of interest; (6) and video evidence shows one person visibly filming in the room where the conversation took place while plaintiffs were present, thereby establish-

ing that at least one cameraman was openly and obviously filming during the course of what plaintiffs have characterized as a "private conversation." Given these facts, plaintiffs could not have reasonably expected that their conversation with defendants would "be free from casual or hostile intrusion or surveillance." *Stone*, 463 Mich at 563. To the contrary, the conversation strikes us as one that was uniquely defined by both "casual" and "hostile" "intrusion," and "surveillance." Accordingly, although a reasonable expectation of privacy is "generally" a question of fact, *id.* at 566, no such question reasonably exists in this case.

MARILYN KELLY, J. (*dissenting*). I respectfully dissent from the Court's order reversing the judgment of the Court of Appeals and reinstating the trial court's order granting defendants' motion for summary disposition. I believe that material questions of fact exist regarding whether plaintiffs could have reasonably expected their conversation with defendants to be private. Accordingly, I would affirm the Court of Appeals.

This case involves application of the Michigan eavesdropping statutes[1] to defendants' videotaping of a conversation between plaintiffs and defendants. During that conversation, plaintiffs demanded that a video, which they believed to be unsuitable for a young audience, not be played during an upcoming concert. The concert included performances by Dr. Dre, Snoop Dogg, and Eminem, among others. Defendants did not play the video during the concert. But they used portions of a videotape of the conversation with plaintiffs in a "bonus track" of a DVD of the concert tour, which drew a worldwide audience.

Plaintiffs filed suit alleging, among other things, invasion of privacy, fraud, and eavesdropping. The trial court granted summary disposition to defendants on all of plaintiffs' claims, ruling that plaintiffs did not have a reasonable expectation of privacy in the conversation. The Court of Appeals affirmed the dismissal of plaintiffs' claims with the exception of the eavesdropping claim. It concluded that there were outstanding issues of fact as to whether the conversation was secretly taped and whether plaintiffs had a reasonable expectation that the conversation would be private.[2] We denied defendants' interlocutory application for leave to appeal.[3]

On remand, the trial court again granted summary disposition to defendants. It concluded that plaintiffs did not have a reasonable expectation that the conversation would be private. The Court of Appeals reversed the trial court's decision on the eavesdropping claim, concluding that plaintiffs presented compelling issues of fact that only a jury may resolve.[4]

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[1] MCL 750.539a *et seq*.

[2] *Bowens v Aftermath Entertainment*, unpublished opinion per curiam of the Court of Appeals, issued April 19, 2005 (Docket No. 250984).

[3] *Bowens v Aftermath Entertainment*, 474 Mich 1111 (2006).

[4] *Bowens v ARY, Inc*., unpublished opinion per curiam of the Court of Appeals, issued September 24, 2009 (Docket No. 282711).

A majority of this Court holds that plaintiffs could not have reasonably expected that their conversation with defendants would be free from casual or hostile intrusion or surveillance. I disagree. MCL 750.539c prohibits "[a]ny person who is present or who is not present during a private conversation [from] willfully us[ing] any device to eavesdrop upon the conversation without the consent of all parties thereto . . . ." A "private conversation" is one in which a person reasonably expects to be free from casual or hostile intrusion or surveillance.[5] Whether a conversation is private depends on the intent and reasonable expectation of the plaintiff.[6] And whether a person can reasonably expect privacy in a conversation generally will present a question of fact.[7]

Applying those principles to this case, I cannot conclude that the Court of Appeals clearly erred in holding that issues of fact exist concerning whether the conversation was "private" under the statute. Without question, some portions of a conversation between the parties were openly recorded. But a review of the recorded video footage submitted to the Court reveals that it is quite possible that the conversation at issue was secretly taped. Although defendants contend that the presence of the video camera should have been obvious, there is no footage of the filming itself. It is not clear whether the camera was visible when the contested filming occurred. Moreover, defendants' representatives explicitly acquiesced in plaintiffs' demand that the conversation be held in private. Hence, I believe that a material question of fact exists concerning whether plaintiffs reasonably expected the conversation at issue to be private. At the very least, it is not a question that this Court should definitively answer as a matter of law.

A majority of the Court finds that six facts compel the conclusion that no reasonable juror could conclude that plaintiffs had a reasonable expectation of privacy: (1) the meeting was held backstage at Joe Louis Arena during the hectic hours preceding a high-profile concert where over 400 people, including national and local media, had backstage passes, (2) the defendant concert-promoters were not receptive to the requests of plaintiffs, who were public-officials, and by all accounts, the relationship was antagonistic, (3) the room in which plaintiffs chose to converse was defendants' operational headquarters, and security personnel connected to defendants controlled the doors, (4) at least nine people in the room, plus others who were unidentified, were free to listen to the conversation and come and go from the room, (5) plaintiffs were aware that there were multiple camera crews in the vicinity, including one from MTV and one specifically hired by defendants to record backstage matters of interest, and (6) video evidence shows one person visibly filming in the room where the conversation took place while plaintiffs were present.

Several of these facts have no relevance to whether plaintiffs had a reasonable expectation of privacy in their conversation with defendants.

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[5] *People v Stone*, 463 Mich 558, 563 (2001).

[6] *Dickerson v Raphael*, 461 Mich 851 (1999).

[7] *Stone*, 463 Mich at 566.

First, the location of the meeting and the fact that many people had backstage passes are irrelevant to whether plaintiffs reasonably expected the conversation to be private. Simply because many people were permitted entry to the room at one time or another does not render a conversation held there open to all of them. Second, the fact that plaintiffs and defendants had an antagonistic relationship is wholly immaterial to whether they engaged in a private conversation. Third, it does not follow as a matter of law that, merely because one party controlled access to the room where the parties conversed, a private conversation did not occur there. Fourth, the fact that camera crews were in the vicinity does not mean that plaintiffs could not reasonably expect a private conversation, especially since defendants explicitly agreed to a private conversation. Fifth, the presence of unidentified people in the room does not mean that the conversation at issue was not private. Rather, it simply establishes that people had access to the room who may or may not have been part of a private conversation.

I believe that the majority erroneously substitutes its judgment for that of the trier of fact. As we stated in *Stone*, "whether a person can reasonably expect privacy in a conversation generally will present a question of fact."[8] I would affirm the judgment of the Court of Appeals and hold that, viewing the evidence in a light most favorable to plaintiffs, there exists a material question of fact with regard to whether the parties' conversation was private.[9] Accordingly, I respectfully dissent.

Leave to Appeal Denied March 18, 2011:

ALESIA HARRIS v GENERAL MOTORS CORPORATION, No. 140241; Court of Appeals No. 285426.

HATHAWAY, J., would grant leave to appeal.

POLLARD v SUBURBAN MOBILITY AUTHORITY FOR REGIONAL TRANSPORTATION, No. 140322; Court of Appeals No. 288851.

MARILYN KELLY and HATHAWAY, JJ., would grant leave to appeal.

GREEN v PIERSON, No. 140808; Court of Appeals No. 289588.

CAVANAGH, MARILYN KELLY, and HATHAWAY, JJ., would grant leave to appeal.

PEOPLE v ROBERT DUNCAN, No. 141672; Court of Appeals No. 292602.

PEOPLE v IVEY, No. 141795; Court of Appeals No. 291592.

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[8] *Id.*

[9] "A court reviewing a motion for summary disposition must consider the pleadings, affidavits, depositions, admissions, and any other evidence in favor of the party opposing the motion, and grant the benefit of any reasonable doubt to the opposing party." *Radtke v Everett*, 442 Mich 368, 374 (1993).

Summary Disposition March 23, 2011:

In re CW, No. 140841; Court of Appeals No. 292866. By order of November 19, 2010, while retaining jurisdiction, we remanded this case to the Genesee Circuit Court, Family Division, for further proceedings. 488 Mich 935 (2010) On order of the Court, the circuit court having conducted an evidentiary hearing pursuant to MCL 710.45(2) and having issued its opinion and order on January 20, 2011, we now affirm the circuit court's decision. The circuit court did not clearly err in holding that the petitioners had not shown by clear and convincing evidence that the decision of the Superintendent of the Michigan Children's Institute to withhold consent to the petitioners to adopt the minor children was arbitrary and capricious.

PEOPLE v TIMOTHY MILLER, No. 140921; Court of Appeals No. 287859. By order of June 28, 2010, the application for leave to appeal as cross-appellant the February 16, 2010, judgment of the Court of Appeals was held in abeyance pending the decision in *People v Smith* (Docket No. 140371). On order of the Court, the case having been decided on December 29, 2010, 488 Mich 193 (2010), the application for leave to appeal as cross-appellant is again considered and, pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we reverse that part of the Court of Appeals' judgment that vacated the defendant's sentence and remanded for resentencing, and we reinstate the judgment of sentence. Offense variable 19 was correctly scored at 10 points. See *People v Smith*, *supra*.

PEOPLE v CORRIN, No. 141779; Court of Appeals No. 29047. By order of November 22, 2010, the application for leave to appeal the July 27, 2010, judgment of the Court of Appeals was held in abeyance pending the decision in *People v Smith* (Docket No. 140371). On order of the Court, the case having been decided on December 29, 2010, 488 Mich 193 (2010), the application is again considered and, pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we reverse in part the judgment of the Court of Appeals. Offense variable (OV) 19 was properly scored by the trial court because that offense variable provides for the consideration of conduct after the completion of the sentencing offense. *People v Smith*, 488 Mich 193 (2010). OV 12 was properly scored by the trial court for the reasons stated in the Court of Appeals dissent. The psychological injury suffered by the victim's family members and the likelihood of the defendant reoffending were properly considered by the trial court as substantial and compelling reasons that justify a departure from the statutory sentencing guidelines. Further, we are not persuaded that the standards set forth in *People v Hill*, 221 Mich App 391, 398 (1997), require reassigning the case to a different judge. Accordingly, we remand this case to the Lenawee Circuit Court so that the resentencing ordered by the Court of Appeals can occur before the same judge. In all other respects, leave to appeal is denied.

PEOPLE v CARR, No. 141849; Court of Appeals No. 299922. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate the sentence of the Lenawee Circuit Court, and we remand this case to that

court for resentencing. The trial court committed plain legal error in scoring offense variable 1 because the defendant did not use the methadone against her child as a weapon, as is required to score the variable. MCL 777.31. In all other respects, leave to appeal is denied. We do not retain jurisdiction.

BILLINGS v MICHIGAN LIABILITY PARTNERS, No. 141978; Court of Appeals No. 291889. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we reverse that part of the Court of Appeals' decision that reinstated the plaintiff's claim of discrimination under the Persons with Disabilities Civil Rights Act, MCL 37.1202 *et seq*. Assuming arguendo that the plaintiff succeeded in demonstrating a disability that qualifies under the act, she nevertheless failed to establish the existence of a genuine issue of material fact that the reason given to the plaintiff for her termination was a pretext for terminating her due to her disability, or that the defendant's decision was in any manner motivated by discriminatory animus. *Peden v Detroit*, 470 Mich 195 (2004). We reinstate the Washtenaw Circuit Court's summary disposition order on the plaintiff's discrimination claim, and we remand this case to the circuit court for the additional proceedings ordered by the Court of Appeals regarding the discovery sanction.

Leave to Appeal Granted March 23, 2011:

PEOPLE v GLENN WILLIAMS, No. 141161; reported below: 288 Mich App 67. The parties shall include among the issues to be briefed whether a larceny needs to be completed before a defendant may be convicted of armed robbery.

DEPARTMENT OF ENVIRONMENTAL QUALITY v WORTH TOWNSHIP, No. 141810; reported below: 289 Mich App 414. The application for leave to appeal the August 17, 2010, judgment of the Court of Appeals is considered, and it is granted, limited to the issue whether the Natural Resources and Environmental Protection Act, MCL 324.101 *et seq*., empowers the Department of Environmental Quality to seek, and the circuit court to grant, an order effectively requiring a township to install a sanitary sewer system when a widespread failure of private septic systems results in contamination of lake waters.

JOHNSON v PASTORIZA, No. 142127; reported below: 290 Mich App 260. The parties shall include among the issues to be briefed (1) whether the 2005 amendment of MCL 600.2922, 2005 PA 270, applies retroactively and (2) if so, whether the reference to "death as described in section 2922a" in the 2005 amendment of MCL 600.2922 incorporates the exceptions to recovery contained at MCL 600.2922a(2).

PEOPLE v JOSEPH FRANKLIN, No. 142323; Court of Appeals No. 292469. The parties shall include among the issues to be briefed (1) whether the trial court was required to give the defendant the opportunity to affirm his guilty plea to second-degree home invasion when the court indicated that it was unable to impose the sentence stated by the court at the plea

hearing; (2) whether the question of the defendant's right to affirm his guilty plea should be evaluated under MCR 6.310(B)(2)(a) or MCR 6.310(B)(2)(b); (3) whether this Court's decision in *People v Grove*, 455 Mich 439 (1997), has been superseded by the language of MCR 6.310(B); and (4) whether, even if the defendant had the right to affirm his guilty plea, he waived that right by failing to object when the trial court vacated his plea and scheduled a trial.

In re MAYS, No. 142566; Court of Appeals No. 297447. The parties shall include among the issues to be briefed (1) whether the Wayne Circuit Court, Family Division, erred in ordering the respondent-father to comply with a treatment plan in the absence of an adjudication of unfitness; (2) whether the so-called "one parent" doctrine, first adopted in *In re CR*, 250 Mich App 185 (2001), should be upheld; (3) whether the respondent-father's challenge to the trial court's assumption of jurisdiction constitutes an improper collateral attack on the trial court's exercise of jurisdiction, where he had an opportunity to bring a direct appeal from the trial court's initial dispositional order, which required him to comply with a treatment plan, but he did not do so, see *In re Hatcher*, 443 Mich 426, 444 (1993); MCR 3.993(A)(1); (4) whether the trial court committed plain error in failing to hold a permanency planning hearing before directing the petitioner to file a supplemental petition seeking termination; (5) whether the trial court clearly erred in finding that clear and convincing evidence was presented to support termination under at least one of the statutory grounds alleged, MCL 712A.19b(3)(c)(i), (g), or (j); and (6) whether the trial court clearly erred in finding that termination was in the children's best interests, MCL 712A.19b(5), without determining whether the children were of a sufficient age to give their views regarding termination, MCL 712A.19a(3), and without considering whether termination was appropriate given that the children were being cared for by a relative, MCL 712A.19a(6)(a).

In re MAYS, No. 142568; Court of Appeals No. 297446. The parties shall include among the issues to be briefed (1) whether the Wayne Circuit Court, Family Division, clearly erred in finding that clear and convincing evidence was presented to support termination under at least one of the statutory grounds alleged, MCL 712A.19b(3)(c)(i), (g), or (j); and (2) whether the trial court clearly erred in finding that termination was in the children's best interests, MCL 712A.19b(5), without determining whether the children were of a sufficient age to give their views regarding termination, MCL 712A.19a(3), and without considering whether termination was appropriate given that the children were being cared for by a relative, MCL 712A.19a(6)(a).

Leave to Appeal Denied March 23, 2011:

PEOPLE v SPARKS, No. 141344; Court of Appeals No. 297511.

RANDOLPH v HENRY FORD HOSPITAL, No. 141702; Court of Appeals No. 285103.

MARILYN KELLY and HATHAWAY, JJ., would grant leave to appeal.

ZAHRA, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v WOODMAN, No. 141813; Court of Appeals No. 297694.

PEOPLE v ALSTAIR RICHARDSON, No. 141826; Court of Appeals No. 289067. Leave to appeal is denied, there being no majority in favor of granting relief.

CAVANAGH, MARILYN KELLY, and HATHAWAY, JJ., would remand this case to the trial court for resentencing.

ZAHRA, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v MCINTYRE, No. 141855; Court of Appeals No. 299236.

BENNETT v MACKINAC BRIDGE AUTHORITY, Nos. 141897 and 141899; reported below: 289 Mich App 616.

ZAHRA, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v CRUDER, No. 141912; Court of Appeals No. 292743.

PEOPLE v TERRELL, No. 141947; reported below: 289 Mich App 616.

PEOPLE v DUNCANS, No. 142079; Court of Appeals No. 292283.

In re MOORE, No. 142362; Court of Appeals No. 298008.

In re FRANKLIN, No. 142423; Court of Appeals No. 299113.

Leave to Appeal Granted March 25, 2011:

PEOPLE v KOWALSKI, No. 141932; Court of Appeals No. 294054. The parties shall include among the issues to be briefed (1) whether the defendant's proffered expert testimony regarding the existence of false confessions, and the interrogation techniques and psychological factors that tend to generate false confessions, is admissible under MRE 702; (2) whether the probative value of the proffered expert testimony is substantially outweighed by the danger of unfair prejudice; and (3) whether the Livingston Circuit Court's order excluding the defendant's proffered expert testimony denies the defendant his constitutional right to present a defense.

HARING CHARTER TOWNSHIP v CITY OF CADILLAC, No. 142117, and SELMA TOWNSHIP v CITY OF CADILLAC, No. 142118; reported below: 290 Mich App 728. The parties shall address (1) whether plaintiffs' claims are ripe for adjudication, and (2) whether *Washtenaw Co Health Dep't v T & M Chevrolet, Inc*, 406 Mich 518 (1979), was correctly decided and, if so, whether it requires the defendant, city of Cadillac, to continue to allow the plaintiff townships to utilize the city's extended wastewater treatment facility for sewage transportation and treatment services beyond the May 12, 2017, termi-

nation dates of the 1977 and 1980 contracts between the city and Wexford County and. if so, the duration of that requirement. The Michigan Townships Association's motion for leave to file a brief amicus curiae is granted. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

MARILYN KELLY, J. (*concurring*). I concur in the order granting leave to appeal. However, I would welcome briefing and argument on all issues raised in this case.

Leave to Appeal Denied March 25, 2011:

In re DAVIS, No. 142500; Court of Appeals No. 297295.

MARILYN KELLY, MARKMAN, and HATHAWAY, JJ., would reverse the judgment of the Court of Appeals, vacate the trial court's order terminating the respondent father's parental rights, and remand this case to that court for further proceedings.

In re HICKS/BROOKS MINORS, No. 142638; Court of Appeals No. 298477.

HILL v JOHNSON, No. 142752; Court of Appeals No. 299303.

Reconsideration Denied March 25, 2011:

In re PEOPLE v LARRY KING, No. 141996; Court of Appeals No. 294682. Leave to appeal denied at 488 Mich 924.

Summary Disposition March 29, 2011:

PEOPLE v VALENTIN, No. 142307; Court of Appeals No. 292825. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Oakland Circuit Court with instructions to amend the judgment of sentence in accordance with the Court of Appeals' order vacating the defendant's conviction of second-degree murder and the accompanying felony-firearm conviction. In all other respects, leave to appeal is denied.

Leave to Appeal Denied March 29, 2011:

YURSCO v RAVINDRAN, No. 141533; Court of Appeals No. 291187.

LUBANSKI v NLC, INC, No. 141666; Court of Appeals No. 291106.

PEOPLE v CLINE, No. 141676; Court of Appeals No. 297904.

PEOPLE v WATERFORD, No. 141696; Court of Appeals No. 296421.

PEOPLE v CARLTON, No. 141815; Court of Appeals No. 298591.

PEOPLE v FITCHETT, No. 141834; Court of Appeals No. 297662.

PEOPLE v ALPHONZO LANG, No. 141842; Court of Appeals No. 298158.

PEOPLE v CARLETUS WILLIAMS, No. 141861; Court of Appeals No. 297389.

PEOPLE v WRIGHT, No. 141870; Court of Appeals No. 297087.

PEOPLE v TERRY JONES, No. 141871; Court of Appeals No. 296906.

PEOPLE v EARL, No. 141889; Court of Appeals No. 299064.

PEOPLE v KESTNER, No. 141893; Court of Appeals No. 298544.

PEOPLE v MOTT, No. 141904; Court of Appeals No. 288407.

PEOPLE v RAPHAEL BELL, No. 141931; Court of Appeals No. 290536.

PEOPLE v STRICKLAND, No. 141944; Court of Appeals No. 298715.

PEOPLE v RICHARD ANDERSON, No. 141974; Court of Appeals No. 296241.

PEOPLE v DEVIN ARMOUR, No. 141995; Court of Appeals No. 291297.

PEOPLE v THEO THOMAS, No. 142001; Court of Appeals No. 299185.

WILSON v SPARROW HEALTH SYSTEM, No. 142005; reported below: 290 Mich App 149.

PEOPLE v RICARDO ROBINSON, No. 142008; Court of Appeals No. 299444.

PEOPLE v CHARLES SMITH, No. 142034; Court of Appeals No. 298485.

PEOPLE v TRUSS, No. 142040; Court of Appeals No. 299129.

ZAHRA, J., did not participate because he was on the Court of Appeals panel.

STATE FARM MUTUAL INSURANCE CO v BROE REHABILITATION SERVICES, INC, No. 142046; reported below: 289 Mich App 277.

PEOPLE v DWAYNE TAYLOR, No. 142050; Court of Appeals No. 285175.

BEACH v CHESTERFIELD TOWNSHIP, No. 142065; Court of Appeals No. 297807.

ZDRAVKOVSKI v GAN GONY, INC, No. 142066; Court of Appeals No. 291735.

PEOPLE v WADHAH THOMAS, No. 142087; Court of Appeals No. 297388.

PEOPLE v HUNTER, No. 142101; Court of Appeals No. 300015.

COFESSCO FIRE PROTECTION, LLC v STEELE, Nos. 142103 and 142104; Court of Appeals Nos. 290959 and 292357.

PEOPLE v JIMMY JONES, No. 142115; Court of Appeals No. 298898.

PEOPLE v CHRISTOPHER KEN WILSON, No. 142125; Court of Appeals No. 292457.

PEOPLE v HOOSIER, No. 142132; Court of Appeals No. 292156.

PEOPLE v DALLO, No. 142138; Court of Appeals No. 291525.

OWENS v CSX TRANSPORTATION, INC, No. 142142; Court of Appeals No. 291427.

ZAHRA, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v GOCHA, No. 142145; Court of Appeals No. 297719.

PEOPLE v ORLANDO DAVIS, No. 142146; Court of Appeals No. 299259.

PEOPLE v LESTER, No. 142147; Court of Appeals No. 298717.

PEOPLE v ANTOINE BAILEY, No. 142150; Court of Appeals No. 291840.

In re CHENAULT ESTATE, Nos. 142151, 142152, and 142153; Court of Appeals Nos. 288515, 289843, and 289845.

PEOPLE v HENDRICK, No. 142168; Court of Appeals No. 300308.

PEOPLE v CHRISTOPHER SHANE WILSON, No. 142173; Court of Appeals No. 298113.

PEOPLE v MANHART, No. 142175; Court of Appeals No. 300292.

PEOPLE v THURMOND, No. 142180; Court of Appeals No. 294144.

PEOPLE v WILLIAM ARMOUR, No. 142181; Court of Appeals No. 288102.

ZAHRA, J., did not participate because he was on the Court of Appeals panel.

In re NATHAN GREENBERG TRUST, No. 142189; Court of Appeals No. 292511.

PEOPLE v DYSON, No. 142193; Court of Appeals No. 299488.

PEOPLE v JARRHOD WILLIAMS, No. 142194; Court of Appeals No. 292909.

PEOPLE v QUINTON WILSON, No. 142202; Court of Appeals No. 292724.

PEOPLE v LIENEMANN, No. 142203; Court of Appeals No. 298566.

PEOPLE v MICHAELS, No. 142207; Court of Appeals No. 292763.

ZAHRA, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v SHAWN JONES, Nos. 142209 and 142210; Court of Appeals Nos. 294141 and 297505.

PEOPLE v HAMMOND, No. 142211; Court of Appeals No. 291359.

ZAHRA, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v SEATON, No. 142213; Court of Appeals No. 293518.

PEOPLE v CINTRON, No. 142214; Court of Appeals No. 293070.

FARHA v NAKASH, No. 142216; Court of Appeals No. 288754.

PEOPLE v ALANIZ, No. 142217; Court of Appeals No. 299977.

EBERSOLE v CONSTRUCTION LOAN ONE, LLC, No. 142220; Court of Appeals No. 292871.

PEOPLE v DEMETRIS JOHNSON, No. 142224; Court of Appeals No. 300156.

PEOPLE v DOSENBERRY, No. 142229; Court of Appeals No. 292185.

SALENBIEN v ARROW UNIFORM RENTAL LIMITED PARTNERSHIP, Nos. 142232 and 142233; Court of Appeals Nos. 291517 and 291543.

PEOPLE v GEORGE PRICE, No. 142238; Court of Appeals No. 300161.

PEASE v RILEY, No. 142247; Court of Appeals No. 291440.

PEOPLE v BRAGGS, No. 142248; Court of Appeals No. 293701.

PEOPLE v BAEZ, No. 142249; Court of Appeals No. 300325.

PEOPLE v EAGAN, No. 142254; Court of Appeals No. 300268.

PEOPLE v DOMINIQUE STONE, No. 142279; Court of Appeals No. 300311.

PEOPLE v NORWOOD, No. 142293; Court of Appeals No. 299449.

PEOPLE v THOMPSON, No. 142303; Court of Appeals No. 300839.

PEOPLE v LONDELL JENKINS, No. 142317; Court of Appeals No. 293668.

PEOPLE v GRANBERRY, No. 142318; Court of Appeals No. 293819.

PEOPLE v GUNN, No. 142335; Court of Appeals No. 292419.

PEOPLE v FERGUSON, No. 142386; Court of Appeals No. 292978.

PEOPLE v LIGHT, No. 142447; Court of Appeals No. 293746.

Reconsideration Denied March 29, 2011:

RUBENFAER v PHC OF MICHIGAN, INC, No. 141464; Court of Appeals No. 289044. Leave to appeal denied at 488 Mich 992.

PEOPLE v GARCIA, No. 141584; Court of Appeals No. 289432. Leave to appeal denied at 488 Mich 949.

CORONA CONSTRUCTION, INC v GRAY, No. 141596; Court of Appeals No. 295576. Leave to appeal denied at 488 Mich 949.

Summary Disposition March 30, 2011:

PEOPLE v PLEMMONS, No. 141679; Court of Appeals No. 297525. 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 under the standard for

direct appeals, because the defendant was deprived of his direct appeal as a consequence of delays to which he did not contribute. We do not retain jurisdiction.

DEPARTMENT OF ENVIRONMENTAL QUALITY v BROWN, No. 141927; Court of Appeals No. 291419. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals to the extent that it held that res judicata did not bar the plaintiff's cause of action to enforce correction orders issued to the defendant pursuant to MCL 333.12709(1). The basis for those orders was the same conduct that was the basis for the action to revoke the defendant's certificate of registration under MCL 333.12709(2). Enforcement of the correction orders could have been resolved in the prior proceeding between the parties. *Adair v Michigan*, 470 Mich 105, 121, 124-125 (2004). In all other respects, leave to appeal is denied.

PEOPLE v KUMASI, No. 141943; Court of Appeals No. 292950. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we reverse in part the judgment of the Court of Appeals, vacate defendant's sentence, and remand this case to the Oakland Circuit Court for resentencing. The trial court did not make a sufficient factual basis for its finding of guilt that defendant violated his probation because he failed to maintain employment. Defendant's probation order states that defendant is to "maintain and/or seek employment as directed by P[robation] O[fficer]," yet the court adduced no evidence with regard to how or whether the probation officer directed defendant to seek employment, particularly in light of the fact that defendant was also a student. Nor did the court adduce any evidence regarding whether defendant was seeking employment. Moreover, because defendant was a minor, the probation order requiring defendant to attend high school *and* maintain employment of 30 hours per week as directed by his probation officer may not have been legally possible given the restrictions set forth in Michigan's youth employment law. See MCL 409.111. Because on review this Court cannot determine to what extent the sentence imposed reflects the defendant's conviction on the vacated count, we remand for resentencing. See *People v Ison*, 132 Mich App 61 (1984). In all other respects, leave to appeal is denied.

Leave to Appeal Granted March 30, 2011:

PEOPLE v LINCOLN WATKINS, No. 142031; Court of Appeals No. 291841. The parties shall include among the issues to be briefed (1) whether MCL 768.27a conflicts with MRE 404(b) and, if it does, (2) whether the statute prevails over the court rule, see *McDougall v Schanz*, 461 Mich 15 (1999), and Const 1963, art 6, §§ 1 and 5, (3) whether the omission of any reference to MRE 403 in MCL 768.27a (as compared to MCL 768.27b(1)), while mandating that evidence of other offenses "is admissible and may be considered for its bearing on any matter to which it is relevant," would violate a defendant's due process right to a fair trial and (4) whether MCL 768.27a interferes with the judicial power to ensure that a criminal defendant receives a fair trial, a power exclusively vested in the courts of this state under Const 1963, art 6, § 1.

The Criminal Defense Attorneys of Michigan and the Prosecuting Attorneys Association of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

PEOPLE v PULLEN, No. 142751; Court of Appeals No. 298138. The parties shall include among the issues to be briefed (1) whether the omission of any reference to MRE 403 in MCL 768.27a (as compared to MCL 768.27b(1)), while mandating that evidence of other offenses "is admissible and may be considered for its bearing on any matter to which it is relevant," would violate a defendant's due process right to a fair trial and (2) whether the Court should rule that evidence of other offenses described in MCL 768.27a is admissible only if it is not otherwise excluded under MRE 403. The stay of trial court proceedings remains in effect.

The Criminal Defense Attorneys of Michigan and the Prosecuting Attorneys Association of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

Leave to Appeal Denied March 30, 2011:

ELLIS v HENRY FORD HEALTH SYSTEM, No. 140569; reported below: 287 Mich App 1.

CAVANAGH, MARILYN KELLY, and HATHAWAY, JJ., would grant leave to appeal.

FARLEY v CARP, Nos. 140572, 140573, and 140574; Court of Appeals Nos. 283405, 283418, and 284681.

CAVANAGH, MARILYN KELLY, and HATHAWAY, JJ., would grant leave to appeal.

WREN v SOUTHFIELD REHABILITATION COMPANY, Nos. 140576 and 140577; Court of Appeals Nos. 283726 and 283727.

CAVANAGH, MARILYN KELLY, and HATHAWAY, JJ., would grant leave to appeal.

WARD v TITAN INSURANCE COMPANY, Nos. 140988 and 140992; reported below: 287 Mich App 552.

CAVANAGH, MARILYN KELLY, and HATHAWAY, JJ., would grant leave to appeal.

PEOPLE v WINES, No. 141423; Court of Appeals No. 295711.

PEOPLE v WEBSTER, No. 141620; Court of Appeals No. 287478.

PEOPLE v STERLING, No. 141774; Court of Appeals No. 297812.

PEOPLE v STRADFORD, No. 141955; Court of Appeals No. 290508.

BLOCH v BLOCH, No. 142012; Court of Appeals No. 290086.

KING v MCPHERSON HOSPITAL, No. 142182; reported below: 290 Mich App 299.

CAVANAGH, MARILYN KELLY, and HATHAWAY, JJ., would grant leave to appeal.

Summary Disposition April 1, 2011:

RUZAK v USAA INSURANCE AGENCY, INC, No. 141510; Court of Appeals No. 288053. The motion for reconsideration of this Court's November 19, 2010, order is considered, and it is granted. We vacate our order dated November 19, 2010. 488 Mich 944 (2010). On reconsideration, the application for leave to appeal the April 27, 2010 judgment of the Court of Appeals is considered and, pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we reverse that part of the judgment of the Court of Appeals holding that the "law of the case" doctrine prohibited the panel from considering the defendant's arguments regarding the renewal rule. Although the Court of Appeals panel that initially considered the case in 2008 remanded for the Grand Traverse Circuit Court to make factual determinations dating back to the insurance policy purchased by the plaintiff in the late 1960s, the panel did not expressly address the defendant's arguments that (a) the renewal rule does not apply when a new insurance policy is issued pursuant to an insured's move to a new state and (b) the renewal rule does not apply where the last change in the insurance policy did not produce a decrease in coverage, but an increase. We remand this case to the Court of Appeals for consideration of the defendant's arguments in this regard. In all other respects, leave to appeal is denied. We do not retain jurisdiction.

ZAHRA, J., did not participate because he was on the Court of Appeals panel.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal Entered April 1, 2011:

WILLIAMS v CITY OF DETROIT, No. 141101; Court of Appeals No. 290255. The motion for reconsideration of this Court's October 8, 2010, order is considered, and it is granted. We vacate our order dated October 8, 2010. 488 Mich 889 (2010). On reconsideration, the application for leave to appeal the February 25, 2010, judgment of the Court of Appeals is considered. We direct the clerk to schedule oral argument on whether to grant the application or take other action. MCR 7.302(H)(1). The parties may file supplemental briefs within 42 days of the date of this order, but they should not submit mere restatements of their application or reconsideration motion papers.

Leave to Appeal Denied April 1, 2011:

GRIEVANCE ADMINISTRATOR v CANADY, No. 141721.

YOUNG, C.J. (*dissenting*). I dissent from the Court's order because I believe that respondent's deceitful conduct warrants a suspension of at least 180 days—a period of suspension requiring respondent to demonstrate affirmatively that he is worthy of reinstatement to the legal profession and of the trust of both the public and the legal system.[1]

I. FACTS AND PROCEDURAL HISTORY

Respondent pleaded guilty to misdemeanor driving while impaired[2] and was sentenced to six months probation. The terms of respondent's probation required him to spend 90 days on an alcohol monitor and to abstain from alcohol and controlled substances. The day after sentencing, respondent tested positive for alcohol. Respondent subsequently pleaded guilty to violating probation. The trial court sentenced respondent to three days in jail and ordered respondent to attend 90 Alcoholics Anonymous (AA) meetings in as many days.[3] Respondent was required to provide attendance verification forms proving that he attended the requisite number of AA meetings.

Respondent submitted verification forms to the court establishing that he had fulfilled the probation requirements. However, respondent's probation officer reported to the court that respondent's AA attendance verification forms were forged because they reflected meetings at times and regarding topics that did not exist. Respondent's probation officer testified that the AA attendance forms had been forged for three months—the entirety of respondent's 90-day requirement. Additionally, respondent expressly told the trial court, untruthfully, that he attended the AA meetings listed on the verification forms. Based upon respondent's failure to comply with the terms of probation—including failure to provide valid attendance verification forms—the trial court revoked respondent's probation and sentenced respondent to 15 days in jail.

Respondent appeared and testified at a disciplinary hearing before a hearing panel of the Attorney Discipline Board (ADB). The panel explained that respondent found attending AA meetings "hard to do" because of his "very busy schedule." Rather than attend the meetings or request a modification of probation, respondent testified that he met with individuals from AA, either in person or on the telephone, discussed AA topics, and that those individuals signed his forms. Respondent also admitted that the trial court revoked his probation, in part, because respondent forged his AA verification forms.

Based upon this evidence, the hearing panel concluded that respondent made "knowingly false statements" to the trial court regarding his attendance at AA meetings, but that the statements "were not made with

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[1] See MCR 9.124.

[2] MCL 257.625(3).

[3] Respondent also entered into a contractual probation agreement with the Attorney Grievance Commission (AGC) that required respondent to comply with these terms.

the intent to deceive . . . ."[4] In light of respondent's clean disciplinary history and alcohol dependency, the ADB ordered that respondent be suspended from the practice of law for 120 days.[5]

II. ANALYSIS

All lawyers in Michigan take an oath and swear or affirm that they will "maintain the respect due to courts of justice and judicial officers." Furthermore, the Michigan Rules of Professional Conduct dictate that "[a] lawyer *shall not* knowingly . . . make a false statement of material fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer."[6] By deliberately fabricating documents regarding his AA attendance and using the fictitious documents to mislead the court that he satisfied the terms of his probation, respondent committed a serious breach of the trust reposed in him as a member of the Michigan Bar. Moreover, respondent's deliberately dishonest statements and conduct before the trial court demonstrate a complete lack of respect for the legal process. While ordinarily, I respect the judgment of the ADB in its determination of sanctions, it is difficult to imagine conduct more damaging to the orderly administration of justice and to the judicial process than a lawyer intentionally lying and presenting manufactured evidence in a court proceeding. This, however, is precisely what respondent did by falsifying his AA attendance sheets and submitting that documentation to the trial court as fact. If we are to honor the central goal of our judicial system—determination of the truth—I do not regard respondent's *motivation* for lying and submitting false evidence to the court to be a legitimate mitigating factor.

In order to strive to determine the truth, our system of justice demands the honesty of attorneys and judges engaged in the work of the court. As officers of the court, attorneys have an absolute obligation to act

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[4] It is hard to parse, much less give deference to, this ADB conclusion: that the respondent's statements and documents provided to the court were "knowingly false" but not made with the "intent to deceive." The ethical standard precludes materially false statements knowingly made. MRPC 3.3(a)(1). There is no question that proofs of the respondent's attendance at AA meetings ordered by the court were "material." Thus, the conclusion advanced by the ADB is of the kind that none but lawyers make and believe. Surely, this is not the standard of conduct we expect of *anyone* appearing in court, much less officers of the court.

[5] Respondent was initially suspended for 60 days by the hearing panel, but the ADB later increased the suspension to 120 days. Respondent is also required to refrain from using alcohol and other nonprescription mind or mood altering substances and to participate in various substance abuse and peer counseling programs until January 2012.

[6] MRPC 3.3(a)(1) (emphasis added).

with candor when making representations to a tribunal.[7] For this very reason, in a related context, I have consistently taken the position that when a judge lies under oath and thereby breaches the legal system's trust, "the *only* appropriate sanction is removal from office."[8] Similarly, when an attorney knowingly lies and presents manufactured evidence in court, the sanction should be commensurately severe. I believe that respondent's 120-day suspension is wholly inadequate because the nature of the ethical breach goes to the very core of his fitness to be an attorney. When a lawyer knowingly lies to the court, he forfeits *any* presumption that he is fit to practice law in our state. I would increase respondent's suspension to *a minimum* of 180 days, which would compel respondent to demonstrate affirmatively that he is worthy of reinstatement to the legal profession.[9]

The purpose of imposing discipline for lawyer misconduct is for the "protection [of] the public, the courts, and the legal profession."[10] We do a grave disservice to the public, the courts, and to the legal profession by allowing automatic reinstatement to attorneys who demonstrate unfitness to practice law by knowingly lying to a tribunal. In such situations, I believe it should *always* be incumbent upon the disciplined attorney to justify his readmission to the profession. Because I believe that the sanction in this case is inadequate and that the appropriate sanction should require reinstatement proceedings, I respectfully dissent.

MARKMAN, J., joined the statement of YOUNG, C.J.

Applications for Leave to Appeal Dismissed on Stipulation April 1, 2011:

SOLOMON v BLUE WATER VILLAGE EAST, LLC, No. 141724; Court of Appeals No. 291780.

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[7] The fact that respondent was appearing as a party defendant rather than a lawyer representing a client does not vitiate his ethical obligations under MRPC 3.3(a)(1).

[8] *In re Servaas*, 484 Mich 634, 716 (2009) (YOUNG, J., dissenting) (emphasis added). See also, *In re Noecker*, 472 Mich 1, 16-18 (2005) (YOUNG, J., concurring); and *In re Nettles-Nickerson*, 481 Mich 321 (2008). I also concurred in part with Justice MARKMAN's dissenting opinion in *In re Servaas*, 484 Mich 634, 655-703 (MARKMAN, J., dissenting).

In addition to cases in which a judge lies under oath, I have consistently supported appropriately exacting sanctions in instances of dishonest judicial behavior. See *In re Logan*, 486 Mich 1050, 1053-1054 (2010) (MARKMAN, J., concurring in part and dissenting in part), and *In re Halloran*, 486 Mich 1054, 1055-1057 (2010) (MARKMAN, J., concurring in part and dissenting in part). Justice MARKMAN and I were in agreement as to the results in each of these cases.

[9] See, MCR 9.123 and 9.124.

[10] MCR 9.105.

DAWE v DR REUVEN BAR-LEVAV & ASSOCIATES, No. 141798; reported below: 289 Mich App 380.

Summary Disposition April 6, 2011:

PEOPLE v DARR, No. 141610; Court of Appeals No. 298269. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate the Court of Appeals' order denying leave to appeal, reverse the Hillsdale Circuit Court's order denying the defendant's appellate counsel's motion to withdraw, and remand this case to the Hillsdale Circuit Court with instructions to appoint new appellate counsel to represent the defendant in pursuing postsentencing and/or appellate relief. The trial court erred in denying the motion to withdraw because the defendant's appointed appellate counsel informed the court that the defendant's confidential disclosures to her placed her in an irreconcilable conflict of interest, the details of which she could not disclose without violating that confidence, which was a sufficient ground for permitting her to withdraw. Appointed counsel may file an application for leave to appeal to the Court of Appeals, and/or may file any appropriate postconviction motions in the circuit court, in accordance with MCR 7.205(F), MCR 6.310(C), and MCR 6.429, except that the time for filing shall be determined based on the date of the circuit court's order appointing counsel. Counsel may include among the issues raised, but is not required to include, those issues raised in the defendant's application for leave to appeal to this Court. In all other respects, leave to appeal is denied. We do not retain jurisdiction.

UNITED SERVICES AUTOMOBILE ASSOCIATION v MICHIGAN CATASTROPHIC CLAIMS ASSOCIATION, No. 141867; reported below: 289 Mich App 24. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate the June 22, 2010, judgment of the Court of Appeals and we reinstate the Washtenaw Circuit Court's order of December 8, 2008, granting summary disposition to the defendant. We do not retain jurisdiction.

DUBUC v EL-MAGRABI, No. 141959; Court of Appeals No. 287756. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we reverse in part the judgment of the Court of Appeals and we remand this case to the Wayne Circuit Court for further proceedings. When the complaint allegations are viewed in a light most favorable to the plaintiff, she did allege an unjustified instigation of the breach by the defendants. The Court of Appeals erred when it concluded, as a matter of law, that the defendants were motivated by a legitimate business interest, which, in this case, was a determination to be made by the jury. In all other respects, leave to appeal is denied.

Leave to Appeal Denied April 6, 2011:

PEOPLE v DIANTE ANDREWS, No. 141648; Court of Appeals No. 298333.

CIPRIANO v CIPRIANO, Nos. 141768 and 141769; reported below: 289 Mich App 361.

SWANSON v PORT HURON HOSPITAL, Nos. 141845 and 141846; reported below: 290 Mich App 167.

CAVANAGH, MARILYN KELLY, and HATHAWAY, JJ., would grant leave to appeal.

PEOPLE v DENT, No. 141919; Court of Appeals No. 290832.

COLONE v WARDELL, Nos. 141985, 141986, and 141987; Court of Appeals Nos. 287601, 287625, and 289111.

CAVANAGH, MARILYN KELLY, and HATHAWAY, JJ., would grant leave to appeal.

ABOUHASSAN v DETROIT BIOMEDICAL LABORATORIES, INC, No. 142105; Court of Appeals No. 291294.

CAVANAGH, MARILYN KELLY, and HATHAWAY, JJ., would grant leave to appeal.

HOGLE v CHRYSLER GROUP, No. 142119; Court of Appeals No. 297971.

JARVIS v HENRY FORD HEALTH SYSTEM, No. 142139; Court of Appeals No. 297986. The application for leave to appeal the November 10, 2010, order of the Court of Appeals is considered, and it is denied, there being no majority in favor of granting leave to appeal.

CAVANAGH, MARILYN KELLY, and HATHAWAY, JJ., would grant leave to appeal.

ZAHRA, J., did not participate because he was on the Court of Appeals panel.

GRIEVANCE ADMINISTRATOR v STEIN, No. 142849.

Leave to Appeal Granted April 8, 2011:

PEOPLE v COOLEY, No. 142228; Court of Appeals No. 292942. The parties shall include among the issues to be briefed whether offense variable 19 was properly scored at 10 points under MCL 777.49(c), because the defendant "interfered with or attempted to interfere with the administration of justice," based on his conduct in throwing away evidence and denying guilt.

The Criminal Defense Attorneys of Michigan and the Prosecuting Attorneys Association of Michigan are invited to file briefs amicus curiae.

Order Declining to Answer Certified Question Entered April 8, 2011:

In re CERTIFIED QUESTION FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY, No. 142041. The question certified by the United States District Court for the District of New Jersey is considered, and the Court respectfully declines the request to answer the certified question.

MARKMAN, J. (*dissenting*). I strongly dissent, and would answer the certified question posed by the United States District Court for the

District of New Jersey. I do not yet know in what manner I would answer its question, but I do know that for this Court to answer such question is in the best interests of the people of this state, and in the best interests of the form of constitutional government that the people of this state have chosen for themselves. When this Court, as it now does, refuses to answer a question certified to it by a federal court, the following consequences arise: (a) we undermine the interests of the people of this state in having significant questions of Michigan law resolved by courts which are accountable to the people of this state; (b) we erode the sovereign interests of this state in retaining control over the interpretation of its own laws, and transfer such control to a lower court of a different sovereign; (c) we weaken our system of judicial federalism in which even in those cases in which a federal court must apply state law, the federal court is obligated to defer to state court interpretations of that law; (d) we place Michigan on an unequal footing with the majority of other states of the Union whose highest courts routinely respond to certified questions and which employ the certification process as one important means by which to maintain the sovereign institutions of their states; and (e) we fail to demonstrate comity and cooperation with a federal court, which is acting in these circumstances to show respect for the role of a state court in giving authoritative meaning to the laws of its own state.

The upshot of the majority's decision will be that an undecided, and significant, question of Michigan law will be decided, not by a judicial body established under the Constitution of this state, not by a judicial body accountable to the people of this state, and not by a judicial body comprised of judges selected by the people of this state, but by a federal district court in New Jersey. And when the decision of that district court is finally rendered, it will not be only the litigants in *this* case who will be affected by our failure to have exercised our responsibility to maintain the integrity of our state institutions, but it will be the "general citizenry of Michigan, which in order to avoid litigation will tend to conform their conduct to what they understand as current law [of Michigan], the law of the federal court[.]" *In re Certified Questions*, 472 Mich 1225, 1238 (2005) (MARKMAN, J., dissenting). Unlike the great number of federal judicial decisions over recent decades that have tended to weaken the role of state judiciaries relative to their federal counterparts, today's weakening of judicial federalism is the result, not of a federal court decision, but of a state court decision. It is an entirely self-inflicted wound.

MARY BETH KELLY and ZAHRA, JJ., joined the statement of MARKMAN, J.

Leave to Appeal Denied April 8, 2011:

PEOPLE v SYLVESTER WASHINGTON, No. 141929; Court of Appeals No. 298970. To the extent *People v Floyd*, 481 Mich 938 (2008), has been seen as inconsistent with *People v Powe*, 469 Mich 1032 (2004); *People v Drohan*, 475 Mich 140, 162 n 14 (2006); and *People v Harper*, 479 Mich 599, 617 n 31 (2007), it is disavowed.

CAVANAGH and MARILYN KELLY, JJ., would grant leave to appeal.

GIRARD v MONTGOMERY, Nos. 142642, and MONTGOMERY v GIRARD, No. 142643; Court of Appeals Nos. 299291 and 299531.

Rehearing Denied April 8, 2011:

KING v STATE OF MICHIGAN, No. 140684; Court of Appeals No. 288290. Reported at 488 Mich 208.

YOUNG, C.J. (*dissenting*). I respectfully dissent from the decision to deny rehearing in this case. This case called upon this Court to interpret the relevant licensing provisions of the amended Insurance Code, which preclude persons who have been convicted of a felony from receiving a resident insurance producer license. The Office of Financial and Insurance Services (OFIS) failed to discharge its statutory duties and enforce relevant statutory mandates when it granted plaintiff an insurance license in 2004, despite plaintiff's previous conviction of a felony. The decision by OFIS to seek revocation of that license, while unfortunate for the improperly licensed plaintiff, was nonetheless proper because the original licensure was invalid. Governmental administrators, like those in OFIS, cannot act in derogation or contravention of their statutory authority when issuing licenses. The original opinion in this case failed to render meaning to all relevant provisions of the Insurance Code by holding to the contrary, and thereby avoided the application of a valid statute. To correct those errors, I would grant rehearing, vacate this Court's prior opinion, and reverse the Court of Appeals.

I would hold that OFIS correctly resolved the apparent conflict between MCL 500.1205 and MCL 500.1239 in the way that most closely adheres to the Legislature's stated intent. In coming to this conclusion, it is necessary to consider the entire statutory structure of the licensing provisions in the Insurance Code. MCL 500.1205 governs the licensing of *resident* insurance producers for individuals who reside in Michigan. The licensing of *nonresident* insurance producers who are licensed in another state but transact business in Michigan, is separately governed by MCL 500.1206a. MCL 500.1239, which specifies the grounds for refusal to grant a license, applies both to resident *and* nonresident insurance producers.

The Legislature has chosen to apply differing licensing standards to resident and nonresident insurance producers. While MCL 500.1205 provides that a resident applicant "*shall not*" be licensed if he has committed an act described in MCL 500.1239, MCL 500.1206a(1) provides that "[u]nless denied licensure under [MCL 500.1239], a nonresident person shall receive a nonresident insurance producer license . . . ." Thus, the Legislature specifically used discretionary language in MCL 500.1239 to permit the commissioner to determine, in his discretion, whether to "refuse to issue an insurance producer's license" to a *nonresident* applicant who has been convicted of a felony. At the same time, the Legislature *prohibited* such issuance to resident applicants by using mandatory language in MCL 500.1205. Plaintiff in this case, as a *resident* applicant, was subject to the more stringent standard, and OFIS thus had no discretion to deny his application. The original opinions by the majority justices in this case simply failed to consider this structure of the Insurance Code when coming to their

respective conclusions that the code allows a discretionary standard to be applied to nonresident applicants, and that the code is ambiguous. Indeed, those opinions did not even respond to the alternative construction offered in the original dissent. This Court has long held in cases involving similar licensing decisions that revocation procedures must be invoked if a license was granted in excess of an agency's statutory authority.[1]

This Court's duty to account for the entire structure of the Insurance Code and enforce those statutory provisions as written is particularly important because of the structure of our government, which provides for a separation of powers among the three branches. This system requires that the Legislature and the Governor make policy choices and that the courts enforce those policy decisions as written. In this case, because the statute as written at the time of plaintiff's licensing in 2004 mandated that OFIS decline to license anyone who had been convicted of a felony, OFIS should not have licensed plaintiff, and this Court cannot use equity to displace the *statutory mandate* or otherwise validate that improper decision.[2] It would indeed be a strange system of government if every administrator or bureaucrat had the power to make decisions in derogation of the limited statutory powers provided by the Legislature. This Court cannot allow agency decisions to be the ultimate authority in licensing when those decisions are made in a manner contrary to a legislative mandate.

The inflexibility purposely built into this statute by the Legislature and approved by the Governor is the result of policy determinations made by those political branches of government. Save those statutes that are an affront to the constitution, no court can legitimately employ its limited judicial power to overcome a valid statutory mandate. Nor can the rule of law, as prescribed by MCL 500.1205(1)(b) when read in the context of MCL 500.1239(1) and MCL 500.1206a, be displaced by the actions of OFIS administrators. An administrative agency may exercise only the powers provided to it and must act within the parameters conferred upon it by statutory law.[3] Action in excess of these powers or outside these parameters in situations in which the Legislature has mandated a specific outcome is not valid.

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[1] See, e.g., *Big Bear Markets of Mich, Inc v Mich Liquor Control Comm*, 345 Mich 569, 576 (1956); *Elliott v Liquor Control Comm*, 339 Mich 78, 82-83 (1954); *Gamble v Liquor Control Comm*, 323 Mich 576, 578 (1949); *George v Travis*, 185 Mich 597 (1915); *Kassab v Acho*, 150 Mich App 104, 112-113 (1986).

[2] See, e.g., *Martin v Secretary of State*, 482 Mich 956 (2008), adopting the opinion in relevant part of Judge O'CONNELL, in *Martin v Secretary of State*, 280 Mich App 417, 430 (2008) (O'CONNELL, P.J., dissenting); *Stokes v Millen Roofing Co*, 466 Mich 660, 671-672 (2002); and *Bilt-More Homes, Inc v French*, 373 Mich 693, 699 (1964), quoted and reaffirmed in *Stokes*, 466 Mich at 672.

[3] See, e.g., *Union Carbide Corp v Pub Serv Comm*, 431 Mich 135, 146(1988); *Mason Co Civic Research Council v Mason Co*, 343 Mich 313, 326-327 (1955); *Taylor v Pub Utilities Comm*, 217 Mich 400, 402-403 (1922).

For these reasons and those otherwise stated in my original dissenting opinion in this case,[4] I respectfully dissent from the Court's decision to deny rehearing.

MARKMAN, J., joined the statement of YOUNG, C.J.

Reconsideration Denied April 8, 2011:

DUNCAN v STATE OF MICHIGAN, Nos. 139345, 139346, and 139347; reported below: 284 Mich App 246. Summary disposition at 486 Mich 906; reconsideration granted at 486 Mich 1071; reconsideration granted and order reinstated at 488 Mich 957; reconsideration denied at 488 Mich 1011; order entered at 488 Mich 1019. On order of the Court, the defendant's January 18, 2011, motion to accept its motion for reconsideration of this Court's December 29, 2010, order is considered, and it is granted. A party may move for reconsideration of a Court order if it "file[s] the items required by [MCR 7.313(A)] within 21 days after the date of certification of the order." MCR 7.313(E). The only stated exception to this rule is that "[t]he clerk shall refuse to accept for filing any motion for reconsideration of an order denying a motion for reconsideration." *Id*. Because this Court's December 29, 2010, order was not an order denying a motion for reconsideration, and because defendant "file[d] the items required by [MCR 7.313(A)] within 21 days after the date of certification of the order," *id*., the court rules entitle the defendant to have this Court consider its motion for reconsideration.

The defendant's January 18, 2011, motion for reconsideration is considered, and it is denied on the grounds of mootness. The defendant asks this Court to reconsider our December 29, 2010, order, in which a majority of this Court determined that our November 30, 2010, order was this Court's final order for reconsideration purposes. *Duncan v Michigan*, 488 Mich 1019 (2010). The relief the defendant seeks in the instant motion for reconsideration is that this Court deem our December 22, 2010, order* as the final order for reconsideration purposes. However, even if our December 22, 2010, order is considered final for reconsideration purposes, defendant would have had to file a motion for reconsideration within 21 days of December 22, 2010. MCR 7.313(E). This deadline has elapsed without such a motion coming before the Court. As a result, the question presently before the Court on reconsideration, whether our December 22, 2010, order in the instant case is final for the purposes of defendant's filing a motion for reconsideration, is moot.

MARILYN KELLY, J. (*concurring in part and dissenting in part*). I dissent from the order but only to the extent that it accepts defendants' motion for reconsideration. On December 29, 2010, we issued an order denying defendants' motion to deem the December 22, 2010, release of my concurring statement and dissenting statements by Justice MARKMAN and

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[4] See *King v Michigan*, 488 Mich 208, 221-241 (2010) (YOUNG, J., dissenting).

* See *Duncan v Michigan*, 488 Mich 957, 960-967 (2010), and *Duncan*, 488 Mich at 1019—REPORTER.

then-Justice CORRIGAN as our "final order." *Duncan v Michigan*, 488 Mich 1019 (2010). That order stated that "[n]o motion for reconsideration of this order will be entertained." *Id*. The Court should stand by that ruling.

I concur in the part of the order that denies defendants' motion for reconsideration.

HATHAWAY, J., joined the statement of MARILYN KELLY, J.

MARTIN v LEDINGHAM, No. 138636; reported below: 282 Mich App 158. Summary disposition at 488 Mich 987.

YKIMOFF v W A FOOTE MEMORIAL HOSPITAL, No. 139561; reported below: 285 Mich App 80. Leave to appeal denied at 488 Mich 988.

ROBELIN v SPECTRUM HEALTH HOSPITALS, No. 139860; Court of Appeals No. 279780. Leave to appeal denied at 488 Mich 1000.

YOUNG, C.J., and MARKMAN, J., would grant the motion for reconsideration and, for the reasons set forth in Justice CORRIGAN's dissent to the order of December 22, 2010, would reverse the judgment of the Court of Appeals and remand for entry of an order granting defendants' motion to strike. See *Robelin v Spectrum Health Hosps*, 488 Mich 1000, 1003 (2010) (CORRIGAN, J., dissenting).

Leave to Appeal Denied April 15, 2011:

IDALSKI v SCHWEDT, No. 139960; Court of Appeals No. 287279.

CAVANAGH, MARILYN KELLY, and HATHAWAY, JJ., would grant leave to appeal.

PEOPLE v BRANDT, No. 140744; Court of Appeals No. 288466.

MARILYN KELLY, J. (*concurring*). I concur in this Court's order denying the prosecutor's application for leave to appeal. I believe that the Court of Appeals correctly determined that offense variable 10 (OV 10)[1] should not be scored under the circumstances of this case. I write separately to address the broader jurisprudentially significant question of whether an institution ever may be a "vulnerable victim" under OV 10.

Offense variable 10 concerns exploitation of a vulnerable victim. In *People v Cannon*,[2] this Court held that, for points to be assessed under OV 10, the defendant must have exploited the victim's vulnerability. "Vulnerability" is defined in MCL 777.40(3)(c) as "the readily apparent susceptibility of a victim to injury, physical restraint, persuasion, or temptation." The statute instructs us as follows:

> Factors to be considered in deciding whether a victim was vulnerable include (1) the victim's physical disability, (2) the victim's mental disability, (3) the victim's youth or agedness, (4) the existence of a domestic relationship, (5) whether the offender abused his or her authority status, (6) whether the offender exploited a victim by his or her difference in size or strength or

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[1] MCL 777.40.

[2] *People v Cannon*, 481 Mich 152, 158 (2008).

both, (7) whether the victim was intoxicated or under the influence of drugs, or (8) whether the victim was asleep or unconscious.[3]

Abuse of authority is the only one of these factors that could feasibly apply to an institutional victim. However, I conclude that the Legislature never intended even it to apply to an institution. Under section MCL 777.40(3)(d) of the act, "[a]buse of authority status" means "a victim was exploited out of fear or deference to an authority figure including but not limited to a parent, physician, or teacher." Given the words used, it is apparent to me that this definition contemplates a living human victim only. An institutional victim cannot conform to this definition. Because it cannot be afraid or show deference, it cannot be "exploited out of fear or deference."

In short, the language about a vulnerable victim in OV 10 can never properly be applied to an institutional victim. Therefore, I believe the Court should clarify that an institution may not be considered a vulnerable victim for purposes of assessing points under OV 10.

PEOPLE V SAMMIE BAILEY, No. 141739; Court of Appeals No. 278411. On order of the Court, leave to appeal having been granted and the briefs and oral arguments of the parties having been considered by the Court, we vacate our order of November 24, 2010. The application for leave to appeal the July 20, 2010 judgment of the Court of Appeals is denied, because we are no longer persuaded that the questions presented should be reviewed by this Court.

Summary Disposition April 18, 2011:

PEOPLE V RICHARD BRYANT, No. 133725; Court of Appeals No. 247039. In conformity with the mandate of the Supreme Court of the United States, the judgment and opinion of this Court dated June 10, 2009 (reported at 483 Mich 132) are vacated. The judgments of the Wayne Circuit Court and the Court of Appeals are affirmed.

Leave to Appeal Denied April 20, 2011:

NAWWAS V SINELLI, No. 142225, and NAWWAS V UNIVERSITY OF MICHIGAN REGENTS, No. 142226; Court of Appeals Nos. 292377 and 292378.
MARILYN KELLY and HATHAWAY, JJ., would grant leave to appeal.

WALKER V GRIBBLE, No. 142284; Court of Appeals No. 291507.
HATHAWAY, J., would grant leave to appeal.

Summary Disposition April 22, 2011:

BINNO V BINNO, No. 141691; Court of Appeals No. 291437. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we reverse only that

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[3] *Id.* at 158-159, citing MCL 777.40(1)(b) and (c).

portion of the judgment of the Court of Appeals holding that two of the defendants owed the decedent a statutory duty of care under the Natural Resources and Environmental Protection Act, MCL 324.101 *et seq*. As the trial court correctly concluded, these defendants were not "operating" a vessel within the meaning of MCL 324.80103(g) and (h) in these circumstances. We affirm the judgment of the Court of Appeals in all other respects.

In re MORRIS, No. 142759; Court of Appeals No. 299471 Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate that part of the Court of Appeals judgment resolving the respondent father's appeal, and we remand this case to that court for reconsideration of the respondent father's appeal in light of the confession of error by petitioner Department of Human Services regarding the failure of it and the Wayne Circuit Court, Family Division, to comply with the notice requirements of the Indian Child Welfare Act (ICWA), 25 USC 1901 *et seq*. See 25 USC 1912(a) and MCR 3.980 (deleted effective May 1, 2010).*

We retain jurisdiction. On remand, in order to expedite reconsideration of the respondent father's appeal, we direct the Court of Appeals to issue an opinion within 28 days of the date of this order, and to file a copy of that opinion with the clerk of this Court. In the event that the Court of Appeals orders the case remanded to the Wayne Circuit Court, Family Division, for further proceedings to resolve the ICWA notice violation, as requested by the petitioner, we order such remand proceedings to be stayed until after the case returns to this Court for completion of our review of the Court of Appeals' opinion. See MCR 7.302(I); 7.209(D).

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal Entered April 22, 2011:

HOFFNER v LANCTOE, No. 142267; reported below: 290 Mich App 449.

Leave to Appeal Denied April 22, 2011:

FERDON v STERLING PERFORMANCE, INC, No. 140723; Court of Appeals No. 294562.

MARKMAN, J. (*concurring*). I concur in this Court's order, and write separately only to respond to the dissent. The dissent states that there is "no basis" for the conclusion of the Workers' Compensation Appellate Commission (WCAC) that "plaintiff's counsel intentionally withheld the [May 7] transcript." I respectfully disagree. In response to the WCAC, plaintiff's counsel stated that the transcript was not filed because "no relevant information was detailed in the transcript that would have negative impact on the defendants' position in the case." Thus, plaintiff's counsel's *own* concession established a sufficient basis for the WCAC's conclusion. While there is no evidence of any intention to mislead on the part of plaintiff's counsel, nonetheless he was required to file the

* See 485 Mich ccxxvi, ccxlvii—REPORTER.

transcript within 60 days of the filing of the appeal pursuant to MCL 418.861a(5), and he did not. That counsel viewed the transcript as irrelevant does not alter the fact that he failed to file it, and did so intentionally.

ZAHRA, J., joined the statement of MARKMAN, J.

MARILYN KELLY, J. (*dissenting*). I respectfully dissent from the Court's order denying plaintiff's application for leave to appeal. Because I believe that the Workers' Compensation Appellate Commission (WCAC) abused its discretion in dismissing plaintiff's appeal, I would reverse its decision, reinstate the case, and remand it for further proceedings.

BACKGROUND

On October 24, 2006, plaintiff filed an application for a hearing for work-related injuries sustained during her employment with defendant, Sterling Performance, Inc. Trial was originally scheduled for May 7, 2008. On that date, the magistrate adjourned the proceedings so that the parties could discuss settlement. The transcript of this "trial" was only seven pages and consisted of nothing more than opening and closing the record and setting a new trial date for June 3, 2008.

On March 4, 2009, Magistrate Victor A. McCoy denied plaintiff's claim for benefits. Plaintiff appealed to the WCAC. Under MCL 418.861a(5), the transcript was due within 60 days of filing the appeal. Plaintiff timely filed the transcript of the June 3 hearing but not the transcript of the May 7 hearing.

On June 9, 2009, the WCAC issued its standard 14-Day Show Cause Order, indicating that "because plaintiff has failed to timely file a complete transcript for all proceedings or a timely request for an extension of time, the Commissioner believes that plaintiff is required to show cause why the claim for review should not be dismissed."

In response, on June 22, 2009, plaintiff's counsel submitted a brief which explained that the WCAC could process plaintiff's appeal without the May 7 transcript because the transcript contained no substantive information. The brief explained that defendants were not harmed by the omission of the May 7 transcript, there being no information in it that would affect defendants' position in the case. Counsel attached the May 7 transcript and an affidavit from plaintiff indicating that she had ordered, paid for, and received both transcripts.

In a split decision, the WCAC dismissed plaintiff's appeal. The majority criticized what it viewed as counsel's intentional withholding of the May 7 transcript. It advised: "Appellant is obligated to submit all transcripts on a timely basis, not just those that counsel deems 'relevant.' " Commissioner Ries dissented, indicating that "[d]ismissal is too harsh a remedy for appellant's transgression."

Plaintiff subsequently moved for reinstatement of her appeal, arguing that the failure to originally submit the May 7 transcript was an inadvertent error. Plaintiff's counsel indicated that "there was never any 'intentional withholding of any part of the transcript.' " Indeed, counsel

attached an affidavit from his secretary stating that, when she filed the appeal, "[she] did not realize that the 6 [sic] page item was part of the transcript."

In a second split decision, the WCAC denied plaintiff's motion for reconsideration. It was the majority's interpretation that plaintiff had changed her story. First, plaintiff had indicated that the transcript contained no relevant, substantive information. After dismissal of the claim, she maintained that the transcript had not been withheld intentionally, but because of a secretarial error. The majority concluded that plaintiff had not shown sufficient cause to grant her motion for reconsideration. Commissioner Ries again dissented, indicating that "[d]ismissal is too harsh a remedy for appellant's transgression."

Plaintiff sought leave to appeal in the Court of Appeals, which denied it on the ground that the appeal lacked merit.

ANALYSIS

MCL 418.861a sets forth the procedural requirements for appealing to the WCAC. MCL 418.861a(5) states in pertinent part:

> A party filing a claim for review . . . shall file a copy of the transcript of the hearing within 60 days of filing the claim for review . . . . For sufficient cause shown, the commission may grant further time in which to file a transcript.

The Court of Appeals held in *Pankey v Bigard/Drillers, Inc*, that "[t]he decision to grant a motion for delayed appeal upon a showing of sufficient cause is within the discretion of the WCAC."[1]

It elaborated on the sufficient cause standard:

> The "sufficient cause" standard . . . is less stringent than a good-cause standard. Sufficient cause is by its nature fact specific and must be determined case by case. Appropriate factors to consider include the length of the delay, the reason for the delay, and any resulting prejudice.[2]

In this case, plaintiff has established sufficient cause because (1) the delay in filing the May 7 transcript was short, (2) plaintiff had a good reason for causing the delay, and (3) the delay did not result in prejudice to defendants because the May 7 transcript contained nothing whatsoever of significance.

First, the delay in filing the May 7 transcript was short. Immediately upon receiving the WCAC's standard 14-day show cause order, plaintiff responded and supplied the WCAC with a copy of the transcript.

Second, plaintiff put forth not one, but two good reasons for the delay. Plaintiff initially argued that her claim should not be dismissed because

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[1] *Pankey v Bigard/Drillers, Inc*, 222 Mich App 15, 18-19 (1997).

[2] *Id.* at 18.

that transcript contained no substantive information. Then, on motion for reconsideration, she argued that the failure to submit the transcript was an inadvertent error. Two members of the WCAC believed that plaintiff's counsel intentionally withheld the transcript. I conclude that there was no basis for that conclusion.

Plaintiff's two justifications for not filing the May 7 transcript initially are not inconsistent with each other. Informing the WCAC that the May 7 transcript contained no substantive information was not a concession that it had been intentionally withheld. Rather, plaintiff was attempting to show that the error was of no significance because it in no way affected defendants' ability to defend themselves. Plaintiff submitted the transcript, which leaves no doubt about the truth of that statement. In addition, at the show cause hearing, plaintiff's counsel submitted an affidavit from his secretary. She stated that counsel had instructed her to forward a complete copy of the transcript and that she thought that she did. She said that the omission was her mistake.

There was no evidence to rebut this sworn claim. No motive was advanced to explain why counsel's withholding of the transcript would have been intentional. Thus, the WCAC erred by concluding that the transcript was purposefully withheld.

Third, the delay in filing the transcript could not possibly have resulted in any prejudice because, as plaintiff contends, it contained nothing of substance. On May 7, the magistrate adjourned the trial date. The transcript of this "trial" contained nothing but the opening and closing of the record. No stipulations were recorded. No testimony was taken.

Moreover, defendants did not oppose plaintiff's request to reinstate her claim, nor did they oppose plaintiff's application for leave to appeal in either the Court of Appeals or in this Court. Indeed, at oral argument on the application for leave to appeal, defense counsel conceded that defendants suffered no prejudice by plaintiff's initial failure to file the May 7 transcript.

Because plaintiff has established sufficient cause why her claim should not have been dismissed, the remaining question is whether the WCAC abused its discretion by dismissing plaintiff's claim. I believe that it did. An abuse of discretion occurs when the decision is outside the range of principled outcomes.[3]

Because the temporarily omitted transcript contained no substantive information, the WCAC was not even momentarily denied any relevant information on which to base a decision on the claim. The omission was both inadvertent and inconsequential. Under these circumstances, I agree with dissenting Commissioner Ries that "[d]ismissal is too harsh a remedy for appellant's transgression."

I would hold that the WCAC abused its discretion. It is entitled and expected to enforce its rules but it should do so fairly. When no evidence exists to support a conclusion that counsel's mistake was intentional and

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[3] *Woodard v Custer*, 476 Mich 545, 557 (2006).

when it caused no delay and no prejudice, the WCAC should not penalize counsel. It should not dismiss the plaintiff's claim.

Defendants argue that, in order to find that the WCAC abused its discretion in dismissing plaintiff's claim, this Court must overrule *Kurtz v Faygo Beverages, Inc*.[4] I disagree. The circumstances in *Kurtz* are distinguishable from the present circumstances.

In *Kurtz*, the plaintiff's claim was dismissed because he failed to timely file a copy of the trial transcript with the WCAC. He did not request an extension, and he first offered an explanation for the delay in his motion for reconsideration of the dismissal order. He explained that the tardy filing was beyond his control because the court reporter failed to prepare the transcript by the due date. Under these circumstances, this Court held that the court reporter's delay did not excuse the late filing because the plaintiff could have requested, but did not timely request a filing extension.

The holding in *Kurtz* rested on the vital fact that the plaintiff had advance notice that the transcript would be late yet he did nothing. In *Kurtz*, the plaintiff *knew* the transcript would be late, but he failed to request an extension. In this case, however, plaintiff thought she had timely filed the entire transcript. Thus, she did not have advance notice that the transcript would be late, and she had no reason to know that she would need an extension.

Since the Court's holding in *Kurtz* rested on facts distinguishable from this case, *Kurtz* need not be overruled in order for this Court to hold that the WCAC abused its discretion.

CONCLUSION

Under the circumstances of this case, I would hold that the WCAC abused its discretion by dismissing plaintiff's claim for review. Hence, I would reverse the WCAC's decision and remand the case for further proceedings. I would instruct the WCAC to not assume that a party's counsel acted intentionally in disobeying its rules unless it has some basis for it. An inadvertent error that causes little delay and prejudices no one should not give rise to the dismissal of a worker's compensation appeal.

HATHAWAY, J., would reverse the Workers' Compensation Appellate Commission's dismissal of this case and remand the case for further proceedings.

PEOPLE v STENBERG, No. 142017; Court of Appeals No. 290918.

Summary Disposition April 25, 2011:

PEOPLE v NAYKIMA HILL, No. 141122; Court of Appeals No. 290031. In lieu of granting leave to appeal, we affirm the judgment of the Court of Appeals in part. Trooper Escott was not required to be qualified pursuant

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[4] *Kurtz v Faygo Beverages, Inc*, 466 Mich 186 (2002).

to MRE 702 because he was not testifying as an expert witness. Rather, he simply testified to the underlying facts and his personal observations concerning his use of a trained dog in the course of a criminal investigation. He did not interpret or extrapolate from those facts or personal observations.

We reverse the judgment of the Court of Appeals in part because the admission of Jacqueline Sistrunk's out-of-court statement that she saw defendant wearing "a brown-hooded coat with fur around it" was harmless error because it is clear beyond a reasonable doubt that the jury verdict would have been the same absent this error. *People v Shepherd*, 472 Mich 343, 348 (2005). The prosecutor presented eyewitness identification testimony of the three victims who each independently identified defendant as their assailant. Such identification testimony was clear and unambiguous, and occurred after each victim had a full and sustained opportunity to observe defendant during their 25-to 30-minute ordeal. In addition, each victim identified the coat that was the subject of Sistrunk's out-of-court statement as the one worn by defendant during the attack. Therefore, even absent Sistrunk's out-of-court statement, the victims were able to connect the coat worn by their assailant to defendant. Further, two of the victims identified the knife that was found in the pocket of the coat as the knife that was taken from their home and wielded by defendant during the attack. Accordingly, due to this substantial identification evidence, any error in the admission of Sistrunk's statement was harmless beyond a reasonable doubt. We remand this case to the Saginaw Circuit Court for reinstatement of defendant's conviction and sentence. In all other respects, leave to appeal is denied.

MARILYN KELLY, J. (*concurring in part and dissenting in part*). I concur in the part of the order affirming the Court of Appeals decision that Trooper Escott was not required to be qualified as an expert pursuant to MRE 702. However, I disagree with the majority's reversal of the Court of Appeals' decision to remand the case for a new trial. In my view, allowing the police officer to testify to Sistrunk's out-of-court statement was not harmless beyond a reasonable doubt. It is not clear that the jury verdict would have been the same absent this error.[1]

Sistrunk told police that defendant was wearing "a brown-hooded coat with fur around it." The majority opines that this statement was harmless in light of the three eyewitnesses who "independently identified defendant as their assailant." However, a careful review of the evidence reveals a less than airtight circumstantial case, and without this statement, the jury could have come to a different conclusion.

Without Sistrunk's statement, the prosecution's case consisted primarily of (1) the victims' identification of defendant, (2) the fact that the dog followed a scent from the victims' house to the house where defendant was arrested, and (3) the fact that the shoes defendant was wearing when arrested matched footprints found at the victims' house. None of this evidence is particularly compelling on its own or without Sistrunk's statement.

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[1] *People v Shepherd*, 472 Mich 343, 348 (2005).

First, although all three victims did positively identify defendant, the circumstances of that identification were very suggestive. The police presented defendant to the victims at their home a few hours after the crime while she was seated in the back of a police car. Before this, the only characteristics the victims had been able to provide police was that the assailant was an African-American female with bloodshot eyes.

All three testified that they did not see her hair, did not know what shade her complexion was, and that the assailant had worn a hooded coat through the entire attack. The hood covered her forehead reaching her eyebrows. The certainty of the statements is diminished by the circumstances of the identification. As the Court of Appeals stated, "it is possible that the jury might have still credited the victims' testimony. But it is also possible that the discrepancy would have led the jury to believe that the victims made a mistake in identifying defendant."[2]

Second, a dog tracked a scent from the victims' home to the Porter Street house and then to the Bond Street house where defendant was arrested. Officers searched the Porter Street house the day of the attack and found nothing connecting defendant with the crime. Curiously, the homeowner reported finding a coat with a knife in the pocket in the closet of the house the next day and brought them to the police. While it is possible that the police missed them, the coat was the main identifying characteristic of the attacker.

In addition, despite the fact that the dog and defendant were together in the front yard of the Bond Street house, the dog never identified defendant as the source of the scent. In fact, Trooper Escott testified that he "went to that front yard to assist the officer dealing with this female." He further stated that Enzo lost the scent at the Bond Street house and was unable to pick it up again. The tracking dog was "right there" near defendant and lost the scent.

Third, to the extent it is persuasive, defendant denied that the shoes she was wearing at the time of the arrest belonged to her. She further contended that the shoes did not fit her, and she put them on only because the police ordered her to do so.

Finally, the Court's order greatly overstates the connection between defendant and that coat and knife found at the Porter Street house. There were two brown coats with fur around the hood. One was found at the Bond Street house on the day of the crime, and the other showed up at the Porter Street house the next day, after the initial search. The coat found at the Bond Street house belonged to Sistrunk's boyfriend. It was brown leather with fur around the hood. Sistrunk admitted that she wore it sometimes. In addition, Sistrunk's boyfriend and some other friends had traveled between the Bond Street and the Porter Street houses the evening before the crime.

Further clouding the accuracy of the identification of the coat is the fact that the victims' initial statements varied. It was only the in-trial identification of the coat that matched. Their initial statements to the

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[2] *People v Hill*, unpublished opinion per curiam of the Court of Appeals, issued May 11, 2010 (Docket No. 290031).

police focused primarily on the coat rather than on any of the assailant's features, and their descriptions of the coat varied from a coat with no mention of color to an olive green coat. In fact, the victim in the best position to view the assailant described the coat as a brown leather coat with fur around the hood. This description fits the coat discovered at the Bond Street house. In addition, no other witness could testify to ever having seen defendant wearing a coat matching that description. This also severely undercuts defendant's connection to the knife found in the pocket of the coat from the Porter Street house.

It is worth pointing out again that the standard of review for finding a constitutional error harmless is that it must be "clear beyond a reasonable doubt, that the jury verdict would have been the same absent the error."[3] The coat was the crucial characteristic of the identification. This was the linchpin of the prosecution's case, and Sistrunk's statement was the crucial piece of evidence that connected all the dots.

While there certainly is evidence that implicates defendant and suggests she committed the crime, I cannot conclude that this high standard has been met, given the significance of Sistrunk's statement. Therefore, I dissent from that part of the Court's order and would affirm the Court of Appeals' decision to reverse defendant's conviction and remand the case for a new trial.

Rehearing Granted and Appeal Dismissed April 25, 2011:

ANGLERS OF THE AUSABLE, INC v DEPARTMENT OF ENVIRONMENTAL QUALITY, Nos. 138863, 138864, 138865, and 138866; reported below: 283 Mich App 115. The motions for rehearing are considered, and they are granted. This Court's opinion of December 29, 2010,* is vacated and this appeal is dismissed on grounds of mootness, for the reasons set forth in the dissenting opinion reported at 488 Mich 61, 91 (2010). The Court of Appeals opinion at 283 Mich App 115 (2009) is also vacated. See *In re Investigative Subpoenas*, 488 Mich 1032 (2011); *United States v Munsingwear, Inc*, 340 US 36, 39-40 (1950) ("The established practice of the Court in dealing with a civil case . . . which has become moot while on its way here or pending our decision on the merits, is to reverse or vacate the judgment below . . . . When that procedure is followed, the rights of all parties are preserved . . . .").

"T[he] judicial power . . . is the right to determine *actual* controversies arising between adverse litigants, duly instituted in courts of proper jurisdiction." *Anway v Grand Rapids R Co*, 211 Mich 592, 616 (1920), quoting *Muskrat v United States*, 219 US 346 (1911) (emphasis added). As a result, "this Court does not reach moot questions or declare principles or rules of law that have no practical legal effect in the case before" it. *Federated Publications, Inc v City of Lansing*, 467 Mich 98, 112 (2002). In accordance with these principles, this case is moot because it presents "nothing but abstract questions of law, which do not rest upon existing facts or rights." *Gildemeister v Lindsay*, 212 Mich 299, 302

[3] *Neder v United States*, 527 US 1, 19 (1999).

* 488 Mich 69—REPORTER.

(1920). In light of the fact that: (a) defendant Merit Energy Company has quitclaimed its easement interest back to the riparian owner; (b) defendant no longer has the physical means of discharging water into Kolke Creek or the AuSable River; (c) defendant is now disposing of the water by alternative means; (d) defendant no longer has a permit that allows discharge into Kolke Creek or the AuSable River; and (e) the Department of Environmental Quality has attested that "there no longer exists the possibility of surface water discharge to Kolke Creek or the AuSable River," this is a case of obvious mootness. There is "no reasonable expectation that the wrong will be repeated," *United States v W T Grant*, 345 US 629, 633 (1953), because the very harms that plaintiffs sought to enjoin no longer exist.

YOUNG, C.J. (*concurring*). I fully join this Court's order and write only to answer a criticism the dissenting statement raises. Justice CAVANAGH quotes my dissenting opinion in *United States Fidelity & Guaranty Co v Mich Catastrophic Claims Ass'n (On Rehearing)*, 484 Mich 1, 27 (2009) (YOUNG, J., dissenting) (*USF&G*), and rhetorically asks the question I raised in that case—"What changed?"—that would lead me to support rehearing in the instant case.

The answer is simple: the majority opinion in *USF&G* prevailed over my dissenting opinion, and I see no reason to remain bound by a position that failed to receive majority support two years ago.[1] Today's order merely applies the very same principles that former Justice WEAVER and Justices HATHAWAY, MARILYN KELLY and notably Justice CAVANAGH himself applied in deciding to grant rehearing in *USF&G*. And although Justice CAVANAGH dissents from the order in this case, he does not repudiate his decision to grant rehearing in *USF&G*. Instead, his dissent in the instant case is fully premised on his belief that this Court's previous disposition on the mootness issue "was properly decided." Because I continue to hold the opposite belief—that this Court erred in issuing an opinion on the merits of a moot case[2]—I fully join today's order.

ZAHRA, J. (*concurring*). I concur in the order granting rehearing, which vacates this Court's opinion of December 29, 2010, as well as the Court of Appeals' opinion of March 31, 2009. I write separately to address the propriety of granting a motion for rehearing when there has been a change in the makeup of the Court between the time the Court's initial opinion is released and the date the motion for rehearing is decided.

MCR 7.313(E), this Court's rule governing motions for rehearing, is a discretionary rule, as it does not define a standard under which this

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[1] Moreover, Justice ZAHRA makes a persuasive argument in his concurring statement to this order that my dissenting opinion in *USF&G* interpreted a standard on rehearing that is inapplicable in this Court. Rather, "[n]othing" in the text of the court rules pertaining to this Court "supports the notion that the Court may only grant rehearing where new legal arguments are presented." *Post* at 887.

[2] See my dissent in the original *Anglers* opinion. *Anglers of the AuSable, Inc v Dep't of Environmental Quality*, 488 Mich 69, 91 (2010).

Court is to decide motions for rehearing.[1] Thus, whether to grant or deny the motion is left to the discretion of the Court. Historically, in exercising discretion, the justices of this Court consider whether the Court properly interpreted and applied the law. This explains why justices typically cast votes on rehearing that are consistent with their initial view of the case.[2] Generally speaking, a justice will only change his or her vote when the legal arguments on rehearing persuade the justice that his or her initial view of the case was erroneous. Not surprisingly, Justices MARILYN KELLY, CAVANAGH, HATHAWAY, and MARKMAN and Chief Justice YOUNG view this

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[1] MCR 7.313(E) provides:

> (1) To move for rehearing, a party must file within 21 days after the opinion was filed (the date of an opinion is stamped on the upper right corner of the first page):
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> (a) 24 copies of a motion prepared as provided in MCR 7.309, if the opinion decided a case placed on a session calendar; or
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> (b) 14 typewritten copies of a motion, if the opinion decided a noncalendar case; and
>
> (c) proof that a copy was served on the parties. The motion for rehearing must include reasons why the Court should modify its opinion.
>
> (2) Unless otherwise ordered by the Court, timely filing of a motion postpones issuance of the Court's judgment order until the motion is denied by the Court or, if granted, until at least 21 days after the filing of the Court's opinion on rehearing.
>
> (3) Any party may answer a motion within 14 days after it is served by filing
>
> (a) 24 or 14 copies of the motion, depending on whether the motion was filed under subrule (D)(1)(a) or (b); and
>
> (b) proof that a copy was served on the other parties.
>
> (4) Unless ordered by the Court, there is no oral argument.

[2] See, e.g., *Bezeau v Palace Sports & Entertainment, Inc*, 488 Mich 904 (2010) (YOUNG, J., dissenting); *Pellegrino v AMPCO Sys Parking*, 487 Mich 860 (2010) (showing that WEAVER and HATHAWAY, JJ, would grant rehearing); *People v Richmond*, 486 Mich 1041 (2010) (CORRIGAN, J, concurring in part and dissenting in part); *Jackson v Green Estate*, 485 Mich 869 (2009) (MARKMAN, J., dissenting); *Boodt v Borgess Med Ctr*, 482 Mich 1001, 1002-1004 (2008) (CAVANAGH, J., dissenting); *Gilbert v DaimlerChrysler Corp*, 472 Mich 1201 (2005) (CAVANAGH, MARILYN KELLY, and WEAVER, JJ., dissenting).

case in the same light that they did on the date the original opinion was issued. The instant motion thus rises or falls on the votes cast by myself and Justice MARY BETH KELLY. Because we were not seated on the Court when the initial opinion was released, we have no established positions in this case.

It is suggested that Justice MARY BETH KELLY and I ought not cast our votes based on the merit of the legal arguments and the correctness of the opinion that is the subject of rehearing and should, instead, limit our review to a determination whether any new arguments have been presented to this Court that were not previously presented at the time the opinion under review was released. Nothing in MCR 7.313(E), however, supports the notion that the Court may only grant rehearing where new legal arguments are presented. Significantly, such a constraint exists in the pertinent court rule for the Court of Appeals. Specifically, MCR 7.215(I)(1), which governs motions for rehearing and reconsideration in the Court of Appeals, states that "[m]otions for reconsideration are subject to the restrictions contained in MCR 2.119(F)(3)." MCR 2.119(F)(3) in turn provides that

> [g]enerally, and without restricting the discretion of the court, a motion for rehearing or reconsideration which merely presents the same issues ruled on by the court, either expressly or by reasonable implication, will not be granted. The moving party must demonstrate a palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error.

The absence of any reference to MCR 2.119(F) in the rule governing motions for rehearing in this Court, and the express reference to it in the equivalent Court of Appeals rule, leads me to conclude that in deciding the pending motions it is appropriate to consider whether the Court's December 29, 2010, opinion was properly decided, rather than limit review to the question regarding whether new arguments are presented on rehearing.[3]

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[3] Although this case presents motions for rehearing, not a motion for reconsideration, I believe the same analysis would apply in considering a motion for reconsideration. See MCR 7.313(F). Moreover, this analysis is wholly consistent with MCR 1.103, which provides:

> The Michigan Court Rules govern practice and procedure in all courts established by the constitution and laws of the State of Michigan. Rules stated to be applicable only in a specific court or only to a specific type of proceeding apply only to that court or to that type of proceeding and control over general rules.

MCR 7.313(E) and MCR 7.313(F) govern motions for rehearing and reconsideration in this Court as part of subchapter 7.300, which houses rules applicable *only to this Court*. They are therefore rules stated to be

This same conclusion has been reached by virtually every justice faced with this situation. Then-Justice ALTON DAVIS voted to grant reconsideration where he concluded the Court's prior order was erroneous. *Duncan v Michigan*, 488 Mich 957, 957-958 (2010) (DAVIS, J., concurring). Likewise, Justice HATHAWAY voted to grant rehearing and vacate an opinion originally issued before she joined the Court. *United States Fidelity & Guaranty Co v Mich Catastrophic Claims Ass'n (On Rehearing)*, 484 Mich 1 (2009).[4] Then-Justice CORRIGAN and Chief Justice YOUNG did the same in *McCready v Hoffius*, 459 Mich 1235 (1999). History informs us that this is not a recent trend in the Court. See, e.g., *Harmsen v Fizzell*, 354 Mich 60 (1958); *Weller v Mancha*, 353 Mich 189 (1958); *Rumney v Coville*, 51 Mich 186 (1883).[5]

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applicable only in a specific court and control over the general rule, MCR 2.119(F), in governing motions for rehearing and reconsideration. As MCR 7.313(E) and (F) are the controlling rules, MCR 2.119(F)(3) would not apply unless somehow incorporated by those rules. MCR 1.103 cannot be read to incorporate MCR 2.119(F)(3) into the rules applicable to motions for rehearing in the Supreme Court. To do so would render meaningless the express reference to MCR 2.119(F)(3) in the rehearing rule applicable to the Court of Appeals, MCR 7.215(I)(1). Simply put, the express reference to MCR 2.119(F)(3) in the Court of Appeals rule would be unnecessary if MCR 1.103 already made MCR 2.119(F)(3) the controlling standard in all Michigan appellate courts.

In an attempt to buttress his argument, Justice CAVANAGH relies on the public internal operating procedures (IOPs) of this Court. However, reference to the IOPs is not helpful in this analysis. First, these procedures are nonbinding and merely observatory guidelines, subject to change at any time without notice. Moreover, these nonbinding procedures suggest only that MCR 2.119(F)(3) be incorporated into review of a motion for reconsideration. Significantly, the IOP for rehearing motions, IOP I(J), makes no reference to MCR 2.119(F)(3). Thus, even if the nonbinding IOPs were looked to for guidance, the conclusion must be reached that MCR 2.119(F)(3) would not apply here because it does not apply to motions for rehearing brought in this Court.

[4] Justice HATHAWAY also would have granted rehearing in *Moore v Secura Ins*, 483 Mich 928 (2009), where the opinion was issued before she joined the Court.

[5] Notwithstanding Justice CAVANAGH's assertion that the members of this Court have generally applied MCR 2.119(F)(3) as the standard for granting rehearing and reconsideration, in each case that he cites the justices referencing MCR 2.119(F)(3) were adhering to their previously stated view of the case. Further, in no decision of this Court has a majority ever applied MCR 2.119(F)(3) as the governing standard for deciding a motion for reconsideration or rehearing. In *United States*

The inquiry does not end, in my opinion, upon review of the correctness of the decision under review. As is evident from the substance of the dissent in this case, which echoes the dissent of Chief Justice YOUNG in *United States Fidelity*, 484 Mich at 27, it can be unsettling to this Court when within the period for rehearing, interpretation of the law changes due to a change in the composition of the Court. See also *Sazima v Shepherd Bar & Restaurant*, 483 Mich 924 (2009) (MARKMAN, J., dissenting). Because of these concerns, my discretion is also guided by consideration of the jurisprudential significance of the issues presented on rehearing.

Justice CAVANAGH claims that the newly composed Court is "undoing recent precedent." Like every justice on this Court, I respect the role stare decisis plays in Michigan's jurisprudence. That said, every justice on this Court, with the exception of Justice MARY BETH KELLY and myself, has at one time or another found it appropriate to overrule precedent because the justice concluded doing so served the best interests of Michigan's jurisprudence. See e.g., *Univ of Mich Regents v Titan Ins Co*, 487 Mich 289 (2010); *Robinson v Detroit*, 462 Mich 439 (2000). In my view, the order granting rehearing and vacating the December 29, 2010, opinion does not undo precedent; it restores precedent. Simply stated, the Court disregarded the mootness doctrine so that it could overrule *Preserve the Dunes, Inc v Dep't of Environmental Quality*, 471 Mich 508 (2004), and change the course of over a century of established Michigan water law. Rehearing is properly granted here, not only because the underlying dispute is moot, but also because *Preserve the Dunes* properly interprets Michigan law.[6]

I also disagree with Justice CAVANAGH that the order granting rehearing runs afoul of *City of Erie v Pap's A M*, 529 US 277 (2000). When considering the instant case in its procedural entirety, the situation here is unlike the one in *City of Erie*.[7] In particular, Merit Energy Company's

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Fidelity, 484 Mich at 11 n 12, the majority cited MCR 2.119(F)(3) in responding to the dissent that the prior decision to grant rehearing was consistent with that standard. A majority, however, did not apply MCR 2.119(F)(3) when this Court actually granted rehearing in that case. *United States Fidelity & Guaranty Co v Mich Catastrophic Claims Ass'n*, 483 Mich 918 (2009).

[6] It is inconsequential in considering the merits of this Court's December 29, 2010, opinion that this Court previously denied the motion to dismiss for mootness. Defendants raise the mootness issue in their motions for rehearing. Moreover, the mootness doctrine is jurisdictional, as it concerns a court's inherent judicial power and, therefore, can be raised at any time. See *People v Richmond*, 486 Mich 29, 34 (2010). Consideration of the correctness of a decision thus necessarily requires consideration regarding whether this Court acted within the scope of its jurisdiction and judicial power.

[7] In *City of Erie*, the United States Supreme Court rejected the plaintiff's argument that the case was moot after the plaintiff voluntarily

alternative plan for remediating the pollutant in its groundwater was largely dictated by the circuit court decision to vacate Merit's permit allowing discharge into Kolke Creek. As Chief Justice YOUNG set forth in his dissenting opinion:

> The lead opinion claims that "the trial court has left open the door for Merit to discharge treated water into Kolke Creek at a lower than originally proposed rate." This claim appears plausible when looking solely at the circuit court's June 26, 2007, amended opinion. But that opinion was superseded by subsequent events. In particular, the circuit court's January 31, 2008, opinion ruled that the [Dep't of Environmental Quality] had erroneously issued a permit to Merit. Both the Court of Appeals and, eventually, this Court denied defendants' applications for leave to appeal, leaving intact the circuit court's opinion. Accordingly, even if the circuit court's June 26, 2007, decision "left open the door for Merit to discharge treated water into Kolke Creek," its January 31, 2008, decision closed that door, and this Court's denial of leave bolted the door shut. Further, without *either* physical access to Kolke Creek *or* a valid permit, Merit has no lawful authority to discharge *any* amount of *anything* into Kolke Creek. [*Anglers of the AuSable, Inc v Dep't of Environmental Quality*, 488 Mich 69, 107 (2010) (citation omitted).]

Thus, unlike the voluntary and unilateral actions on the part of the plaintiff in *City of Erie*, the vacation of Merit's permit and this Court's decision to deny leave came about independently from Merit and without action on the part of Merit. As a result, the situation here is not one where a party's voluntary actions are an attempt to insulate a favorable decision from review. Rather, the independent court action invalidating Merit's permit moves this case entirely outside the concerns raised in *City of Erie*.[8] Accordingly, I concur in the Court's order to grant rehearing.

MARY BETH KELLY, J., joined the statement of ZAHRA, J.

CAVANAGH, J. (*dissenting*). I dissent from the majority's decision to grant defendants' motions for rehearing and vacate this Court's December 29, 2010, opinion. Contrary to Justice ZAHRA's belief that this Court "disregarded the mootness doctrine," this Court previously considered, at great length, defendants' arguments related to this issue, as evidenced by my concurring statement and the three "emphatic[]" dissenting state-

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closed his nude dancing establishment and sold his property because the plaintiff could reopen his business in another building, as it was still incorporated. *City of Erie*, 529 US at 284-288, and *id*. at 302-303 (Scalia, J., concurring).

[8] See also *Anglers of the AuSable, Inc v Dep't of Environmental Quality*, 486 Mich 982, 986 n 6 (CORRIGAN, J., dissenting), and *id*. at 989 n 10 (YOUNG, J., dissenting), persuasively distinguishing *City of Erie* from the instant case.

ments to this Court's June 18, 2010, order denying defendant Merit's motion to dismiss for mootness. *Anglers of the AuSable, Inc v Dep't of Environmental Quality*, 486 Mich 982, 994 (2010) (YOUNG, J., dissenting). Defendants make no new arguments in their current motions, and the June 18, 2010, order was properly decided; therefore, reconsideration on mootness grounds is improper.[1] Apparently, some members of the major-

[1] I cannot join Justice ZAHRA's belief that MCR 2.119(F)(3) does not apply to this Court's review of motions for rehearing and reconsideration. Although it is true that MCR 7.313(E) and (F) apply only to this Court and do not expressly cross-reference MCR 2.119(F)(3), MCR 1.103 addresses the general applicability of the court rules and states that the rules "govern practice and procedure in *all courts* . . . . Rules stated to be applicable only in a specific court or only to a specific type of proceeding apply only to that court or to that type of proceeding and control over the general rules." (Emphasis added.) Thus, because MCR 7.313(E) and (F) offer no standard for considering motions for reconsideration and rehearing and MCR 2.119(F)(3) does not state that it is applicable only in specific courts or to a specific type of proceeding, it appears that it is applicable to this Court's consideration of motions for reconsideration and rehearing.

This Court's own publicly available Internal Operating Procedures further support the premise that MCR 2.119(F)(3) applies to this Court's review of motions for rehearing and reconsideration. Indeed, IOP I(E)(5)(b)(ii) states, "MCR 7.313(E) does not specify grounds for a motion for reconsideration. The same general principles that govern motions for reconsideration in trial courts apply. MCR 2.119(F)(3)." I acknowledge that the introduction to the Internal Operating Procedures explains that "[t]he Michigan Court Rules are and remain the governing procedures of this Court," but the introduction also states that the procedures "could be grouped under the heading 'How Things Work at the Supreme Court' " and that "the goal of [the procedures] was to set forth those features of our internal procedures that might benefit the appellate practitioner." Further, IOP I(E)(5)(b)(ii) is consistent with MCR 1.103's directive that the court rules "govern practice and procedure in all courts" unless otherwise stated. Thus, because our Internal Operating Procedures are available for public review and are intended to assist the appellate practitioner in navigating a course through this Court, I believe that they should not be summarily ignored.

Finally, although I believe that MCR 2.119(F)(3) does apply to this Court's consideration of motions for reconsideration and rehearing, I agree that the Court retains an element of discretion given that MCR 2.119(F)(3) states that it "[g]enerally" applies and that it does not "restrict[] the discretion of the court." Nevertheless, the members of this Court have generally applied MCR 2.119(F)(3) as the standard for

ity are now willing to rely merely on the ever-changing nature of the AuSable River as reason to reverse course, contrary to their previous statements. Indeed, only two short years ago, Chief Justice YOUNG eloquently bemoaned this Court's reconsideration of a matter after a change in this Court's composition. In his dissent in *United States Fidelity & Guaranty Co v Mich Catastrophic Claims Ass'n (On Rehearing)*, 484 Mich 1, 27 (2009) (*USF&G*), the Chief Justice stated:

> I. WHAT CHANGED?
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> The facts have not changed. The text of the statute at issue has not changed. The parties' arguments have not changed. And the rationale advanced in the opinions of this Court has not changed. Yet, within a matter of months, a decision of this Court, thoughtfully briefed, argued, and considered by seven justices, is no longer worth the paper it was written on. Even the casual observer, however, does not really need to ask why. The reason is obvious: . . . the composition of this Court changed.

Now, in what appears to be "déjà vu all over again," Chief Justice YOUNG is happy to join in our newly composed Court's undoing of recent precedent. I find interesting Chief Justice YOUNG's freshly announced willingness to forgo his position in *USF&G* because he now sees "no reason to remain bound by a position that failed to receive majority support two years ago." *Ante* at 885. While Chief Justice YOUNG is obviously free to change his mind, it is worth noting that his decision comes now, when it suits his previous dissenting position in this case, yet he consistently held fast to his *USF&G* dissent, see *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 485 Mich 966, 967 n 10 (2009) (YOUNG, J., dissenting); *Univ of Mich Regents v Titan Ins Co*, 484 Mich 852, 853-855 (2009) (YOUNG, J., dissenting), even as recently as the end of last term, see *McCormick v Carrier*, 487 Mich 180, 266 (2010) (MARKMAN, J., dissenting).

Also, Justice ZAHRA errs in the application of his newly created standard for reviewing motions for reconsideration and rehearing. Even

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determining whether granting a motion for reconsideration or rehearing is proper. See, e.g., *Duncan v Michigan*, 486 Mich 1071, 1074 (2010) (MARILYN KELLY, C.J., dissenting); *McCormick v Carrier*, 485 Mich 851-852 (2009) (WEAVER, J., concurring); *Univ of Mich Regents v Titan Ins Co*, 484 Mich 852, 853-854 (2009) (YOUNG, J., dissenting); *United States Fidelity & Guaranty Co v Mich Catastrophic Claims Ass'n (On Rehearing)*, 484 Mich 1, 3 n 12 (2009); *People v Osaghae*, 460 Mich 529, 535 (1999) (MARILYN KELLY, J., dissenting), see, also, IOP I(E)(5)(b)(ii). Furthermore, older caselaw from this Court indicates that MCR 2.119(F)(3) reflects this Court's historical standard for deciding motions for reconsideration and rehearing. See, e.g., *Thompson v Jarvis*, 40 Mich 526 (1879) (denying a motion for rehearing because "nothing [was] suggested beyond what was considered by the court upon original arguments.").

if one accepts that a justice may consider the merits of the legal arguments, correctness of the opinion, and jurisprudential significance of the issues presented,[2] Justice ZAHRA, in concurring with this Court's order reversing on *mootness* grounds, considers the merits of the legal arguments and correctness of the *June 18, 2010, order*, not this Court's December 29, 2010, opinion. Defendants did not file a motion for reconsideration of this Court's June 18, 2010, order; therefore, the majority's reaching to grant rehearing of this Court's subsequent opinion is quite a stretch.

Furthermore, Justice ZAHRA's claim that this Court's order "restores precedent" because it breathes new life into *Preserve the Dunes, Inc v Dep't of Environmental Quality*, 471 Mich 508 (2004), is true only from a very narrow perspective. As Justice MARILYN KELLY explained in her concurring opinion in this case, "*Preserve the Dunes* is of relatively recent vintage, having been decided a mere six years ago. . . . Moreover, *Preserve the Dunes* represented a sea change in one area of the law and toppled settled interpretations of MEPA that had existed for nearly 30 years." *Anglers of the AuSable, Inc v Dep't of Environmental Quality*, 488 Mich 69, 88 (2010) (MARILYN KELLY, J., concurring), citing *Eyde v Michigan*, 393 Mich 453, 454 (1975), *Ray v Mason Co Drain Comm'r*, 393 Mich 294, 304-305 (1975), *West Mich Environmental Action Council v Natural Resources Comm*, 405 Mich 741, 751 (1979), and *Nemeth v Abonmarche Dev, Inc*, 457 Mich 16 (1998). Thus, in essence, the majority believes that rehearing is proper in this case merely because it permits them to resuscitate a precedent with which they agree.

Finally, as I explained in my concurring statement to the order denying the motion to dismiss for mootness, *Anglers of the AuSable*, 486 Mich at 982-985, this case is not moot. The United States Supreme Court has warned appellate courts to be particularly wary of finding an issue moot when there remains "a public interest in having the legality of the practices settled," *United States v W T Grant Co*, 345 US 629, 632-633 (1953), and when the party seeking to moot the issue is the party that prevailed in the lower court, *City of Erie v Pap's A M*, 529 US 277, 287-288 (2000). Such concern is necessary because any effort to circumvent the Court's jurisdiction by a party through its voluntary actions is repugnant to an appellate court's "interest in preventing litigants from attempting to manipulate the Court's jurisdiction to insulate a favorable decision from review." *City of Erie*, 529 US at 288, see, also, *City News & Novelty, Inc v City of Waukesha*, 531 US 278, 283-284 (2001). The majority's decision to grant the motions for rehearing and dismiss this case as moot despite the utter lack of new arguments relating to this issue is perhaps even more repugnant to this principle.

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[2] I would note that Justice ZAHRA's new standard will almost always boil down to a justice's decision on the "correctness of the opinion" because it would be rare for this Court to consider an issue that is not jurisprudentially significant, see MCR 7.302(B)(3), nor does this Court often entertain frivolous legal arguments.

The majority's decision to vacate this Court's opinion leaves unanswered several questions of significant public concern, including whether plaintiffs have a cause of action to challenge the of the Department of Environmental Quality (DEQ) decision to issue a permit to discharge water into Kolke Creek and the proper method to determine the reasonableness of water use. Further, and perhaps most importantly, the majority's decision encourages gamesmanship by permitting defendants to "insulate a favorable decision from review" because defendants' unilateral actions were the basis for Merit Energy Company's motion to dismiss for mootness, just as in *City of Erie*. The plaintiff-respondent in *City of Erie* filed an affidavit after the United States Supreme Court granted certiorari stating that he had closed his business, sold his property, and never intended to operate a nude dancing establishment again. *City of Erie*, 529 US at 284-288; *id.* at 302-303 (Scalia, J., concurring). The *City of Erie* Court reasoned that the plaintiff-respondent could still obtain another building and reopen the establishment, given that it was still incorporated under state law. *Id.* at 287 (majority opinion). Similarly, in this case, defendant Merit could obtain another easement and pursue a discharge that would constitute a reasonable use of the water under the existing test. The *City of Erie* Court also reasoned that both parties had a continuing interest in the litigation because the city could not enforce its ordinance under the lower court's decision, even against other parties, and the plaintiff-respondent still had an interest in preserving the lower court's decision in favor of his rights. *Id.* at 288. In *City of Erie*, the city's inability to enforce its ordinance against the plaintiff-respondent and other inhabitants of the city constituted an ongoing injury. Similarly here, plaintiffs' ability to enforce their riparian interests against defendant and other parties seeking to use Kolke Creek will continue to be affected by the conclusion that plaintiffs lack a cause of action to challenge the DEQ's decision to issue a permit to discharge water into Kolke Creek and the unanswered question regarding the proper method to determine the reasonableness of water use.

The majority attempts to address this problem by vacating the Court of Appeals' opinion in this case, but its efforts fail. By erroneously concluding that this case is moot, the majority rewards defendants by insulating them from the unfavorable result of this Court's well-reasoned opinions. Furthermore, the cases cited by the majority in support of its decision to vacate the Court of Appeals' opinion address situations where appellate review was "prevented through *happenstance*," *United States v Munsingwear, Inc*, 340 US 36, 40 (1950) (emphasis added), i.e., "due to circumstances *unattributable to any of the parties*," *Karcher v May*, 484 US 72, 83 (1987) (emphasis added); see, also, *US Bancorp Mtg Co v Bonner Mall Partnership*, 513 US 18, 22-23 (1994). And, while the United States Supreme Court has concluded that, in some situations, vacation of a lower court decision is proper when a party who seeks review of the merits of an adverse ruling is frustrated by the "unilateral action of the party who prevailed below," *US Bancorp*, 513 US at 25, that Court has also concluded that unilateral attempts to moot a case only after leave to appeal is granted should not be well received, see *City of Erie*, 529 US at 288 (noting that the defendant raised the mootness issue after the Court

granted certiorari). Indeed, in this case, defendants' attempts to moot this case and insulate its favorable result began only after this Court granted leave to appeal.

Thus, I cannot agree that this case presents no justiciable issues. Rather, because the mootness issue was already thoughtfully considered by this Court and defendants merely present the same unconvincing arguments, I would deny defendants' motions for rehearing.

MARILYN KELLY and HATHAWAY, JJ., joined the statement of CAVANAGH, J.

Leave to Appeal Denied April 25, 2011:

PEOPLE v WENMAN, No. 141664; Court of Appeals No. 298284.

PEOPLE v WILLIE SIMS, No. 141812; Court of Appeals No. 297423.

PEOPLE v DRAKE, No. 141840; Court of Appeals No. 297379.

PEOPLE v CURTIS BAILEY, No. 141854; Court of Appeals No. 297375.

PEOPLE v PAUPORE, No. 141863; Court of Appeals No. 287950.

YOUNG, C.J., did not participate because he is closely acquainted with a relative of a party.

ZAHRA, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v SPILLMAN, No. 141865; Court of Appeals No. 299221.

ZAHRA, J., did not participate because he was on the Court of Appeals panel.

GET BACK UP, INC v DETROIT BOARD OF ZONING APPEALS, No. 141868; Court of Appeals No. 299190.

PEOPLE v LANTON, No. 141900; Court of Appeals No. 298066.

PEOPLE v BURGESS, No. 141902; Court of Appeals No. 297654.

PEOPLE v CORRION, No. 141905; Court of Appeals No. 298816.

PEOPLE v PALOMBO, No. 141921; Court of Appeals No. 298078.

ZAHRA, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v TYLER, No. 141945; Court of Appeals No. 298283.

BESIC v CITIZENS INSURANCE COMPANY OF THE MIDWEST, No. 141967; reported below: 290 Mich App 19.

PEOPLE v ROSE, No. 141991; Court of Appeals No. 298451.

PEOPLE v DANNER, No. 142009; Court of Appeals No. 298565.

PEOPLE v AARON CHAPMAN, No. 142019; Court of Appeals No. 298933.

PEOPLE v ABDUL-HAK, No. 142020; Court of Appeals No. 299950.

PEOPLE v SANDERS, No. 142027; Court of Appeals No. 299281.

ZAHRA, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v RAAR, No. 142039; Court of Appeals No. 298536.

PEOPLE v MARQUEST HENDERSON, No. 142053; Court of Appeals No. 298557.

PEOPLE v MCLEMORE, No. 142055; Court of Appeals No. 292331.

PATE v JUDY, No. 142060; Court of Appeals No. 297273.

PEOPLE v FITZPATRICK, No. 142069; Court of Appeals No. 297850.

PEOPLE v SAMS, No. 142077; Court of Appeals No. 299427.

PEOPLE v HEATHCOAT, No. 142078; Court of Appeals No. 298261.

PEOPLE v EDWARD JOHNSON, No. 142088; Court of Appeals No. 299634.

PEOPLE v MELODY HARRIS, No. 142091; Court of Appeals No. 299682.

PEOPLE v ERNEST JACKSON , No. 142093; Court of Appeals No. 299628.

PEOPLE v WATTERS, No. 142098; Court of Appeals No. 299566.

PEOPLE v BOWDEN, No. 142100; Court of Appeals No. 299578.

PEOPLE v BONNER, No. 142109; Court of Appeals No. 297248.

PEOPLE v FRY, No. 142113; Court of Appeals No. 299602.

PEOPLE v FLOYD JENNINGS, No. 142123; Court of Appeals No. 298807.

PEOPLE v CHARLES MILLER, No. 142131; Court of Appeals No. 296705.

PEOPLE v WHITTENBERG, No. 142134; Court of Appeals No. 299954.

PEOPLE v LORENZO MCCRAY, No. 142135; Court of Appeals No. 297788.

SMITH v DOADES, No. 142144; Court of Appeals No. 291026.

SOCIALIST PARTY OF MICHIGAN v SECRETARY OF STATE, No. 142163; Court of Appeals No. 299951.

PEOPLE v DELANGELO JOHNSON, No. 142164; Court of Appeals No. 297890.

PEOPLE v DEANDRE KING, No. 142166; Court of Appeals No. 297561.

PEOPLE v THOMAS DUNCAN, No. 142167; Court of Appeals No. 300468.

MERKEL v LINCOLN CONSOLIDATED SCHOOLS, No. 142176; Court of Appeals No. 292795.

LUCKY ENTERPRISES v HAMOOD, No. 142178; Court of Appeals No. 293632.

YOUNG v OAKLAND COUNTY, No. 142183; Court of Appeals No. 293066.

ZAHRA, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v STURGES, No. 142201; Court of Appeals No. 292920.

ZAHRA, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v SALERNO, No. 142205; Court of Appeals No. 300249.

PEOPLE v DARIUS JACKSON, No. 142206; Court of Appeals No. 291985.

KORDA v OAKLAND COUNTY SHERIFF, No. 142215; Court of Appeals No. 290920.

PEOPLE v GORDON WELLS, No. 142219; Court of Appeals No. 293182.

ZAHRA, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v CHAD KING, No. 142222; Court of Appeals No. 300103.

PEOPLE v LACALAMITA, No. 142223; Court of Appeals No. 294436.

PEOPLE v DELL, No. 142230; Court of Appeals No. 297930.

PEOPLE v GONZALES, No. 142231; Court of Appeals No. 300302.

PEOPLE v BENNETT, No. 142235; reported below: 290 Mich App 465.

GET BACK UP, INC v DETROIT BOARD OF ZONING APPEALS, No. 142239; Court of Appeals No. 299422.

PEOPLE v LORRIE THOMAS, No. 142250; Court of Appeals No. 300230.

JJL PROPERTIES v TRAFFIC JAM AND SNUG OF MICHIGAN, INC, No. 142251; Court of Appeals No. 291203.

PEOPLE v SCHUTZE, No. 142256; Court of Appeals No. 293253.

PEOPLE v KENNETH CLARK, Nos. 142259, 142260, and 142661; Court of Appeals Nos. 281460, 281461, and 281462.

SELECT CONSTRUCTION COMPANY, INC v LASALLE GROUP, INC, No. 142262; Court of Appeals No. 293143.

PEOPLE v ROGER BARNES, No. 142271; Court of Appeals No. 293352.

PEOPLE v SHUMPERT, No. 142272; Court of Appeals No. 292634.

HUDSON v LORENCE, No. 142275; Court of Appeals No. 291714.

PEOPLE v GORDON, No. 142277; Court of Appeals No. 291745.

PEOPLE v DALE LEWIS, No. 142278; Court of Appeals No. 300291.

PEOPLE v MCCLAVEY, No. 142285; Court of Appeals No. 300324.

L LOYER CONSTRUCTION COMPANY v DEPARTMENT OF TRANSPORTATION, No. 142290; Court of Appeals No. 294067.

PEOPLE v HARVEY, No. 142291; Court of Appeals No. 293358.

PEOPLE v CHRISTOPHER HOWARD, No. 142298; Court of Appeals No. 293585.

PEOPLE v MCDONALD, No. 142299; Court of Appeals No. 293015.

KULONGOWSKI v BROWER, No. 142302; Court of Appeals No. 293996.

ZAHRA, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v MORGAN, No. 142305; Court of Appeals No. 294591.

PEOPLE v SHERRI SCOTT, No. 142309; Court of Appeals No. 300289.

PEOPLE v GRONDON, No. 142310; Court of Appeals No. 292494.

PEOPLE v MALTBIA, No. 142313; Court of Appeals No. 300184.

STATE TREASURER v JOHNSON, No. 142325; Court of Appeals No. 294142.

PEOPLE v IMARI JENNINGS, No. 142327; Court of Appeals No. 299767.

PEOPLE v JADIDNOURI, No. 142328; Court of Appeals No. 293560.

PEOPLE v NATHANIEL WILLIAMS, No. 142329; Court of Appeals No. 299310.

PEOPLE v YANNA, No. 142331; Court of Appeals No. 299761.

PEOPLE v ST ANN, No. 142337; Court of Appeals No. 294569.

ZAHRA, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v BENSON, No. 142338; Court of Appeals No. 287768.

PEOPLE v EUGENE WILLIAMS, No. 142341; Court of Appeals No. 293250.

MCQUIRTER v DEPARTMENT OF CORRECTIONS, No. 142342; Court of Appeals No. 300409.

AASTAD v EDWARDS, No. 142343; Court of Appeals No. 293101.

UPJOHN v CITY OF ROYAL OAK, No. 142345; Court of Appeals No. 298766.

In re ANDERSON ESTATE, No. 142350; Court of Appeals No. 292036.

PEOPLE v BRAKE, No. 142351; Court of Appeals No. 293141.

PEOPLE v BRASWELL, No. 142352; Court of Appeals No. 293743.

PEOPLE v STEPHNEE SMITH, No. 142355; Court of Appeals No. 292876.

PEOPLE v BOWMAN, No. 142358; Court of Appeals No. 292415.

ZAHRA, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v TRAVON DIXON, No. 142367; Court of Appeals No. 292130.
ZAHRA, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v DEVINE, No. 142369; Court of Appeals No. 294568.

PEOPLE v CASH, No. 142371; Court of Appeals No. 300282.

WEGLARZ v CONVENTION & SHOW SERVICES, INC, No. 142373; Court of Appeals No. 298316.
ZAHRA, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v BOLES, No. 142376; Court of Appeals No. 300549.

GRIEVANCE ADMINISTRATOR v HENRY, No. 142377.

PEOPLE v TIMOTHY WILLIAMS, No. 142389; Court of Appeals No. 288704.
ZAHRA, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v STEIN, No. 142402; Court of Appeals No. 293646.

PEOPLE v WESTON, No. 142404; Court of Appeals No. 294813.

PEOPLE v DENHOF, No. 142408; Court of Appeals No. 287720.

PEOPLE v LAMPING, No. 142410; Court of Appeals No. 293538.

STEVENSON v GENERAL MOTORS CORPORATION, No. 142411; Court of Appeals No. 299087.

PEOPLE v LUTZE, No. 142412; Court of Appeals No. 294347.

PEOPLE v IVAN ARMSTRONG, No. 142413; Court of Appeals No. 300734.

PEOPLE v LECLEAR, No. 142417; Court of Appeals No. 292867.

PEOPLE v JAMEL DAVIS, No. 142421; Court of Appeals No. 292613.

PEOPLE v TREVINO, No. 142427; Court of Appeals No. 290526.
ZAHRA, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v EUBANKS, No. 142428; Court of Appeals No. 292681.

DAVIS v DEPARTMENT OF CORRECTIONS, No. 142430; Court of Appeals No. 297934.

LATHAM v BARTON MALOW COMPANY, No. 142435; Court of Appeals No. 290268.

PEOPLE v ISBY, No. 142449; Court of Appeals No. 293879.

PEOPLE v MCCARTY, No. 142451; Court of Appeals No. 293275.

PEOPLE v CZERKIES, No. 142452; Court of Appeals No. 296999.

ZAHRA, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v GALVAN, No. 142456; Court of Appeals No. 292877.

CASANOVA v DEPARTMENT OF CORRECTIONS, No. 142459; Court of Appeals No. 297441.

MCCARTHY v SOSNICK, Nos. 142461 and 142462; Court of Appeals Nos. 300159 and 300160.

PEOPLE v SELMA SMITH, No. 142471; Court of Appeals No. 300932.

PEOPLE v LEON HARRIS, No. 142475; Court of Appeals No. 287169.

PEOPLE v MILBOURN, No. 142486; Court of Appeals No. 300588.

PEOPLE v LOVELL THOMAS, No. 142488; Court of Appeals No. 293888.

PEOPLE v HERNTON, No. 142490; Court of Appeals No. 300930.

HUSTON v CONSUMERS ENERGY COMPANY, No. 142497; Court of Appeals No. 298664.

PEOPLE v GREEN, No. 142498; Court of Appeals No. 300770.

PEOPLE v CRABTREE, No. 142509; Court of Appeals No. 301282.

PEOPLE v KENNETH JOHNSON, No. 142552; Court of Appeals No. 292238.

ZAHRA, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v HALL, No. 142561; Court of Appeals No. 301163.

In re FORFEITURE OF A QUANTITY OF MARIJUANA, No. 142563; reported below: 291 Mich App 243.

HOEY v GENERAL MOTORS CORPORATION, No. 142583; Court of Appeals No. 298919.

PEOPLE v GREENE, No. 142588; Court of Appeals No. 300989.

PEOPLE v WOLSCHLEGER, No. 142673; Court of Appeals No. 301429.

ZAHRA, J., did not participate because he was on the Court of Appeals panel.

Reconsideration Denied April 25, 2011:

PEOPLE v DAVID DAVIS, No. 141794; Court of Appeals No. 298681. Leave to appeal denied at 488 Mich 1039.

ZAHRA, J., did not participate because he was on the Court of Appeals panel.

MEREDITH v OAKWOOD HEALTHCARE, INC, No. 141418; Court of Appeals No. 288507. Leave to appeal denied at 488 Mich 1035.

MARILYN KELLY, J., would grant reconsideration and, on reconsideration, would grant leave to appeal.

CROWN ENTERPRISES, INC v CITY OF ROMULUS, No. 141692; Court of Appeals No. 286525. Summary disposition at 488 Mich 1025.

PEOPLE v RAIHALA, No. 141799; Court of Appeals No. 297684. Leave to appeal denied at 488 Mich 1040.

AMERICAN HOME ASSURANCE COMPANY v MICHIGAN CATASTROPHIC CLAIMS ASSOCIATION, Nos. 141817 and 141819: reported below: 288 Mich App 706. Leave to appeal denied at 488 Mich 1040.

ACE AMERICAN INSURANCE COMPANY v MICHIGAN CATASTROPHIC CLAIMS ASSOCIATION, No. 141819; reported below: 288 Mich App 706. Leave to appeal denied at 488 Mich 1040.

PEOPLE v CHRISTOPHER SMITH, No. 141864; Court of Appeals No. 297435. Leave to appeal denied at 488 Mich 1040.

Summary Disposition April 28, 2011:

PEOPLE v GAGNIER, No. 139735; Court of Appeals No. 281868. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Oakland Circuit Court. The trial court articulated substantial and compelling reasons to support a departure from the sentencing guidelines but failed to articulate any rationale to justify the extent of the particular departure imposed in this case. *People v Smith*, 482 Mich 292 (2008). On remand, the trial court shall either issue an order that articulates why this level of departure is warranted, or resentence the defendant. In all other respects, leave to appeal is denied. We do not retain jurisdiction.

PEOPLE v LAIDLAW, No. 139751; Court of Appeals No. 281867. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Oakland Circuit Court. The trial court articulated substantial and compelling reasons to support a departure from the sentencing guidelines but failed to articulate any rationale to justify the extent of the particular departure imposed in this case. *People v Smith*, 482 Mich 292 (2008). On remand, the trial court shall either issue an order that articulates why this level of departure is warranted, or resentence the defendant. In all other respects, leave to appeal is denied. We do not retain jurisdiction.

PEOPLE v SIMPSON, Nos. 142036, 142089, and 142099; Court of Appeals Nos. 299308, 299297, and 299261. 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, of the issue whether the trial court erred in requiring the defendant to register under the Sex Offenders Registration Act, MCL 28.721 *et seq*. The Court of Appeals currently has before it the case of *People v Gentile*, Docket No. 295570, a case we

remanded for consideration as on leave granted on November 24, 2010, and that involves an issue similar to that presented in this case. We note that the Court's disposition in *Gentile* may be instructive in resolving the issue specified in this order. In all other respects, leave to appeal is denied.

PEOPLE v MANNING, No. 142286; Court of Appeals No. 300111. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Saginaw Circuit Court. The trial court articulated a substantial and compelling reason for departing from the sentencing guidelines when imposing a sentence following a probation violation, but it failed to articulate any rationale to justify imposition of a minimum sentence that was 71 months above the sentencing guidelines maximum of 9 months. *People v Smith*, 482 Mich 292 (2008). On remand, the trial court shall either issue an order that articulates why this level of departure is warranted, or resentence the defendant. In all other respects, leave to appeal is denied. We do not retain jurisdiction.

Leave to Appeal Denied April 28, 2011:

PEOPLE v HUBBARD, No. 141518; Court of Appeals No. 296200.

ALLSTATE INSURANCE COMPANY v BROE, No. 142160; Court of Appeals No. 290133.

PEOPLE v ORLEWICZ, No. 142796; Court of Appeals No. 285672.

DEBANO-GRIFFIN v LAKE COUNTY, No. 142902; Court of Appeals No. 282921.

ZAHRA, J., did not participate because he was on the Court of Appeals panel.

Reconsideration Denied April 28, 2011:

PEOPLE v SWAIN, No. 141504; reported below: 288 Mich App 609. Leave to appeal denied at 488 Mich 992.

Summary Disposition April 29, 2011:

VINSON v ABN AMRO MORTGAGE GROUP, INC, No. 142162; Court of Appeals No. 292579. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals. Record evidence that the defendant resolved to eliminate manual dialing, which only the plaintiff utilized because her disability required her to work from her home, and that the defendant terminated the plaintiff with the stated intent to replace her with an able-bodied individual who could work in the defendant's office, established a rebuttable prima facie case of discrimination under the Persons with Disability Civil Rights Act, MCL 37.1101 *et seq.* The circuit court erred in ruling that the plaintiff did not create a prima facie case because she admitted that she had no evidence that the defendant took any adverse action against her because

of her disability. Rather, the plaintiff's deposition testimony in that regard was ambiguous. Further, the subject of reasonable accommodation was not addressed in her deposition. The circuit court also erred in ruling that the plaintiff did not plead her failure of reasonable accommodation claim. See Complaint, ¶ 20.

The circuit court's alternative basis for granting summary disposition to the defendant—that the plaintiff did not bear her burden to establish that the defendant's purported nondiscriminatory basis to terminate her was a mere pretext—was also erroneous. The defendant claimed that it terminated the plaintiff because its auto-dialing system could only be operated from its office, and the plaintiff could not utilize the auto-dialing system because she could only work from her home. However, the defendant provided no evidentiary support for its claim that the auto-dialing system could not be operated from the plaintiff's home. Therefore, the plaintiff was not obligated to establish that the defendant's purported nondiscriminatory basis for its termination of the plaintiff was a mere pretext for its discriminatory action. *Sniecinski v Blue Cross & Blue Shield of Mich*, 469 Mich 124, 134 (2003). We remand this case to the Oakland Circuit Court for further proceedings not inconsistent with this order.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal Entered April 29, 2011:

PEOPLE v LAIDLER, Nos. 142442 and 142443; reported below: 291 Mich App 199. The parties shall submit supplemental briefs within 42 days of the date of the order appointing appellate defense counsel. The briefs shall address whether, for purposes of offense variable 3, Dante Holmes was a victim and, even if Holmes was not a victim, whether the defendant could appropriately be scored 100 points for offense variable 3 on the theory that "death result[ed] from the commission of a crime and homicide is not the sentencing offense." See MCL 777.33(2)(b).

Leave to Appeal Denied April 29, 2011:

PEOPLE v GREGG, No. 142148; Court of Appeals No. 300129.

CAVANAGH, J., would grant the application for leave to appeal.

MARILYN KELLY, J. (*dissenting*). I dissent from the Court's order denying defendant's application for leave to appeal. By assessing 10 points for offense variable 19 (OV 19) (interference with the administration of justice), the trial court erroneously punished defendant for exercising his constitutional and statutory rights.[1] Accordingly, I would vacate defendant's sentence and remand this case to the trial court for resentencing.

The police stopped defendant for erratic driving and driving with no taillights. When asked if he had been drinking, defendant stated that he

[1] MCL 777.49.

had consumed "two beers." The police officer administered field sobriety tests, which defendant failed. The officer also administered a preliminary chemical breath analysis, the results of which indicated that defendant had a blood alcohol content of 0.166. The officer transported defendant to the Clinton County Jail, where defendant refused to submit to a chemical breath test.[2]

Defendant pled guilty to OUIL-third. At sentencing, the trial judge assessed 10 points for OV 19 based on defendant's refusal to submit to a chemical breath test at the police station. The court imposed a sentence of five years of probation, with the first year in jail. The Court of Appeals denied defendant's application for leave to appeal.

Defendant argues that the trial judge erroneously scored 10 points for OV 19. MCL 777.49 sets forth the criteria for scoring OV 19. It provides, "Offense variable 19 is threat to the security of a penal institution or court or interference with the administration of justice or the rendering of emergency services." Ten points may be scored when "the offender . . . interfered with or attempted to interfere with the administration of justice."

The Fourth Amendment of the United States Constitution protects the people from unreasonable searches and seizures.[3] The Michigan Constitution contains a similar protection.[4] Both constitutional provisions require a warrant supported by probable cause for searches and seizures to be reasonable, and therefore constitutional, unless an exception to the warrant requirement applies.[5]

MCL 257.625c provides that a person who operates a vehicle upon a public highway is considered to have given implied consent to chemical tests of his or her blood, breath, or urine. However, this implied consent is revocable under the protections afforded by the Fourth Amendment, just like consent to any other search. Indeed, "[i]n conducting any consent search, the authorities are limited by the terms of the consent. Consent may be withdrawn or limited at any time prior to the completion of the search."[6]

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[2] A preliminary chemical breath analysis, commonly known as a PBT, is distinct from a chemical breath test. Preliminary chemical breath analyses are administered roadside when a suspected offender is pulled over and are used to establish probable cause to arrest an offender for drunk driving. The results of a preliminary chemical breath analysis are inadmissible in court as substantive evidence of intoxication. See MCL 257.625a(2)(b). By contrast, chemical breath tests are performed after an offender has been arrested and are admissible in court as evidence of intoxication. See MCL 257.625a(6)(a) and (d).

[3] US Const, Am IV.

[4] Const 1963, art 1, § 11.

[5] *Katz v United States*, 389 US 347, 357 (1967).

[6] *People v Powell*, 199 Mich App 492, 496-497 (1993) (citations omitted).

This axiomatic right is at the very core of the Fourth Amendment. Thus, defendant had a constitutional right to refuse the warrantless chemical breath test. By definition, his assertion of this constitutional right cannot amount to an interference with the administration of justice. Accordingly, the trial judge erroneously scored OV 19 at 10 points.

Moreover, assuming arguendo that defendant did not have a constitutional right to refuse a chemical test, the Legislature nonetheless provided drivers with several statutory rights with respect to chemical tests. In this regard, MCL 257.625a(6)(b) provides:

> A person arrested for a crime described in section 625c(1) shall be advised of all of the following:
>
> (*i*) If he or she takes a chemical test of his or her blood, urine, or breath administered at the request of a peace officer, he or she has the right to demand that a person of his or her own choosing administer 1 of the chemical tests.
>
> (*ii*) The results of the test are admissible in a judicial proceeding as provided under this act and will be considered with other admissible evidence in determining the defendant's innocence or guilt.
>
> (*iii*) He or she is responsible for obtaining a chemical analysis of a test sample obtained at his or her own request.
>
> (*iv*) If he or she refuses the request of a peace officer to take a test described in subparagraph (*i*), a test shall not be given without a court order, but the peace officer may seek to obtain a court order.
>
> (*v*) Refusing a peace officer's request to take a test described in subparagraph (*i*) will result in the suspension of his or her operator's or chauffer's license and . . . in the addition of 6 points to his or her driver record.

By its terms, this statute gives drivers the option of (1) taking a test as requested by an officer, (2) taking the requested test and then procuring his or her own test, or (3) refusing a test and having his or her license suspended.[7]

Likewise, subparagraph (*iv*) explicitly provides that, if a person refuses the request of an officer to take a chemical breath test, a test *shall not be given* without a court order.[8] This provision effectively codifies the Fourth Amendment protection from a warrantless search and the principle that an officer may not lawfully compel a chemical breath test without a warrant. Thus, not only did defendant have a constitutional right to refuse a warrantless chemical test, he had a statutory right to refuse it.

Finally, even if defendant had no constitutional or statutory right to refuse a chemical breath test, differences in the relevant statutory language compel a finding that a driver may refuse such a test. As

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[7] See also *Collins v Secretary of State*, 384 Mich 656, 667 (1971).

[8] MCL 257.625a(6)(b)(*iv*), see also *People v Snyder*, 181 Mich App 768, 771 (1989) ("We conclude only that a search warrant is encompassed within the term 'court order' for purposes of this statute . . . .").

previously noted, preliminary chemical breath analyses are distinct from chemical breath tests. The Legislature provided that preliminary chemical breath analyses are mandatory. MCL 257.625a(2) indicates that "a peace officer . . . may *require* [a driver] to submit to a *preliminary* chemical breath analysis." (Emphasis added.) Similarly, MCL 257.625a(4) provides that a person who refuses to submit to a *preliminary* chemical breath analysis "shall be advised that refusing . . . to take a test . . . is a misdemeanor . . . ." (Emphasis added.)

By contrast, the provisions governing chemical breath tests do not include mandatory language. Indeed, MCL 257.625a(6)(b)(*i*) states that a peace officer may "request" submission to a chemical test. A "request," by definition, may be denied. And subsections (6)(b)(*i*) through (*iv*) provide drivers with several alternative options in response to a request for a chemical breath test. Had the Legislature intended to mandate compliance with chemical breath tests, it could have incorporated compulsory language in MCL 257.625a(6), just as it did in the provisions governing preliminary chemical breath analyses. It chose not to do so.

Additionally, the Legislature prescribed criminal penalties for failure to comply with a preliminary breath analysis. Yet it prescribed a civil penalty—license suspension—for failure to submit to a chemical breath test. This is further evidence that refusal to comply with a chemical breath test does not constitute a criminal interference with the administration of justice such that points may be assessed under OV 19.

This Court's refusal to correct the trial court's erroneous scoring of OV 19 ignores basic tenets of Fourth Amendment jurisprudence. It disregards the language of MCL 257.625a, and sanctions a heightened punishment for an offender who exercised his or her constitutional and statutory rights. Although defendant's jail term has ended and he has been released on probation, he remains a ward of the Department of Corrections. Thus, he is entitled to resentencing.

HEIDINGER v HEIDINGER, No. 142851; Court of Appeals No. 299365.

Superintending Control Denied May 3, 2011:

VANDUSSEN v COURT OF APPEALS, No. 142950. By order of April 27, 2011, this Court remanded this case to the Court of Appeals for that court to issue an explanatory order on or before May 2, 2011. On order of the Court, the Court of Appeals having issued such an order on May 2, 2011, the complaint for superintending control is again considered, and relief is denied because the Court is not persuaded that it should grant the requested relief.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal Entered May 4, 2011:

WHITMORE v CHARLEVOIX COUNTY ROAD COMMISSION, No. 142106; Court of Appeals No. 289672 At oral argument, the parties shall address whether the plaintiffs demonstrated that the defendant "knew, or in the exercise

of reasonable diligence should have known, of the existence of the defect" that rendered the roadway not "reasonably safe and convenient for public travel." MCL 691.1402(1); MCL 691.1403. See *Wilson v Alpena Co Rd Comm*, 474 Mich 161 (2006). The parties may file supplemental briefs within 42 days of the date of this order, but they should not submit mere restatements of their application papers.

Leave to Appeal Denied May 4, 2011:

PEOPLE v CARAWAY, No. 142155; Court of Appeals No. 292587.

PEOPLE v SALTERS, No. 142186; Court of Appeals No. 299097.

ZAHRA, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v ALOBAIDI, No. 142227; Court of Appeals No. 292638.

ZAHRA, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v DADOUSH, No. 142264; Court of Appeals No. 292571.

PEOPLE v POST, No. 142266; Court of Appeals No. 293239.

PEOPLE v MCELRATH, No. 142370; Court of Appeals No. 291900.

JOHNSON v GATES, No. 142901; Court of Appeals No. 302252.

Summary Disposition May 6, 2011:

PEOPLE v TERRY, No. 141983; Court of Appeals No. 292734. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals holding that the prosecutor's introduction of polygraph evidence was harmless error, we vacate the defendant's convictions and sentences, and we remand this case to the Macomb Circuit Court for a new trial. The Court of Appeals erred in relying on the invited response rule applied in *People v Kahley*, 277 Mich App 182, 183-184 (2007), in which the polygraph testimony was volunteered by a police witness, rather than, as in this case, intentionally introduced by the prosecution by posing a clearly improper question for the sole purpose of eliciting inadmissible polygraph evidence that conveyed to the jury the implication that codefendant Blair Lindsay's testimony against the defendant was truthful. See *People v Jones*, 468 Mich 345 (2003), and the proper application of the invited response doctrine explicated therein. In light of the extensive impeachment of the prosecution witnesses, all of whom acknowledged having initially implicated Lindsay as the shooter, the curative instruction was insufficient to prevent prejudice to the defendant from the inference of truthfulness that the prosecutor sought to suggest by the improper, uninvited question concerning the polygraph test administered to Lindsay before he was allowed to plead guilty under the plea bargain.

In all other respects, leave to appeal is denied.

MARILYN KELLY, J. (*concurring*). I concur fully with the order reversing the judgment of the Court of Appeals, vacating defendant's convictions and sentences, and remanding to the trial court for a new trial. I write separately only because I would reverse on another issue as well. I would hold that the prosecutor's questions regarding defendant's failure to report the crime and proclaim his innocence before his arrest were improperly admitted.

The Court of Appeals relied on *People v Goodin*.[1] One element of the offense in that case was a failure to report. Notably, no such element is contained in assault with intent to commit murder, the offense charged in this case.

Moreover, the facts of this case would not have prompted an innocent person to proclaim his innocence to the police preemptively.[2] For example, there is no evidence that defendant was aware before his arrest that the police considered him a suspect. Lindsay, the key prosecution witness at trial, was the prime suspect, and all the witnesses initially identified Lindsay as the perpetrator. The prosecutor laid no foundation to impeach defendant with his silence by showing that the police had any information that would give rise to the charges ultimately filed against him. Nor is there evidence that defendant was aware that Lindsay had implicated him.

Under these circumstances, it was "natural" for the defendant not to go to the police unbidden and inform on his friend Lindsay. More importantly, it was also natural for him not to spontaneously profess his own innocence to police before he was accused of anything. Thus, defendant's pre-arrest silence was inadmissible. The trial court's ruling allowing the prosecutor to question defendant about his failure to do so prejudiced his right to remain silent.[3] Finally, the jury never received a limiting instruction that such evidence could be considered only for impeachment purposes, further compounding the error.

I concur in the order reversing the judgment of the Court of Appeals because the prosecutor's introduction of polygraph evidence was not harmless error. However, because the issue involving defendant's failure to profess his innocence will likely arise on retrial, I would also reverse the Court of Appeals' holding that allowed the use of his pre-arrest silence.

ZAHRA, J., did not participate because he was on the Court of Appeals panel.

REEVES V MIDMICHIGAN HEALTH, No. 142059; Court of Appeals No. 291855. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to

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[1] 257 Mich App 425, 433 (2003).

[2] See *People v Collier*, 426 Mich 23, 34 (1986) ("[I]mpeachment with prearrest silence 'should be approached with caution, and, wherever it is undertaken, it should be prefaced by a proper demonstration that it was "natural" to expect the defendant to speak in the circumstances.' "), quoting *Commonwealth v Nickerson*, 386 Mass 54, 61-62 (1982).

[3] *Collier*, 426 Mich at 34.

appeal, we reverse the judgment of the Court of Appeals, for the reasons stated in the Court of Appeals dissenting opinion, and we reinstate the November 18, 2008, order of the Gratiot Circuit Court granting Gratiot Medical Center summary disposition.

MARILYN KELLY and HATHAWAY, JJ., would deny leave to appeal.

Leave to Appeal Denied May 6, 2011:

FARMERS INSURANCE EXCHANGE v YOUNG, No. 141571; Court of Appeals No. 275584.

MARKMAN, J. (*concurring*). I concur in the Court's order denying leave to appeal, but write separately because I would refine the holding of *Amerisure Ins Co v Plumb*, 282 Mich App 417 (2009), concerning the proper analysis for determining whether a claimant is precluded from obtaining personal protection insurance (PIP) benefits under MCL 500.3113(a).

MCL 500.3113(a) provides an exclusion for PIP benefits in circumstances in which "[t]he person was using a motor vehicle or motorcycle which he or she had taken unlawfully, unless the person reasonably believed that he or she was entitled to take and use the vehicle." Based on this language, *Plumb* correctly stated that "[w]hen applying § 3113(a), the first level of inquiry will always be whether the taking of the vehicle was unlawful. If the taking was lawful, the inquiry ends because § 3113(a) does not apply." *Plumb*, 282 Mich App at 425. "An unlawful taking does not require an intent to permanently deprive the owner of the vehicle to constitute an offense." *Mester v State Farm Mut Ins Co*, 235 Mich App 84, 88 (1999). Rather, an unlawful taking may occur where a person has taken a vehicle "without authority." MCL 750.413; MCL 750.414. However, *Plumb* did not expressly identify *whose* authority must be lacking for the purposes of § 3113(a). To the extent that it is necessary to do so, I would clarify that, at least in my judgment, this provision is focused on the authority of the *owner* of the vehicle, not the state of Michigan. That is, for the purposes of § 3113(a), a vehicle may be "unlawfully taken" where it is taken without the authority of its owner, not where a person has taken the vehicle without a valid driver's license, the requisite insurance, or in violation of some other provision of the Michigan Vehicle Code.

Plumb also properly recognized that once an "unlawful taking" has been established, the "next step in [the] analysis is to determine whether [the claimant] 'reasonably believed that . . . she was entitled to *take* and *use* the vehicle.' " *Plumb*, 282 Mich App at 427. The statute makes clear that at this stage the determinative question is whether a claimant's belief was "reasonable." Whether the use was "legal" will often be a highly relevant factor in making this determination, but may not control in every case. For instance, different considerations might attach in an emergency; in such a circumstance, the illegal operation of a vehicle may not always, "as a matter of law," *id*. at 431, preclude a finding of a "reasonable belief" to use the vehicle under § 3113(a), as it did in *Plumb*.

In sum, § 3113(a) requires a threshold determination that a vehicle was "unlawfully taken" from its *owner*. If this threshold showing is made,

the next step in the analysis looks to whether the claimant had a *reasonable* belief that he or she was entitled to "take," and to "use," the vehicle. This analytical framework is compelled by § 3113(a), and should aid in alleviating the legitimate concerns of the dissenting Court of Appeals judge in *Plumb* and in this case.

MARILYN KELLY, J. (*dissenting*). I respectfully dissent from the Court's order denying plaintiff's application for leave to appeal. I believe that the Court of Appeals majority erred in concluding that MCL 500.3113(a) prevents defendant from obtaining no-fault benefits. Section 3113(a) denies coverage to individuals who unlawfully take a vehicle, not to those who unlawfully use a vehicle. Since defendant did not unlawfully take the vehicle involved in this case, § 3113(a) does not preclude him from receiving no-fault benefits.

FACTS AND PROCEDURAL HISTORY

This case arises out of an automobile accident. Nicole Williams owned an uninsured 2001 Kia which became involved in an automobile accident. Before the accident, Williams enlisted Lynda Lee, her cousin, to stay at her house and take care of her seven-year-old son Jalen while Williams went on a vacation. Before leaving, Williams told Lee that the Kia was uninsured. She testified that she assumed Lee would understand that to mean that she should not drive the car. She testified that her agreement with Lee to stay at her house and care for Jalen did not require Lee to use an automobile. There was food in the house, and Jalen's school was within walking distance.

Williams's sister, Cynthia Hughes, drove Williams to the airport when she departed on vacation. Williams testified that Hughes did not use the Kia for this trip. However, Lee disagreed. She testified that Hughes drove Williams to the airport in the Kia while she and Jalen stayed at Hughes' home. Lee further testified that, when Hughes returned from the airport, she turned the keys to the Kia over to Lee and told her to return the auto to Williams's home. It is undisputed that the keys to the Kia were left in Lee's possession.

On the night of the accident, Lee testified, she drove the Kia to a party store to buy beer and took Jalen with her, then drove with him to defendant Rufus Young's workplace. Young worked in a duplex doing plumbing, electrical, and drywall repair. He also lived on the premises. Lee testified that she sat on the porch and drank either two or three 40-ounce malt liquors while Jalen rode his bike. When she returned to the car, she and Young agreed that she was not fit to drive.

Young testified that, even though Lee was intoxicated, he could not allow her and Jalen to stay at the duplex. He was concerned that his landlord would object. He wanted Lee to leave but did not want her to drive in her intoxicated condition. Thus, he agreed to drive Lee and Jalen to Williams' home, even though his driver's license had been suspended.

Young acknowledged that he did not receive permission from Williams to drive the Kia before she left for her vacation. He testified in his deposition that, in light of his past driving record, Williams probably

would not have allowed him to use the Kia. At trial, however, he testified that he thought that Williams would have approved of his driving the vehicle in light of Lee's intoxication. Young had no knowledge of whether Lee had permission to drive the Kia.

While Young was driving to Williams's home with Lee and Jalen as passengers, the Kia collided with another automobile, injuring Lee and Young, and killing Jalen. The driver of the other car was issued a traffic citation, whereas Young received no citation for the accident.

None of the individuals or vehicles involved in the accident was insured. Young's request for personal protection insurance (PIP) benefits was assigned to plaintiff Farmers Insurance Exchange. Farmers sought a declaratory judgment in circuit court. It claimed that it could deny benefits to Young under MCL 500.3113(a) because he had used Williams's vehicle without her consent. It argued that, because Young had no operator's license, he lacked a reasonable belief that he was entitled to use the vehicle.

After a bench trial, the judge granted declaratory relief to Farmers. It ruled that Young was ineligible for PIP benefits under MCL 500.3113(a) because he was unlicensed and therefore not lawfully entitled to drive the vehicle. The Court of Appeals affirmed, with Judge O'CONNELL dissenting. Young sought leave to appeal, and this Court ordered oral argument on his application.[1]

ANALYSIS

MCL 500.3113 provides, in relevant part:

> A person is not entitled to be paid personal protection insurance benefits for accidental bodily injury if at the time of the accident any of the following circumstances existed:
>
> (a) The person was using a motor vehicle or motorcycle which he or she had taken unlawfully, unless the person reasonably believed that he or she was entitled to take and use the vehicle.

The two clauses of MCL 500.3113(a) must be separated. First, the statute provides that someone is not entitled to PIP benefits if "[t]he person was using a motor vehicle which he or she had taken unlawfully." Thus, a person will be excluded from benefits if he or she unlawfully takes a vehicle and is injured in an accident.

Second, the statute contains a savings clause: "unless the person reasonably believed that he or she was entitled to take and use the vehicle." Thus, a person who takes a vehicle unlawfully is entitled to PIP benefits if he or she reasonably believes himself or herself entitled to take the vehicle. The savings clause has significance only when a vehicle is unlawfully taken. It does not come into play if the vehicle was taken lawfully; it does not serve as an alternate ground upon which to deny PIP benefits.

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[1] 488 Mich 980 (2010).

Furthermore, the statute does not, nor was it intended to, address whether the *use* of the motor vehicle was legal. It does not require lawful operation of a motor vehicle in order for an individual to obtain PIP benefits. As previously noted by the Court of Appeals, "it is the unlawful nature of the taking, not the unlawful nature of the use, that is the basis of exclusion under [MCL 500.3113(a)]."[2] Indeed, Judge O'CONNELL's dissent in this case illustrates the absurdity of denying PIP benefits under § 3113(a) if the vehicle was unlawfully operated:

> [A] requirement that one must "legally use" or "lawfully operate" a motor vehicle before one can collect no-fault benefits would defeat the purpose of purchasing insurance. . . . [M]any motorists would be surprised to learn that they would not be entitled to PIP benefits if they caused an accident by, for example, running a red light or speeding, or if they had a suspended or expired license at the time of an accident.[3]

Moreover, inserting a "lawful use" requirement into § 3113(a) defeats an objective of the no-fault act, which is to provide benefits to those who are involved in automobile accidents, regardless of fault.

The controlling issue in this case is whether Young unlawfully took the vehicle. The phrase "taken unlawfully" is not defined in the no-fault act. However, it clearly contemplates that the vehicle must have been taken in violation of a statute or ordinance. In my view, Young did not have the requisite criminal intent to violate a statute in taking the vehicle because he had implied consent through Lee to use it at the time of the accident.

The question whether an individual violated a statute in taking a vehicle must be viewed from the perspective of the person taking the vehicle. This approach is mandated because statutes pertaining to the unlawful taking of a vehicle, such as MCL 750.413 or MCL 750.414, contain an element of intent.

In the case at hand, defendant Young neither had the intent to steal nor to joyride when he drove Lee back to her cousin's home. When Lee showed up at his place of work in the vehicle with its owner's son in tow, she appeared to have the authority to drive the vehicle.

Furthermore, the facts of this case indicate that there was an unbroken chain of permissive entrustment extending from Williams to Young. Williams, the owner of the vehicle, gave the car keys to Hughes, who in turn gave them to Lee. Or Williams gave them directly to Lee. Thus, Lee had lawful possession of the Kia when she drove to Young's place of work. Lee then gave Young permission to operate the vehicle,

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[2] *Butterworth Hosp v Farm Bureau Ins Co*, 225 Mich App 244, 250 (1997).

[3] *Farmers Ins Exch v Young*, unpublished opinion per curiam of the Court of Appeals, issued August 3, 2011 (Docket Nos. 275584 and 283865) p 5 n 5 (O'CONNELL, J. dissenting).

because she was intoxicated. Since Lee was in lawful possession of the vehicle, the consent to her use flowed to Young when she allowed him to drive.

It is undisputed that Williams never denied Lee permission to operate her vehicle. She merely informed Lee that the vehicle was uninsured. Williams may have intended that Lee use the vehicle only in an emergency. However, the fact that Lee may have exceeded the scope of intended use of the vehicle is irrelevant to the determination of whether Young had the owner's implied consent to use it. The use of a motor vehicle in violation of restrictions placed on its use by its owner when entrusting it to others does not necessarily equate with an unlawful taking. So long as there is an unbroken chain of permissive entrustment that extends back from the vehicle operator to the owner, there is no unlawful taking.[4]

Because Young had implied consent to drive the vehicle, he cannot be said to have taken it unlawfully. Thus, MCL 500.3113(a) does not preclude him from obtaining PIP benefits. Even assuming arguendo that Young unlawfully took the vehicle, I would still conclude that he is entitled to PIP benefits pursuant to the savings clause of MCL 500.3113(a). Notwithstanding the fact that Young did not have a valid driver's license, under the facts of this case, his belief that he was entitled to take and use the vehicle was reasonable.

For these reasons, I would reverse the judgment of the Court of Appeals, vacate the declaratory judgment, and remand the case for further proceedings.

HATHAWAY, J., would grant leave to appeal.

ZAHRA, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v CORDES, No. 142015; Court of Appeals No. 299437.

MARILYN KELLY, J. (*dissenting*). I respectfully dissent from the Court's order denying defendant's application for leave to appeal. The Michigan Constitution prohibits cruel or unusual punishment[1] and the United States Constitution prohibits cruel and unusual punishment.[2] I would grant leave to consider whether the requirement in MCL 750.520c(2)(b) of lifetime monitoring for offenders convicted of second-degree criminal sexual conduct (CSC II) constitutes cruel and/or unusual punishment. This is a jurisprudentially significant issue that the Court should address.

Defendant and the parties amicus curiae presented significant evidence that MCL 750.520c(2)(b) is the harshest law of its kind in the United States. It is the only one that leaves the judge no sentencing discretion and has no ameliorative mechanism. In addition, the offender bears the entire financial burden of monitoring regardless of his or her ability to pay. Failure to pay is a felony punishable by up to two years in prison and a fine. The estimated lifetime cost of monitoring can be

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[4] *Bronson Methodist Hosp v Forshee*, 198 Mich App 617 (1993).

[1] Const 1963, art 1, § 16.

[2] US Const, Am VIII.

significant, in this case between $100,000 and $300,000. Offenders must wear a monitoring device at all times except when it is charging; they must stay within 12 to 50 feet of the device while it charges for 2 to 4 hours a day; and they must wait outside buildings for 10 minutes before entering to ensure satellite contact.

The defendant in this case has been sentenced to prison time and lifetime monitoring. He is entitled to be punished in accordance with the Michigan and United States constitutions. I believe he has raised a valid question about whether MCL 750.520c(2)(b) is constitutional.

Accordingly, I disagree with the Court's decision to deny defendant's application for leave to appeal.

PEOPLE v HALLADAY, No. 142062; Court of Appeals No. 299699.

MARILYN KELLY, J. (*dissenting*). I respectfully dissent from the Court's order denying defendant's application for leave to appeal. The Michigan Constitution prohibits cruel or unusual punishment[1] and the United States Constitution prohibits cruel and unusual punishment.[2] I would grant leave to consider whether the requirement in MCL 750.520c(2)(b) of lifetime monitoring for offenders convicted of second-degree criminal sexual conduct (CSC II) constitutes cruel and/or unusual punishment. This is a jurisprudentially significant issue that the Court should address.

Defendant presented significant evidence that MCL 750.520c(2)(b) is the harshest law of its kind in the United States. It is the only one that leaves the judge no sentencing discretion and has no ameliorative mechanism. In addition, the offender bears the entire financial burden of monitoring regardless of his or her ability to pay. Failure to pay is a felony punishable by up to two years in prison and a fine. The estimated lifetime cost of monitoring can be significant, in this case between $100,000 and $300,000. Offenders must wear a monitoring device at all times except when it is charging; they must stay within 12 to 50 feet of the device while it charges for 2 to 4 hours a day; and they must wait outside buildings for 10 minutes before entering to ensure satellite contact.

The defendant in this case has been sentenced to prison time and lifetime monitoring. He is entitled to be punished in accordance with the Michigan and United States constitutions. I believe he has raised a valid question about whether MCL 750.520c(2)(b) is constitutional.

Accordingly, I disagree with the Court's decision to deny defendant's application for leave to appeal.

SNAY v VEST, No. 142333; Court of Appeals No. 293618.

MARILYN KELLY, J. (*concurring*). I concur in the Court's order denying plaintiff's application for leave to appeal. I write separately because I strongly disagree with the overly rigid standing threshold in the Paternity Act.[1] I urge the Legislature to reconsider the act and to confer standing on fathers who can definitively prove their paternity.

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[1] Const 1963, art 1, § 16.

[2] US Const, Am VIII.

[1] MCL 722.711 *et seq*.

BACKGROUND

Defendant Destiny Vest was married to Harold Vest at the time of the conception and birth of the child who is the subject of this appeal. However, it is undisputed that plaintiff is the child's biological father. Plaintiff filed a complaint seeking sole physical custody of the child and joint legal custody with defendant. Plaintiff alleged that it was in the best interests of the child that he have physical custody.

The circuit court initially entered an ex parte order awarding joint legal custody to the parties and sole physical custody to plaintiff. However, after a hearing, the court granted defendant's motion for summary disposition and dismissed the case, concluding that plaintiff lacked standing under the Paternity Act.

Plaintiff appealed, and the Court of Appeals affirmed the decision. It agreed that plaintiff lacked standing to seek custody of the child, but urged this Court to "revisit this issue in the context of this case."[2] Plaintiff then sought leave to appeal in this Court.

THE NEED FOR CHANGE

Plaintiff argues that he has standing to seek custody because he has been determined to be the biological father of the child. I recognize that the Paternity Act does not confer standing on a father or putative father unless the child satisfies the statutory definition of "born out of wedlock."[3] I further recognize that the child in this case does not meet that definition because defendant was married to Harold Vest at the time of the conception and birth of the child. But I question the wisdom of refusing to allow a proven biological father standing to adjudicate his rights with respect to his child.

In his dissent in *Girard v Wagenmaker*,[4] then Chief Justice CAVANAGH noted the grave policy concerns resulting from the standing requirements in the Paternity Act. Rather than paraphrase his thoughtful concerns regarding the act, I adopt his analysis as my own:

> This brings me to the policy concerns implicated by this case. . . . The Wagenmakers contend that it would be profoundly undesirable to permit a putative father legal standing to bring a paternity claim against the wishes of the mother and her husband, where the mother and husband maintain an intact marriage and

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[2] *Snay v Vest*, unpublished opinion per curiam of the Court of Appeals, issued November 18, 2010 (Docket No. 293618), p 1 n 1.

[3] MCL 722.711(a) defines "child born out of wedlock" as "a child begotten and born to a woman who was not married from the conception to the date of birth of the child, or a child that the court has determined to be a child born or conceived during a marriage but not the issue of that marriage."

[4] *Girard v Wagenmaker*, 437 Mich 231 (1991).

choose to treat the child as their own. At first glance, there might appear to be substantial force to this argument, which relies not only on the principle of protecting the sanctity of the family, but on the emotional and psychological well-being of the child involved. It must be conceded that a case like this one raises a painful moral dilemma. For several reasons, however, I believe this broad policy argument must fail.

First, and perhaps most important given the precept of judicial restraint, a substantive policy question like this should be left to the Legislature. As I have demonstrated above, the only reasonable reading of the language of the Paternity Act, *as previously interpreted by this Court* [in *Syrkowski v Appleyard*, 420 Mich 367 (1985)], compels the conclusion that the Legislature has authorized a paternity action like that brought by Girard in this case. If, on the other hand, the statutory language does not permit this Court to avoid the moral and policy questions, I would conclude that the balance of interests weighs in favor of permitting Girard's claim. It is more than a little hypocritical to contend, as do the Wagenmakers, that denying standing to Girard is consistent with "the law's repugnance to adulterers." The biological mother in this kind of situation is certainly no less an "adulterer" than the biological father. It is surely a bit late to talk of preserving the "sanctity" of the marital family by the time a situation like the one alleged in this case has arisen.

There is still a more basic pragmatic issue. Denying putative fathers like Girard a *legal* forum in which to press their claims will not prevent such claims from being made, quite possibly at times and in a manner far less conducive to the psychological health and security of the child involved. The law, after all, cannot sweep reality under the rug. Instead of leaving such paternity disputes unresolved, to fester and rankle down through the years, would it not be more desirable to give the parties their day in court and settle the issue once and for all? If the concern is the possibility of malicious or unfounded lawsuits, appropriate sanctions already exist. Furthermore, the Wagenmakers' concern that the mechanics of the paternity inquiry would intrude unacceptably into their intimate marital privacy is unfounded given the ease and reliability of modern scientific paternity testing on the basis of blood samples.

* * *

It cannot be emphasized too strongly that upholding Girard's standing to bring his paternity claim would not *in any way* endorse or prejudge his claim to provide support for the child, or his claim to custody or visitation rights. But to deny Girard *standing* to bring his claim at the very outset is inherently unjust. The fact that it might appear unlikely or improbable that a given putative father might ultimately succeed on the merits of his claim in no way justifies denying him his day in court to *make* that claim. I am

> unwilling to make the arbitrary assumption that *no* support, custody, or visitation claim by a putative father, regarding the child of a married woman, will *ever* have sufficient merit to justify recognizing the standing of *any* such claimants. The merits of each case are most appropriately considered at the very court hearing which the putative father seeks. His minimal right to such a hearing—in elemental due process terms, "the opportunity to be heard 'at a meaningful time and in a meaningful manner' "—is the *only* issue before this Court in this case.
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> Taking the broadest view of the statutory scheme, it seems to me that there would be something oddly askew with a legal framework which recognized the standing of a husband seeking to *dis*claim paternity of his wife's child, yet refused standing to a man seeking to *claim* paternity of such a child. There is a sadly negative cast to the entire law of paternity. The focus is almost always on the recalcitrant father, forced unwillingly into supporting a child he refuses to acknowledge. It is rarely on the out-of-wedlock father who willingly shoulders his paternal responsibilities and voluntarily seeks to establish a relationship with his child. This undertow of social assumptions has affected the constitutional case law of the United States Supreme Court, which has shown a solicitous concern for the due process rights of the unwilling father threatened with involuntary liability for child support, while turning a remarkably cold shoulder to the due process claims of willing fathers who wish to maintain a relationship with their children. This Court, however, need not and should not interpret Michigan's Paternity Act in such a selective and negative manner.[5]

Perpetuation of a rigid standing rule in the face of conclusive evidence of paternity does not always serve the interests of children, putative parents, or the State of Michigan. As this Court stated in *Serafin v Serafin*:

> "If the function of a court is to find the truth of a matter so that justice might be done, then a rule which absolutely excludes the best possible evidence of a matter in issue rather than allow it to be weighed by the trier of fact must necessarily lead to injustice. Further, when a court voluntarily blindfolds itself to what every citizen can see, the public must justifiably question the administration of law to just that extent."[6]

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[5] *Id*. at 269-276 (CAVANAGH, C.J., dissenting) (citations omitted).

[6] *Serafin v Serafin*, 401 Mich 629, 635-636 (1977), quoting *Davis v Davis*, 507 SW2d 841, 847 (Tex Civ App, 1974), rev'd on other grounds, 521 SW2d 603 (Tex, 1975).

Given that the Court is bound by the definition of "born out of wedlock" in the Paternity Act, I concur in the Court's order denying plaintiff's application for leave to appeal. But I wish to point out the adverse policy consequences of the part of the Paternity Act involved here. It raises an unyielding barrier to fathers and putative fathers who seek to have their claims redressed by our courts. When a plaintiff, like Mr. Snay, has presented conclusive evidence of paternity, the legal system should not turn a blind eye to his claims.

CAVANAGH, J. I would grant leave to appeal for the reasons stated in my dissent in *Girard v Wagenmaker*, 437 Mich 231, 253-278 (1991) (CAVANAGH, C.J., dissenting).

HATHAWAY, J., would grant leave to appeal.

Reconsideration Denied May 6, 2011:

PLUNKETT v DEPARTMENT OF TRANSPORTATION, No. 140193; reported below: 286 Mich App 168. Leave to appeal denied at 488 Mich 1055.

MARILYN KELLY, J., would grant reconsideration for the reasons stated in her dissenting statement in this case, 488 Mich 1055, 1057-1065 (2011).

HATHAWAY, J., would grant reconsideration and, on reconsideration, would grant leave to appeal.

CAVANAGH, J., did not participate due to a familial relationship with counsel of record.

ZAHRA, J., did not participate because he was on the Court of Appeals panel.

BOWENS v ARY, INC, No. 140296; Court of Appeals No. 282711. Summary disposition at 489 Mich 851.

MARILYN KELLY, J., would grant reconsideration for the reasons stated in her dissenting statement in this case, 489 Mich 851, 852-854 (2011).

Summary Disposition May 13, 2011:

PEOPLE v LIONEL TURNER, No. 141745; Court of Appeals No. 298839. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Wayne Circuit Court for further proceedings consistent with MCR 6.310(C).

Although the plea agreement negotiated between the prosecutor and defendant was not predicated upon a statement by the court that it would sentence defendant to a specified term or within a specified range, see *People v Cobbs*, 443 Mich 276 (1993), the circuit court gratuitously "promised" that it would sentence defendant to "the low-end of the guidelines" range if defendant "entered into" the plea. After acknowledging and accepting the circuit court's promise, defendant entered guilty pleas to kidnapping, carjacking, armed robbery, five counts of first-degree criminal sexual conduct, second-degree criminal sexual conduct, and felony-firearm. However, at sentencing, the circuit court imposed a sentence at the high end of the sentencing guidelines range.

Because of the unique facts of this case, we remand this case to the Wayne Circuit Court for further proceedings consistent with MCR 6.310(C).

We do not retain jurisdiction.

MARILYN KELLY, J. (*concurring in the result*). I concur in the result of the Court's order. I would explicitly vacate defendant's sentence and direct the trial court to sentence defendant at the low end of the guidelines range pursuant to its "promise" or provide defendant the opportunity to withdraw his plea.

Leave to Appeal Denied May 13, 2011:

EVANS v GROSSE POINTE PUBLIC SCHOOLS SYSTEM, No. 140670; Court of Appeals No. 288546. Leave to appeal having been granted and the briefs and oral arguments of the parties having been considered by the Court, we vacate our order of September 15, 2010. 488 Mich 861 (2010). The application for leave to appeal the January 19, 2010, judgment of the Court of Appeals is denied.

MARKMAN, J. (*concurring*). I concur in the order, but write separately to respond to the dissent's assertion that "MCR 2.105(J)(3) precludes the entry of summary disposition in favor of defendant." MCR 2.105(J)(3) provides:

> An action shall not be dismissed for improper service of process unless the service failed to inform the defendant of the action within the time provided in these rules for service.

Thus, MCR 2.105(J)(3) applies to "improper" service of process. Contrary to the dissent, I do not believe that it applies to a complete failure to serve process.

Because defendant here is a public entity, MCR 2.105(G) governs how it may be legally served. This rule, which the dissent does not discuss, or even cite, identifies specific persons on whom service must be made in a suit against a public school district, and establishes two means by which to effect service. First, service may be made on one of the identified officers—"the president, secretary, treasurer," or "an officer having substantially the same duties." MCR 2.105(G)(5) and (8). Alternatively, service may be made by "serving a summons and a copy of the complaint with a person in charge of the office of an officer on whom service may be made," *and* "sending a summons and a copy of the complaint by registered mail addressed to such officer at his or her office." MCR 2.105(G)(8).

Here, plaintiff proceeded by using the alternative method of service, and whether he completed the first required step by "serving the person in charge of the office of an officer" was disputed. A process server maintained that he served Janet Truance, the executive assistant to defendant's superintendent, with the summons and a copy of the complaint. Truance, however, despite specifically signing an "acknowledgement of service," claimed that she was handed a copy of the complaint only. Following an evidentiary hearing, the trial court

credited Truance's account. Thus, service failed, and the court granted defendant's motion for summary disposition, and the Court of Appeals affirmed.

In my judgment, the trial court's determination that plaintiff did not receive the summons was clearly erroneous. Truance's signed acknowledgement constituted "proof of service"—a "written acknowledgment of receipt of a summons and a copy of the complaint, dated and signed by the person authorized under this act to receive them." MCL 600.1910(1)(a); MCR 2.104(A)(1). However, despite this error, the lower courts still reached the right result because there is no question that plaintiff did not even *attempt* to complete the second step of the alternative process by "sending a summons and a copy of the complaint by registered mail addressed to [the superintendent] at his or her office." MCR 2.105(G)(8). Clearly, *both* requirements of this provision are necessary to constitute personal service on the public officer.

Accordingly, the question in this case is whether MCR 2.105(J)(3), which applies to "improper service of process," excuses plaintiff's failure to serve process at all pursuant to MCR 2.105(G)(8). The answer to this question is clear, in my judgment: "MCR 2.105(J)(3) is not applicable- . . . where the question is not one of defects in the manner of service, but rather a complete failure of service of process." *Holliday v Townley*, 189 Mich App 424, 425-426 (1991). The dissent may believe that "defendant got all the notice it needed," but the governing court rule instructs us on this matter, not the personal perspective of a judge.

MARILYN KELLY, J. (*dissenting*). I respectfully dissent from the Court's order denying plaintiff's application for leave to appeal. I believe it was error for the trial court to grant defendant's motion for summary disposition. Accordingly, I would reinstate plaintiff's claim.

Plaintiff sued defendant alleging that defendant discharged him from his job in violation of the Persons with Disabilities Civil Rights Act.[1] Romeo District Court Officer Thomas Urban made service of process on Janet Truance, the executive assistant to defendant's superintendent. Urban maintained that he served a summons and a complaint. Truance claimed that she received only the complaint. Truance further claimed that this was the first time she had been served with process on behalf of defendant. In any event, she signed an acknowledgement of service, acknowledging receipt of a summons and a complaint. However, she claimed that she did not read the acknowledgement and that she was told she was signing a document showing receipt of the papers she was handed.

Following an evidentiary hearing, the trial judge concluded that Truance's account of her receipt of the papers was more credible than that of Urban. Thus, since there was no effective service of process and the statute of limitations had expired, the trial court granted defen-

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[1] MCL 37.1101 *et seq*.

dant's motion for summary disposition. The Court of Appeals affirmed the trial court.[2] We granted plaintiff's application for leave to appeal.[3]

Plaintiff argues that MCR 2.105(J)(3) precludes dismissal of his suit. That court rule provides that "[a]n action shall not be dismissed for improper service of process unless the service failed to inform the defendant of the action within the time provided in these rules for service." Here, there is no dispute that service of the complaint was timely. Rather, the question is whether plaintiff's service, assuming it was deficient for failure to include a summons, failed to inform defendant of the action against it.[4]

I believe that defendant had sufficient notice of the action against it by virtue of plaintiff's complaint. It is undisputed that the complaint adequately stated the basis for the trial court's jurisdiction, the factual basis for plaintiff's claim, and included a demand for relief. In terms of substance, a summons is different from a complaint in that it indicates the time within which the defendant is required to answer or take other action. It also includes a notice that, if the defendant fails to answer or take other action within the time allowed, judgment may be entered against the defendant for the relief demanded in the complaint.[5]

Defendant's attorney acted promptly to answer and defend. So, as a practical matter, the service made on defendant informed it of the action within the time provided in the court rules. Even if no summons was served, it cannot be said that defendant was deprived of knowledge of the action against it. Thus, I believe that MCR 2.105(J)(3) precludes the entry of summary disposition in favor of defendant.

For these reasons, I would reinstate plaintiff's claim.

CAVANAGH, J., joined the statement of MARILYN KELLY, J.

HATHAWAY, J., would reverse the judgment of the Court of Appeals.

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[2] *Evans v Grosse Pointe Pub Sch Sys (On Reconsideration)*, unpublished opinion per curiam of the Court of Appeals, issued January 19, 2010 (Docket No. 288546).

[3] 488 Mich 861 (2010).

[4] My concurring colleague believes that plaintiff's effort to serve process amounted to a "complete failure." From this conclusion, he cites *Holliday v Townley*, 189 Mich App 424 (1991), as authority for the proposition that MCR 2.105(J)(3) is inapplicable. Although I believe *Holliday* was incorrectly decided, I need not reach its applicability to this case. I do not believe that failure to include a summons constitutes a complete failure of service of process. Nor does the failure to serve a summons and complaint by registered mail necessarily constitute a complete failure. At a minimum, in this case, plaintiff did serve defendant with a complaint. A complete failure would suggest that plaintiff failed to serve any documents that timely informed defendant of the action. Moreover, even if *Holliday* did apply, this Court is not bound by a decision of the Court of Appeals.

[5] See MCR 2.102(B)(10) and (11).

PEOPLE v SCHAW, No. 141213; reported below: 288 Mich App 231.

MARILYN KELLY, J. (*dissenting*). I dissent and would grant defendant's application for leave to appeal. I write separately to explain my reasoning and express my disapproval of the prosecutor's behavior in this case.

During the trial, certain statements by defendant were admitted as admissions under MRE 801(d)(2). Included was a tape of a telephone conversation between defendant and his wife, as well as their conversation during one of her visits to him in jail. In these conversations, defendant stated that he was a convicted felon and had spent time in prison.

The prosecution redacted the statements defendant made about his prior conviction and time in prison from the written transcript that it provided to defense counsel. Consequently, counsel did not foresee that the statements would remain on the tape recording that was played for the jury at trial. However, the statements were left in and the jury heard them.

Defense counsel moved for a mistrial. The dialogue between the prosecutor, defense counsel, and the court on the motion for a mistrial established that the prosecutor's failure to redact the recordings was clearly intentional. Both attorneys acknowledged an agreement between the previous prosecutor and defense counsel that the statements would not be admitted. The trial court concluded that the prosecutor's conduct was "inadvertent" and denied a mistrial.

On appeal, the Court of Appeals dismissed the prosecutor's misconduct in a footnote. The panel held that, because defendant's statements were admissible, "defendant did not suffer prejudice that impaired his ability to get a fair trial."[1] I find this a questionable conclusion worthy of further review. Moreover, I strongly disapprove of the prosecution's intentional decision to sandbag defense counsel.

The prosecutor could have notified defense counsel of his intent to unilaterally withdraw from the agreement, which would have given counsel the opportunity to try to prevent prejudice to defendant. For example, counsel could have sought an order enforcing the agreement or a protective order prohibiting disclosure of the past convictions. But instead, the prosecutor unilaterally and intentionally violated the agreement without prior notice. Therefore, the trial court was stuck with the option of giving a curative instruction (which both defense counsel and the court thought might prejudice defendant more by calling attention to his past convictions and imprisonment) or granting a mistrial. It did neither.

Finally, the trial court erroneously concluded that the prosecutor's misconduct was inadvertent. The record indicates the opposite conclusion—the prosecutor's conduct was intentional. This Court should rebuke such conduct in the strongest possible manner because it violates the basic tenet of fairness in interactions with opposing counsel. It also

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[1] *People v Schaw*, 288 Mich App 231, 238 n 4 (2010).

violates the spirit, if not the letter, of the Michigan Rules of Professional Conduct (MRPC)[2] and our court rules.[3]

I would grant leave to appeal to consider whether defendant suffered sufficient prejudice from the prosecutor's misconduct that it impaired his ability to get a fair trial. Accordingly, I dissent from the order denying defendant's application for leave to appeal.

CAVANAGH, J., joined the statement of MARILYN KELLY, J.

HATHAWAY, J., would grant leave to appeal.

ZAHRA, J., did not participate because he was on the Court of Appeals panel.

Summary Disposition May 18, 2011:

WOLF v CITY OF DETROIT, No. 140679; reported below: 287 Mich App 184. Leave to appeal having been granted and the briefs and oral arguments of the parties having been considered by the Court, we vacate the January 21, 2010, opinion and order of the Court of Appeals. At this time, a material question of fact exists concerning the direct and indirect costs of the services for which the solid waste inspection fee is charged. Such a finding is necessary to determine whether the city of Detroit's solid waste inspection fee is proportionate to the necessary costs of the inspection service, and may also impact whether the fee serves a revenue-raising or a regulatory purpose. See *Bolt v City of Lansing*, 459 Mich 152, 161-162 (1998). Accordingly, summary disposition in favor of the defendant was improper. We therefore remand this case to the Court of Appeals. Because substantial fact-finding may be necessary, the Court of Appeals should consider a further remand to the circuit court for this purpose. See MCL 600.308a(5).

MARILYN KELLY, J. (*concurring in part and dissenting in part*). I concur in the Court's order vacating the January 21, 2010, opinion and order of the Court of Appeals. However, I dissent from the Court's decision to remand this case to the Court of Appeals. I would instead remand the case to the Wayne Circuit Court for further findings of fact because trial courts are better equipped to make such findings. I would also retain jurisdiction over the case so that the Supreme Court can rule on its merits once the trial court makes its findings of fact.

PEOPLE v OLIVER, No. 142895; Court of Appeals No. 302630. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Muskegon Circuit Court to enter an amended judgment of sentence granting the defendant sentencing credit of 11 months for the period of time that he was incarcerated in jail as a condition of probation. His incarceration was imposed as part of the sentence in this case, and sentence credit is required in that circumstance. *People v Sturdivant*, 412

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[2] See MRPC 3.4, "Fairness to Opposing Party and Counsel."

[3] See MCR 9.104(A)(3) (stating that a lawyer commits misconduct subject to disciplinary proceedings if he or she engages in conduct "that is contrary to justice, ethics, honesty, or good morals").

Mich 92 (1981), modified in *People v Whiteside*, 437 Mich 188 (1991). In all other respects, leave to appeal is denied.

Leave to Appeal Granted May 18, 2011:

PEOPLE v RAMON BRYANT, No. 141741; reported below: 289 Mich App 260. The parties shall include among the issues to be briefed: (1) whether, in evaluating whether a distinctive group has been sufficiently underrepresented under *Duren v Missouri*, 439 US 357 (1979), so as to violate the Sixth Amendment's fair-cross-section requirement, courts may choose to examine only the composition of the defendant's particular jury venire, or whether courts must always examine the composition of broader pools or arrays of prospective jurors; (2) whether a defendant's claim of such underrepresentation must always be supported by hard data, or whether statistical estimates are permissible and, if so, under what circumstances; and (3) whether any underrepresentation of African-Americans in the defendant's venire, or in Kent County jury pools between 2001 and 2002, was the result of systematic exclusion under the third prong of *Duren*.

The Criminal Defense Attorneys of Michigan and the Prosecuting Attorneys Association of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

PEOPLE v MAURICE RICHARDS, No. 142234; Court of Appeals No. 293285. The application for leave to appeal the October 19, 2010, judgment of the Court of Appeals is considered, and it is granted, limited to the issue whether the circuit judge's instruction to the jury permitting jurors to discuss the evidence among themselves in the jury room during trial recesses violated the defendant's right to an impartial jury and a fair trial. See Administrative Order 2008-2 and proposed MCR 2.513(K).*

The Criminal Defense Attorneys of Michigan and the Prosecuting Attorneys Association of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issue presented in this case may move the Court for permission to file briefs amicus curiae.

Leave to Appeal Before Decision by the Court of Appeals Granted May 20, 2011:

JOSEPH v ACIA, No. 142615; Court of Appeals No. 302508. The parties shall include among the issues to be briefed: (1) whether the minority/insanity tolling provision of the Revised Judicature Act, MCL 600.5851(1), applies to toll the one-year-back rule in MCL 500.3145(1) of the no-fault automobile insurance act; and (2) whether *Univ of Mich Regents v Titan Ins Co*, 487 Mich 289 (2010), was correctly decided.

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* 482 Mich lxxxix and 475 Mich 1223, 1227, respectively—REPORTER.

The Michigan Association for Justice and Michigan Defense Trial Counsel, Inc., are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

CAVANAGH, J., would deny the application for leave to appeal before decision by the Court of Appeals.

Leave to Appeal Denied May 20, 2011:

BRONSON METHODIST HOSPITAL v ALLSTATE INSURANCE COMPANY, No. 140301; reported below: 286 Mich App 219.* Leave to appeal having been granted and the briefs and oral arguments of the parties having been considered by the Court, we vacate our order of October 27, 2010. 488 Mich 918 (2010). The application for leave to appeal the November 24, 2009, judgment of the Court of Appeals is denied.

MARILYN KELLY, J., would reverse the Court of Appeals.

BROWN v TAUBMAN COMPANY, No. 140385; Court of Appeals No. 283521. On March 8, 2011, the Court heard oral argument on the application for leave to appeal the September 24, 2009, judgment of the Court of Appeals. On order of the Court, the application is again considered, and it is denied, there being no majority in favor of granting leave to appeal or taking other action.

MARILYN KELLY, J. (*concurring*). I concur in the Court's order denying defendant's application for leave to appeal. I write separately in response to the dissent.

This case involves a slip-and-fall accident. Plaintiff arrived at Great Lakes Crossing Shopping Center around 8:00 p.m. on the day of her accident. While traversing a walkway leading to an entrance to the shopping center, plaintiff slipped and fell on black ice, injuring her leg. She did not see the ice before she fell.

The trial court granted defendant's motion for summary disposition, concluding that the black ice on which plaintiff slipped was open and obvious. The Court of Appeals reversed the trial court and reinstated plaintiff's case, holding that there were material questions of fact as to whether the ice was open and obvious.[1] We granted oral argument on defendant's application for leave to appeal.[2]

The dispositive question in this case is whether the black ice was open and obvious such that an average person of ordinary intelligence should have discovered it upon casual inspection.[3] If so, defendant is entitled to

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* As amended by order of the Supreme Court entered May 23, 2011—REPORTER.

[1] *Brown v Taubman Co, LLC*, unpublished opinion per curiam of the Court of Appeals, issued September 24, 2009 (Docket No. 283521).

[2] 486 Mich 939 (2010).

[3] *Bertrand v Allen Ford, Inc*, 449 Mich 606, 611 (1995) (stating that "if the particular activity or condition creates a risk of harm *only* because

summary disposition.[4] In this case, plaintiff presented evidence creating questions of fact that rendered summary disposition inappropriate.

Plaintiff testified that it was sunny and unseasonably warm on the day she fell. Defendant countered with weather reports showing that temperatures ranged between 22 and 32 degrees. What the temperature was at the time of the accident and during the hours before it should be resolved by a trier of fact, not a trial judge or justice of this Court as a matter of law.

Furthermore, the dissent cites testimony that snow was visible on the ground near the sidewalk. However, photographs of the walkway in question show *no* snow on the walkway. Rather, there were trace amounts of snow in bushes next to the sidewalk. In fact, defendant admitted that the walkway itself was snow-free. The fact that the parties have presented conflicting testimony regarding the presence of snow around the walkway further demonstrates the existence of questions of fact.

Also supporting plaintiff's claim that the black ice was not open and obvious was testimony from one of defendant's security guards. The guard testified that he returned to the scene of the accident to spread salt on the walkway, knowing plaintiff had fallen there. He could not see the ice that was there.

The dissent opines that a lifelong resident of Michigan should be aware that black ice forms during the winter. Hence it is open and obvious even when invisible.[5] If this position were adopted by the Court, people in Michigan would be on notice that, in winter, black ice is to be expected and no liability for falling on it exists. This proposition is unprecedented in Michigan law. As our Court of Appeals has astutely observed, black ice, defined as an invisible or nearly invisible coating of ice on a paved surface, is not by its nature open and obvious.[6]

Finally, the dissent erroneously claims that my position would lead to property owners always being held liable for accidents arising from black ice. As stated above, the proper inquiry to determine liability for black ice accidents is whether a reasonable person should have discovered the ice upon casual inspection and realized its danger. This is an objective standard that not all plaintiffs will be able to satisfy.

For example, suppose it is winter and there is snow on the ground. John Doe, walking along a sidewalk, slips and falls on black ice. Jane Doe, following several yards behind, witnesses the accident. Under this hypothetical, Jane knows or should know that the sidewalk is hazardous. Thus, if she walks on the ice and falls, her claim might properly be

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the invitee does not discover the condition or realize its danger, then the open and obvious doctrine will cut off liability if the invitee should have discovered the condition and realized its danger").

[4] See *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 475 (1993).

[5] It appears that the dissent would adopt a categorical rule that *all* icy conditions are open and obvious during a Michigan winter.

[6] *Slaughter v Blarney Castle Oil Co*, 281 Mich App 474, 483 (2008).

dismissed because, under an objective standard, a reasonable person would be alerted to the danger. But John, if he had no reason to discover the black ice, should not be charged with knowledge of the hazardous condition simply because it is winter and snow is on the ground.[7]

To determine whether a genuine issue of material fact exists, we consider the pleadings, affidavits, and other relevant record evidence in a light most favorable to plaintiff, the nonmoving party.[8] Applying that principle to this case, summary disposition should not have been entered in favor of defendant. The dissent fails to meaningfully apply this standard of review to the facts before the Court. I believe the Court of Appeals properly reversed the trial court's grant of summary disposition in favor of defendant.

CAVANAGH, J., joined the statement of MARILYN KELLY, J.

YOUNG, C.J., and MARY BETH KELLY, J., would reverse the judgment of the Court of Appeals.

MARKMAN, J. (*dissenting*). I respectfully dissent. On a January evening, plaintiff, a lifelong resident of Michigan, slipped and fell on ice on a walkway adjacent to defendant's parking lot. On the day of the fall, temperatures were at or below freezing, and, over the three days preceding, sleet, ice, and snow had fallen. Although the parking lot surface was mostly clear of snow, there was snow and ice on the ground, with the areas adjacent to the parking lot clearly covered in snow and ice. The trial court granted defendant's motion for summary disposition, concluding that the ice was "open and obvious," but the Court of Appeals reversed.

I agree with the trial court that, considering the wintry conditions that existed at the time of plaintiff's fall, the potential for the walkway to be icy should have been well understood by plaintiff. Despite weather records indicating that daytime temperatures at the time of the fall hovered at the freezing point, plaintiff testified that the day was "sunny" and "unseasonably warm," and that she did not see snow or ice on the ground before she fell. Other observers testified that there was visible snow and ice covering the grounds of the surrounding area. The Court of Appeals, citing the existence of conflicting evidence, concluded that reasonable minds could differ regarding whether the so-called "black ice" was open and obvious. I disagree. A lifelong resident of Michigan should be well aware that during winter, when for several days snow has been falling, and when temperatures have been and remain below freezing, ice may form on parking lots. These factors are more than sufficient, in my judgment, to establish the presence of potentially hazardous conditions that would have alerted an average person of ordinary intelligence to discover and react to the "danger" upon casual inspection. *Janson v Sajewski Funeral Home, Inc*, 486 Mich 934, 935 (2010). Because plaintiff should have known that the walkway might be icy, such a condition can

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[7] I respectfully decline the dissent's invitation to opine on a limitless variety of factual circumstances not present in this case in which a defendant would be entitled to summary disposition.

[8] *Radtke v Everett*, 442 Mich 368, 374 (1993).

fairly be said to have been "open and obvious." For these reasons, I would reverse the Court of Appeals and reinstate the grant of summary disposition for defendant.

In *Slaughter v Blarney Castle Oil Co*, 281 Mich App 474, 479 (2008), the Court of Appeals observed:

> When applying the open and obvious doctrine to conditions involving the natural accumulation of ice and snow, our courts have progressively imputed knowledge regarding the existence of a condition as should reasonably be gleaned from *all of the senses as well as one's common knowledge of weather hazards* that occur in Michigan during the winter months. (Emphasis added.)

Rather than looking at what might be gleaned from "all of the senses," along with matters of "common knowledge of weather hazards," Justice MARILYN KELLY prefers to focus only upon the visual component of black ice. Under this approach, of course, black ice will *never* be considered "open and obvious," and property owners, to whom black ice is similarly invisible, will *always* be held liable for accidents arising from this condition.[1] Further, contrary to the analysis of Justice KELLY, "[t]he ["open and obvious"] test is objective, and the inquiry is whether a reasonable person in the plaintiff's position would have foreseen the danger, not whether the particular plaintiff knew or should have known that the condition was hazardous." *Slaughter*, 281 Mich App at 479, citing *Corey v Davenport College (On Remand)*, 251 Mich App 1, 5 (2002). That "black ice" may have obtained in this case does not alter the reality that as wintry conditions persist in this state, a reasonable person will increasingly be alerted to the hazardousness of such conditions, and will increasingly be assumed to have encountered conditions fairly characterized as "open and obvious."

This case illustrates the ongoing confusion in the law of this state concerning the "open and obvious" status of "black ice," confusion that this Court has an obligation at some point to dispel. Instead, once again, we fail to afford guidance and direction on this matter, leaving in place conflicting and discordant decisions, and thereby enabling defendants and plaintiffs to each rely upon different precedents in support of their respective positions that "black ice" is or is not "open and obvious." See, e.g., *Janson*, 486 Mich at 934; *Pray v Baybest Ribs, LLC*, 488 Mich 979 (2010); *Powell v Save-A-Lot*, 485 Mich 959 (2009); *Kenny v Kaatz Funeral*

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[1] Justice KELLY responds to this assertion by positing a hypothetical in which, apparently like lemmings going over a cliff, one person after another slips and falls on the same black ice. At some point, we are assured, a plaintiff who has witnessed preceding slips and falls, and who has nonetheless proceeded onto the same black ice, "might" not prevail in a lawsuit. The preposterousness of this hypothetical speaks eloquently as to the black ice rule that the concurrence would establish and for the consequences of her rule to property owners within this state.

Home, Inc, 472 Mich 929 (2005); *Slaughter*, 281 Mich App at 474; *Kenny v Kaatz Funeral Home, Inc*, 264 Mich App 99 (2004); and the instant case. As the highest court of this state—a state in which snow and ice have sometimes been known to accumulate during winter months—it is our responsibility to address the confusing and inconsistent approaches in our caselaw and to clarify the rights and obligations of persons who must regularly confront these conditions.

ZAHRA, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v PARKS, No. 142051; Court of Appeals No. 292547.

MARILYN KELLY, J. (*dissenting*). I dissent from the order denying defendant's request for leave to appeal. The application raises a jurisprudentially significant issue regarding the legal implications of the police failing to make an audio or visual recording of a custodial interrogation. This issue has received increased attention nationwide in recent years as more and more states implement some form of electronic recording requirement.

In *Stephan v State*,[1] the Alaska Supreme Court held that a failure to electronically record a custodial interrogation conducted in a place of detention violates a suspect's right to due process under the state constitution. In Alaska, any statement thus obtained is generally inadmissible at trial. However, all other courts that have opined on the issue of whether the failure to record a custodial interrogation violates their state constitution have found it unmeritorious.[2] Among them is our own Court of Appeals.[3] This Court has not yet considered the issue.

Although most courts have concluded that a failure to electronically record police interrogations does not violate their state's constitution, many have recognized the benefits of such recordings to all parties.[4] Consequently, many states now require them. A few courts have adopted mandatory recording requirements as part of their supervisory powers. They have held that the proper remedy for a violation of that requirement is suppression at trial of the statement made to the police.[5] Other courts imposing a recording requirement have adopted the remedy of a cautionary jury instruction when that requirement is violated.[6] Still

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[1] 711 P2d 1156 (Alaska, 1985).

[2] See, e.g., *State v Lockhart*, 298 Conn 537, 557 n 10 (2010) (collecting cases).

[3] *People v Fike*, 228 Mich App 178, 184 (1998).

[4] See, e.g., *id*. at 188-190 (FITZGERALD, J., concurring).

[5] *State v Scales*, 518 NW2d 587, 592 (Minn, 1994); *State v Barnett*, 147 NH 334, 338 (2001) (a recorded interrogation is inadmissible unless the defendant's statement is recorded in its entirety); *In re Jerrell CJ*, 283 Wis 2d 145 (2005) (juvenile interrogations only).

[6] *Commonwealth v DiGiambattista*, 442 Mass 423, 445-446 (2004); NJ Crim Prac R 3:17.

other courts that have not yet adopted a recording rule have directed further study on the merits of adopting such a rule.[7]

Several state legislatures have passed statutes requiring electronic recording of police interrogations.[8] In Michigan, the House of Representatives passed a bill requiring electronic recording of interrogations in 2010,[9] but the legislative session ended before the Senate took it up. The Michigan Senate unanimously passed a similar bill in April of this year, and the measure is currently pending in the House.[10]

Given these developments, I would grant defendant's application for leave to appeal. The issue that defendant presents involves legal principles of major significance to this state's jurisprudence. The Court should determine whether, in the exercise of its supervisory powers, it should require that all custodial police interrogations in Michigan be electronically recorded. If so, it should determine the appropriate remedy for a violation of that requirement.

NOBLE V OFFICE OF THE RACING COMMISSIONER, No. 142102; Court of Appeals No. 292080.

MARILYN KELLY, J. (*dissenting*). I would grant leave to appeal.

Plaintiff, a horse trainer, was required to follow certain rules when entering his horse in races in this state. He claims that he followed the rules but was penalized anyway.

MCL 431.316(6) requires that a horse not be entered in a race if it has a drug in its body. An exception exists if, in conformity with MCL 431.330(1), defendant, the Office of Racing Commissioner, specifically allows the drug by rule or written order. If a trainer does enter a horse in violation of these rules, he or she is subject to strict liability and disciplinary action.

Defendant racing commissioner admits that it has adopted an unwritten rule that allows the drug flunixin to be administered within 48 hours of a race and that 1.0 μg/ml may remain in the horse's system at the time of racing. Plaintiff states that all trainers know and rely on this informal rule and that he relied on it in this case.

Given that MCL 431.316(6) creates a zero-tolerance rule, it is difficult to understand how it and defendant's informal rule can coexist harmo-

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[7] See, e.g., *Clark v State*, 374 Ark 292, 304 (2008) ("[W]e believe that the criminal justice system will be better served if our supervisory authority is brought to bear on this issue. We therefore refer the practicability of adopting such a [recording] rule to the Committee on Criminal Practice for study and consideration.").

[8] DC Code 5-116.01; 725 Ill Comp Stat 5/103-2.1; Me Rev Stat Ann tit 25, § 2803-B(1)(K); Tex Code Crim Proc Ann art 38.22, § 3; Wis Stat 972.115.

[9] HB 5763.

[10] SB 152.

niously. On the other hand, it is not clear that the use of flunixin in this case would have violated the statute, given that a veterinarian administered it for treatment of an injury.

Adding further confusion is the fact that by rule, defendant allows the use of phenylbutazone (sometimes called "Bute"), an older nonsteroidal anti-inflammatory drug (or "horse aspirin"). Flunixin is recognized as a safer version of horse aspirin but has not been officially recognized in the rule, which was adopted before flunixin began to be widely used.

There is also reason to question the testing methods used in this case. The test administered to plaintiff's horse was a test merely to detect the presence of flunixin. Moreover, the equipment used had not been calibrated. Therefore, the test may not have reliably disclosed the amount of flunixin in the horse's blood. The Michigan Department of Agriculture technician who performed the analysis admitted as much.

Consequently, defendant's assertion that the horse had four times the allowable limit of the drug in his blood is not reliable. Plaintiff sent the urine sample that defendant obtained to the University of Louisiana for testing. The university laboratory results revealed only 0.85 μg/ml of flunixin in the urine sample, a level that defendant permits.

Lastly, there was evidence that the standard defendant used to establish its informal rule regarding flunixin was not based on sound testing. Plaintiff's expert testified that studies show that flunixin may remain in a horse's blood for up to two weeks after being administered. Also, the level can spike after several days because of changes in the horse's pH values.

On the basis of plaintiff's arguments, I think that the circuit court's decision may have been correct and that the Court of Appeals erred. I believe that plaintiff's substantive due process rights may have been violated. Therefore, I would grant leave to appeal.

LAFARGE MIDWEST, INC v CITY OF DETROIT, No. 142143; reported below: 290 Mich App 240.

MARY BETH KELLY, J. (*concurring*). I concur with this Court's decision to deny leave to appeal. However, I write separately to indicate that I would have reversed the Court of Appeals for the reasons stated in the Court of Appeals dissent had the Legislature not amended the Michigan Renaissance Zone Act, MCL 125.2681 *et seq.*, after that court released its opinion.

MARILYN KELLY, J., would grant leave to appeal.

Leave to Appeal Denied May 24, 2011:

KLEVORN v CITY OF BOYNE CITY, No. 140758; Court of Appeals No. 286870.

TAYLOR v CITY OF TRAVERSE CITY, No. 140847; Court of Appeals No. 287565.

PEOPLE v MCINTOSH, No. 141410; Court of Appeals No. 290028.

PEOPLE v BARTELL, No. 141603; Court of Appeals No. 291076.

PEOPLE v HINTON, No. 141766; Court of Appeals No. 298588.

PITTS v KARMANOS CANCER CENTER, No. 141836; Court of Appeals No. 296696.

ZAHRA, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v POWELS, No. 141878; Court of Appeals No. 283213.

PEOPLE v LONNIE PARKER, No. 142006; Court of Appeals No. 290941.

PEOPLE v HEBESTREIT, No. 142080; Court of Appeals No. 298370.

CAMP v CITY OF CHARLEVOIX, No. 142218; Court of Appeals No. 291473.

PEOPLE v RUCKER, No. 142273; Court of Appeals No. 294493.

PEOPLE v CARLYLE, No. 142292; Court of Appeals No. 300382.

PEOPLE v EDWARD TURNER, No. 142301; Court of Appeals No. 300404.

PEOPLE v INGRAM, No. 142314; Court of Appeals No. 293872.

PEOPLE v MOSS, No. 142332; Court of Appeals No. 293428.

CITY OF THE VILLAGE OF DOUGLAS v VON DER HEIDE, No. 142353; Court of Appeals No. 292948.

PEOPLE v DESJUAN MURRAY, No. 142354; Court of Appeals No. 298028.

ZAHRA, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v KENNETH THOMPSON, No. 142356; Court of Appeals No. 300069.

HATHAWAY, J., not participating. Justice HATHAWAY recuses herself and will not participate in this case as she was the presiding trial court judge. See MCR 2.003(B).

PEOPLE v MCKEEVER, No. 142357; Court of Appeals No. 300474.

PEOPLE v JEFFERY BARNES, No. 142359; Court of Appeals No. 288711.

ZAHRA, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v MCCRUMB, No. 142360; Court of Appeals No. 300857.

PEOPLE v MIDDS, No. 142365; Court of Appeals No. 292895.

ZAHRA, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v MAURICE ANDREWS, No. 142385; Court of Appeals No. 300082.

PEOPLE v PEGUIES, No. 142387; Court of Appeals No. 300667.

PEOPLE v SAVOLA, No. 142391; Court of Appeals No. 300629.

PEOPLE v JAMES MATTHEWS, No. 142392; Court of Appeals No. 292508.

PEOPLE v TROWELL, No. 142396; Court of Appeals No. 294421.

BURKE v UNITED AMERICAN ACQUISITIONS AND MANAGEMENT, INC, No. 142398; Court of Appeals No. 290590.

ZAHRA, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v BURKETT, No. 142420; Court of Appeals No. 295101.

ZAHRA, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v CORTNEY WILSON, No. 142433; Court of Appeals No. 301270.

PEOPLE v VAUGHN, No. 142434; Court of Appeals No. 300477.

ALPHA INVESTMENT v ALPHA REAL ESTATE, No. 142437; Court of Appeals No. 291939.

JONCO TRADING COMPANY, INC v POST-NEWSWEEK STATIONS MICHIGAN, INC, No. 142440; Court of Appeals No. 293633.

ZAHRA, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v ROBERT STONE, No. 142450; Court of Appeals No. 291087.

PEOPLE v STEVE HIGGINS, No. 142453; Court of Appeals No. 299821.

PEOPLE v JERRELL JONES, No. 142455; Court of Appeals No. 293824.

PEOPLE v SUMPTER, Nos. 142469 and 142470; Court of Appeals Nos. 280835 and 292814.

PEOPLE v WILLIE WASHINGTON, No. 142473; Court of Appeals No. 292318.

GRAVES v CIVIL SERVICE COMMISSION, No. 142478; Court of Appeals No. 298990.

BURTON v CIVIL SERVICE COMMISSION, No. 142479; Court of Appeals No. 299202.

PITTS v ATTANASIO, No. 142481; Court of Appeals No. 294320.

ZAHRA, J., did not participate because he was on the Court of Appeals panel.

JACKSON v DEPARTMENT OF CORRECTIONS, No. 142482; Court of Appeals No. 298054.

PEOPLE v FLEETWOOD, No. 142485; Court of Appeals No. 301173.

PEOPLE v HURN, No. 142487; Court of Appeals No. 286067.

PEOPLE v THEODORE BELL, No. 142493; Court of Appeals No. 301422.

PEOPLE v SLAUGHTER, No. 142494; Court of Appeals No. 293068.

ZAHRA, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v RUTLEY, No. 142495; Court of Appeals No. 291682.

RETIRED DETROIT POLICE AND FIRE FIGHTERS ASSOCIATION, INC v DETROIT POLICE OFFICERS ASSOCIATION, No. 142504; Court of Appeals No. 293998.

ZAHRA, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v CURRAN WILSON, No. 142506; Court of Appeals No. 294056.

PEOPLE v MARTINEZ, No. 142508; Court of Appeals No. 293562.

PEOPLE v HERNANDEZ, No. 142511; Court of Appeals No. 293894.

PEOPLE v SCHUH, No. 142512; Court of Appeals No. 291259.

ZAHRA, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v ZEEMAN, No. 142513; Court of Appeals No. 299827.

RONDINGO v CASCO TOWNSHIP, No. 142520; Court of Appeals No. 292611.

PEOPLE v DANIEL CLUESMAN, No. 142521; Court of Appeals No. 300794.

PEOPLE v FOWLKES, No. 142522; Court of Appeals No. 300124.

PEOPLE v TONY JENKINS, No. 142524; Court of Appeals No. 300428.

PEOPLE v NEWKIRK, No. 142529; Court of Appeals No. 301155.

PEOPLE v MANSOR AL-SHIMARY, No. 142531; Court of Appeals No. 293188.

BARR LABORATORIES, INC v DEPARTMENT OF TREASURY, No. 142534; Court of Appeals No. 291968.

PEOPLE v BOYD, No. 142536; Court of Appeals No. 292301.

ZAHRA, J., did not participate because he was on the Court of Appeals panel.

MCCORMICK v CITY OF PETOSKEY, No. 142539; Court of Appeals No. 293278.

AQUATIC MANAGEMENT SERVICES, INC v DEPARTMENT OF ENVIRONMENTAL QUALITY, No. 142540; Court of Appeals No. 292365.

PEOPLE v LECHLEITNER, No. 142543; reported below: 291 Mich App 56.

PEOPLE v WILLIAM SHORT, No. 142548; Court of Appeals No. 291912.

PEOPLE v ALEN PRICE, No. 142551; Court of Appeals No. 300847.

PEOPLE v SIMMONS, No. 142554; Court of Appeals No. 300649.

ZAHRA, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v GAFFNEY, No. 142555; Court of Appeals No. 300548.

PEOPLE v THOMAS JONES, No. 142560; Court of Appeals No. 300934.

PEOPLE v LAMAR JOHNSON, No. 142562; Court of Appeals No. 288763.

ZAHRA, J., did not participate because he was on the Court of Appeals panel.

HOME OWNERS INSURANCE COMPANY v PROGRESSIVE MICHIGAN INSURANCE COMPANY, No. 142565; Court of Appeals No. 293417.

PEOPLE v JOHN SIMS, No. 142569; Court of Appeals No. 293968.

PEOPLE v DARRETT KING, No. 142572; Court of Appeals No. 291037.

PEOPLE v ERIC CHAPMAN, No. 142574; Court of Appeals No. 299689.

ZAHRA, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v TAME, No. 142575; Court of Appeals No. 290486.

PEOPLE v NAPOLEAN WATKINS, No. 142581; Court of Appeals No. 294812.

PEOPLE v ZIOMEK, No. 142584; Court of Appeals No. 301022.

PEOPLE v BELCHER, No. 142585; Court of Appeals No. 293599.

PEOPLE v LAMAR, No. 142589; Court of Appeals No. 301414.

PEOPLE v MEADOR, No. 142590; Court of Appeals No. 292776.

PEOPLE v KENNETH HILL, No. 142592; Court of Appeals No. 293201.

PEOPLE v ABDUL AL-SHIMARY, No. 142594; Court of Appeals No. 293193.

PEOPLE v LONDELL SWANIGAN, No. 142596; Court of Appeals No. 294765.

PEOPLE v COREY DUNCAN, No. 142602; Court of Appeals No. 294574.

PEOPLE v TONY BANKS, No. 142603; Court of Appeals No. 293870.

PEOPLE v SHEARD, No. 142610; Court of Appeals No. 300038.

CITY OF PLYMOUTH v MCINTOSH, No. 142611; reported below: 291 Mich App 152.

PEOPLE v FARROW, No. 142612; Court of Appeals No. 293960.

PEOPLE v HOUTHOOFD, No. 142613; Court of Appeals No. 269505.

PEOPLE v LOVE, No. 142621; Court of Appeals No. 300572.

PEOPLE v HOLLIS, No. 142623; Court of Appeals No. 295432.

PEOPLE v NAIF AL-SHIMARY, No. 142629; Court of Appeals No. 293096.

PEOPLE v GANZEVELD, No. 142632; Court of Appeals No. 295303.

PEOPLE v HADLEY, No. 142633; Court of Appeals No. 301180.

BEARD v HORTON, No. 142637; Court of Appeals No. 290153.

PEOPLE v VARGAS, No. 142641; Court of Appeals No. 292906.

PEOPLE v ZEEK, No. 142644; Court of Appeals No. 294024.

PEOPLE v WANDT, No. 142646; Court of Appeals No. 301511.

PEOPLE v CHRISTIAN, No. 142648; Court of Appeals No. 301500.

PEOPLE v NASER AL-SHIMARY, No. 142654; Court of Appeals No. 293256.

HEYS v BUTZEL LONG, No. 142661; Court of Appeals No. 293666.

PEOPLE v STANLEY, No. 142662; Court of Appeals No. 301019.

PEOPLE v BOESKOOL, No. 142677; Court of Appeals No. 299724.

PEOPLE v LESNIAK, No. 142678; Court of Appeals No. 301373.

SUMPTER v DEPARTMENT OF CORRECTIONS, No. 142679; Court of Appeals No. 301689.

PEOPLE v GARRETT, No. 142680; Court of Appeals No. 293248.

GEICO INDEMNITY COMPANY v GOLDSTEIN, No. 142688; Court of Appeals No. 288418.

PEOPLE v ANTHONY ROBINSON, No. 142689; Court of Appeals No. 301098.

FORSTEK v CLIO AREA SCHOOLS BOARD OF EDUCATION, No. 142697; Court of Appeals No. 293028.

PEOPLE v LAJDZIAK, No. 142699; Court of Appeals No. 295361.

ZAHRA, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v O'BRYAN, No. 142702; Court of Appeals No. 301382.

PEOPLE v O'BRYAN, No. 142704; Court of Appeals No. 292570.

PEOPLE v SIKORSKI, No. 142717; Court of Appeals No. 301491.

PEOPLE v TERRY WILLIAMS, No. 142879; Court of Appeals No. 297588.

Superintending Control Denied May 24, 2011:

MCCOWAN v ATTORNEY GRIEVANCE COMMISSION, No. 142721.

Reconsideration Denied May 24, 2011:

PEOPLE v WILKINSON, No. 139121; Court of Appeals No. 291724. Leave to appeal denied at 488 Mich 1038.

HADDEN v MCDERMITT APARTMENTS, LLC, No. 140618; reported below: 287 Mich App 124. Leave to appeal denied at 488 Mich 945.

YOUNG, C.J., and MARKMAN, J., would grant the motion for reconsideration and, on reconsideration, would grant leave to appeal for the reasons set forth in Justice MARKMAN's dissenting statement in this case, 488 Mich 945 (2010).

PRAY v BAYBEST RIBS, LLC, No. 141002; Court of Appeals No. 286672. Leave to appeal denied at 488 Mich 979.

YOUNG, C.J., and MARKMAN, J., would grant the motion for reconsideration and, on reconsideration, would grant leave to appeal for the reasons set forth in Justice MARKMAN's dissenting statement in this case, 488 Mich 979 (2010).

DECKER v STOIKO, Nos. 141049, 141050, and 141051; reported below: 287 Mich App 666. Leave to appeal denied at 488 Mich 947.

CLARK v SWARTZ CREEK COMMUNITY SCHOOLS BOARD OF EDUCATION, No. 141394; Court of Appeals No. 29830. Leave to appeal denied at 488 Mich 993.

PEOPLE v RODRIGUEZ, No. 141627; Court of Appeals No. 290599. Leave to appeal denied at 488 Mich 1038.

Leave to Appeal Granted May 25, 2011:

PATTERSON v NICHOLS, Nos. 142438 and 142439; Court of Appeals Nos. 288375 and 291287. The parties shall include among the issues to be briefed (1) whether the defendant had a duty to the decedent; (2) if so, whether the defendant's conduct can be viewed as the proximate cause of the decedent's death; (3) whether the defendant's conduct can be viewed as "so reckless as to demonstrate a substantial lack of concern for whether an injury results"; (4) whether a claim for intentional infliction of emotional distress is cognizable under the circumstances of this case; (5) if so, whether the defendant's conduct can be viewed as "extreme and outrageous"; (6) the degree of recklessness sufficient to meet the standard required to establish intentional infliction of emotional distress; (7) whether the defendant showed that she acted in good faith; and (8) whether the defendant was performing ministerial acts, as opposed to discretionary acts.

We further order that this case be argued and submitted to the Court together with the case of *Patterson v Nichols* (Docket No. 142441) at such future session of the Court as both cases are ready for submission.

PATTERSON v NICHOLS, No. 142441; Court of Appeals No. 296198. The parties shall include among the issues to be briefed (1) whether the defendant had a duty to the decedent; (2) if so, whether the defendant's conduct can be viewed as the proximate cause of the decedent's death; (3) whether the defendant's conduct can be viewed as "so reckless as to demonstrate a substantial lack of concern for whether an injury results"; (4) whether a claim for intentional infliction of emotional distress is cognizable under the circumstances of this case; (5) if so, whether the defendant's conduct can be viewed as "extreme and outrageous"; (6) the degree of recklessness sufficient to meet the standard required to establish intentional infliction of emotional distress; (7) whether the defendant showed that she acted in good faith; and (8) whether the defendant was performing ministerial acts, as opposed to discretionary acts.

We further order that this case be argued and submitted to the Court together with the case of *Patterson v Nichols* (Docket Nos. 142438 and 142439) at such future session of the Court as both cases are ready for submission.

PEOPLE v BUIE, No. 142698; reported below: 291 Mich App 259. The parties shall include among the issues to be briefed (1) whether defense counsel's agreement to allow two witnesses to testify at trial via two-way interactive video technology waived any of the defendant's rights under the Confrontation Clause, US Const, Am VI; Const 1963, art 1, § 20; (2) whether there was good cause for the use of two-way interactive video technology pursuant to MCR 6.006(C); (3) whether the parties consented to the use of two-way interactive video technology at trial pursuant to MCR 6.006(C)(2); and (4) if there was a violation of the Confrontation Clause or MCR 6.006(C), whether there was plain error affecting the defendant's substantial rights, *People v Carines*, 460 Mich 750, 763 (1999).

Persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

Leave to Appeal Denied May 25, 2011:

PEOPLE v COLEMAN, No. 142306; Court of Appeals No. 292804.

PEOPLE v GAUTHIER, No. 142330; Court of Appeals No. 292157.

GORDON v JIM LIPPENS CONSTRUCTION, INC, No. 142344; Court of Appeals No. 293084.

MARILYN KELLY and HATHAWAY, JJ., would grant leave to appeal.

LOBSINGER v TISEO BROTHERS, INC, No. 142401; Court of Appeals No. 291213.

MARILYN KELLY and HATHAWAY, JJ., would grant leave to appeal.

PEOPLE v SCHINDERLE, No. 142499; Court of Appeals No. 301325.

MARILYN KELLY, J., would grant leave to appeal.

Leave to Appeal Denied May 27, 2011:

LAETHEM EQUIPMENT COMPANY v CURRIE KENDALL, No. 142647; Court of Appeals No. 293116.

MARKMAN, J. (*concurring*). I concur for the simple reason that the language of the release at issue does not include defendants. Unfortunately, the Court of Appeals, which reached the correct result, engaged in an analysis that was clouded and confused by *Shay v Aldrich*, 487 Mich 648 (2010). Relying upon *Shay*, as it was obligated to do, the Court of Appeals engaged in an unnecessary discussion concerning third-party beneficiaries to determine that defendants are not third-party beneficiaries of this release, a conclusion that is both obvious and irrelevant. As I stated in my dissent in *Shay*, "[t]he third-party-beneficiary statute is

relevant in this case only because it precludes a court from considering plaintiff's motion for reformation, not because it provides a basis for rewriting Michigan contract law." *Id.* at 704. In the instant case, however, there being no motion for reformation or, indeed, any need for such motion, the third-party-beneficiary statute simply has no application. It is regrettable, but altogether predictable, that the parties would disagree concerning the meaning of *Shay*, and that the lower courts in following *Shay* would engage in irrelevant analysis of contract law. *Shay*, in my judgment, remains a decision that "unsettles contract law in this state on the basis of an essentially impenetrable analysis." *Id*. at 706.

Summary Disposition June 1, 2011:

JAKUPOVIC v CITY OF HAMTRAMCK, No. 142436; Court of Appeals No. 293715. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals and we remand this case to the Wayne Circuit Court for entry of an order granting summary disposition to the defendant. The Court of Appeals recognized that the plaintiff had stated the wrong address in giving notice to the defendant of an alleged defect in a sidewalk. The Court of Appeals erred by excusing this error, rather than enforcing the notice requirement found at MCL 691.1404(1) as written. *Rowland v Washtenaw Co Rd Comm,* 477 Mich 197, 219 (2007). The statute requires notice of "the exact location" of the defect, and in this case, the plaintiff failed to specify the correct address where the defect was allegedly located.

MARILYN KELLY and HATHAWAY, JJ., would grant leave to appeal.

VESTAX SECURITIES v DEPARTMENT OF TREASURY, No. 142535; Court of Appeals No. 292062. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals. The evidentiary record does not support the Court of Appeals determination that the independent registered representatives were the plaintiff's agents or that there exists a substantial nexus between Michigan and the plaintiff's business activities sufficient to impose Michigan Single Business Tax upon it. We remand this case to the Court of Claims for reinstatement of the April 27, 2009, order granting summary disposition to the plaintiff.

MARILYN KELLY, J., would grant leave to appeal.

NILL v BORDERS GROUP, INC, No. 142639; Court of Appeals No. 298446. 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.

PEOPLE v CURTIS LEWIS, No. 142819; Court of Appeals No. 294687. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we reverse the part of the Court of Appeals decision vacating the defendant's sentence and remanding for resentencing and reinstate the sentence imposed by the Jackson Circuit Court. The defendant was convicted of armed robbery, a crime punishable with imprisonment for life or any term of years, and MCL 769.34(2)(b) does not apply when a defendant is convicted of a crime punishable with imprisonment for life or any term of

years because the minimum will never exceed 2/3 of the statutory maximum of life. *People v Washington*, 489 Mich 871 (2011); *People v Powe*, 469 Mich 1032 (2004); *People v Drohan*, 475 Mich 140, 162 n 14 (2006); and *People v Harper*, 479 Mich 599, 617 n 31 (2007).

Leave to Appeal Denied June 1, 2011:

BATES ASSOCIATES, LLC v 132 ASSOCIATES, LLC, No. 141966; reported below: 290 Mich App 52.

PEOPLE v JOHN ROBINSON, No. 142133; Court of Appeals No. 299874.

PEOPLE v KERR, No. 142257; Court of Appeals No. 293384.

MARILYN KELLY, J., would grant leave to appeal.

ZAHRA, J., did not participate because he was on the Court of Appeals panel.

EWALD v GENERAL MOTORS, LLC, No. 142263; Court of Appeals No. 298813.

PEOPLE v THOMAS RICHARDSON, No. 142334; Court of Appeals No. 287857. This Court has a long-held view that a prosecutor must exhibit a high ethical standard when presenting a case to the jury:

> It is the duty of the public prosecutor to see that the person charged with crime receives a fair trial, so far as it is in his power to afford him one, and it is likewise his duty to use his best endeavor to convict persons guilty of crime; and in the discharge of this duty an active zeal is commendable, yet his methods to procure conviction must be such as accord with the fair and impartial administration of justice . . . . [*People v Dane*, 59 Mich 550, 552 (1886).]

While we do not agree with the defendant that the prosecutor committed misconduct that jeopardized the fairness of the trial in this case, some of the prosecutor's arguments compel comment. We address the following matters in particular. First, comments and arguments drawing a comparison between the case being tried with notorious crimes is ill-advised. Generally, less emotion-laden analogies will serve just as well in making a point. Second, comments disparaging the sincerity of the religious beliefs held by a defendant or witness should generally be avoided. An exception exists if the sincerity of those beliefs has been offered to explain actions or used to support credibility. That exception did not exist in this case. Third, calling defense witnesses such names as "whore" or "bottom feeder" is simply unprofessional. Similarly, suggesting that the victim's children had betrayed her by testifying for their father, the defendant, was inappropriate.

Finally, and of great importance, the prosecutor complained during closing arguments that the court had made evidentiary rulings that were not favorable to her. Among her comments, the prosecutor told the jury that one of her witnesses had been "muzzled," and she described the

process whereby the court makes evidentiary decision as "crazy." Those comments disparage the reputation of both the judge and the justice system under which the prosecutor labors. Further, they suggest that the prosecutor had admissible evidence that she was precluded from presenting. Closing argument to the jurors is an unsuitable forum to announce disagreement with the judge's rulings. Fortunately for the prosecutor, the court informed the jurors what they could consider as evidence and told them that the arguments of counsel were not to be considered as evidence.

CAVANAGH, J., would grant leave to appeal to consider the issue of prosecutorial misconduct.

PEOPLE v FLIRTEE TAYLOR, No. 142390; Court of Appeals No. 294777.

MARILYN KELLY, J., would grant leave to appeal.

SPAYTH v CITY OF ANN ARBOR, No. 142448; Court of Appeals No. 292460.

HATHAWAY, J., would grant leave to appeal.

ZAHRA, J., did not participate because he was on the Court of Appeals panel.

ODOM v CITY OF DETROIT, No. 142483; Court of Appeals No. 293021.

MARILYN KELLY and HATHAWAY, JJ., would grant leave to appeal.

PEOPLE v CURTIS LEWIS, No. 142814; Court of Appeals No. 294687.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal Entered June 3, 2011:

NASON v STATE EMPLOYEES' RETIREMENT SYSTEM, No. 142246; reported below: 290 Mich App 416.

Leave to Appeal Denied June 3, 2011:

PEOPLE v NOVAK, No. 140800; Court of Appeals No. 284838. Leave to appeal having been granted and the briefs and oral arguments of the parties having been considered by the Court, we vacate our order of July 15, 2010. The application for leave to appeal the January 26, 2010 judgment of the Court of Appeals is denied.

MARKMAN, J. (*concurring*). I concur in this Court's order denying leave to appeal because the Court of Appeals, in my judgment, did not err in concluding that the trial court did not abuse its discretion in admitting the "minor child incest" story written by defendant. I write separately to respond to Justice MARILYN KELLY's dissenting statement.

First, contrary to the dissent's contention, the story was admitted for a proper purpose under MRE 404(b). It was admitted for the purpose of demonstrating intent and absence of mistake or accident. In order to prove second-degree criminal sexual conduct, the prosecutor had to establish that defendant engaged in "sexual contact," which is defined as "intentional touching . . . for the purpose of sexual arousal or gratification . . . ." MCL 750.520a(q). During closing argument, defense counsel

argued that "there wasn't a singular shred of testimony that any touching, if it even happened, was for sexual purpose." Consequently, the fact that defendant had written an incest story involving minor children was highly relevant to, and probative of, whether defendant's touching of the complainant was done for the purpose of sexual arousal or gratification. That is, the story was admissible for the proper purpose of proving the nature of defendant's intentions in the manner in which he touched his minor grandchild. During closing argument, defense counsel also suggested that the minor-complainant may have been mistaken in her belief that defendant penetrated her anus with his penis and that defendant possibly had accidentally touched her breast. Consequently, the story was also admissible for the purpose of establishing the absence of mistake or accident. Although the prosecutor conceded on appeal that the story was not admissible for the latter purpose, this Court is, of course, "not bound to accept such a concession." *People v Reed*, 449 Mich 375, 395 (1995). The *trial court* deemed the evidence admissible for the purpose of demonstrating intent *and* absence of mistake or accident, and such a determination will be upheld absent abuse of discretion.

Second, contrary to the dissent's suggestion, MRE 404(b) "does not require a showing of distinctive similarity between other acts and the charge at issue in every instance where Rule 404(b) evidence is proffered." *People v VanderVliet*, 444 Mich 52, 69 (1993). Instead, "[w]here the proponents' theory is not that the acts are so similar that they circumstantially indicate that they are the work of the accused, similarity between charged and uncharged conduct is not required." *Id.* Because the story here was offered as evidence of intent and the absence of mistake or accident, *rather* than as evidence of a common plan or scheme, distinctive similarity is not required. Furthermore, the dissent is wrong to assert that there are "no similarities" between the story and the complainant's allegations: both involve an adult male having sexual relations with minor female children who are relatives.

Third, again contrary to the dissent's contention, the story's probative value was not substantially outweighed by the danger of unfair prejudice. "Evidence is not inadmissible simply because it is prejudicial. Clearly, in every case, each party attempts to introduce evidence that causes prejudice to the other party." *Waknin v Chamberlain*, 467 Mich 329, 334 (2002). " 'Relevant evidence is inherently prejudicial; but it is only *unfair* prejudice, substantially outweighing probative value, which permits exclusion of relevant matter under Rule 403.' " *Id.*, quoting *People v Mills,* 450 Mich 61, 75-76 (1995) (emphasis added). MRE 403 "is not designed to permit the court to 'even out' the weight of the evidence . . . or to make a contest where there is little or none." *Waknin*, 467 Mich at 334 (citation omitted). Instead, the rule only prohibits evidence that is *unfairly* prejudicial. "Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury." *People v Crawford*, 458 Mich 376, 398 (1998).

The evidence in the present case was not merely marginally probative. As explained above, the fact that defendant wrote a story about an adult male having sexual relations with minor children helped refute defen-

dant's claim that the complainant was mistaken about the touching or, if the touching did take place, that it was accidental. It also shed light on defendant's intentions. Furthermore, the trial court did a thorough job of instructing the jury regarding the limited proper purposes of the "other acts" evidence. As the trial court explained to the jury:

> You've heard evidence that was introduced to show that the defendant committed a crime or improper acts for which he is not on trial. If you believe this evidence, you must be very careful only to consider it for certain purposes. You may only think about whether this evidence tends to show that the defendant had a reason to commit the crime; that the defendant specifically meant to have touched [the complainant] for sexual purposes; that the defendant acted purposefully—that is, not by accident or mistake, or because he misjudged the situation . . . . You must not consider this evidence for any other purpose. For example, you must not decide that it shows the defendant is a bad person or that he is likely to commit crimes. You must not convict the defendant here because you think he is guilty of other bad conduct. All the evidence must convince you beyond a reasonable doubt that the defendant committed the alleged crime, or you must find him not guilty.

Finally, again contrary to the dissent's contention, the prosecutor's case was not "weak." The complainant was unequivocal in her testimony concerning who touched her and where she was touched, and another witness testified that defendant had sexually abused her in a similar fashion when she was younger. Given this evidence, even assuming that the trial court *did* abuse its discretion in admitting the story—and I do not believe the court did—defendant has not satisfied his burden of demonstrating that it is more probable than not that the admission of the story was outcome determinative. *People v Lukity*, 460 Mich 484 (1999).

CAVANAGH, J. (*dissenting*). I would reverse the judgment of the Court of Appeals and remand for a new trial for the reasons stated by the Court of Appeals dissent. I agree with the dissent that the trial court abused its discretion in admitting defendant's "sex manual" at trial, and the error in admitting the manual was not harmless, especially in light of the weaknesses in the prosecution's case.

HATHAWAY, J., joined the statement of CAVANAGH, J.

MARILYN KELLY, J. (*dissenting*). I disagree with the decision to deny defendant's application for leave to appeal. The Court of Appeals dissent was correct in concluding that the trial court abused its discretion in admitting defendant's fictitious story in evidence at trial. And the error was not harmless. Hence, I would reverse the lower courts' decisions and remand this case for a new trial.

Defendant was charged with one count of first-degree criminal sexual conduct and one count of second-degree criminal sexual conduct based on allegations that he touched the complainant's chest and penetrated her anus. Complainant, his granddaughter, was nine years old when she testified at trial. She stated that once, when visiting defendant's house, she sat on defendant's lap while watching a movie in the living room. She

claimed that, while she was on his lap, defendant touched her "back butt" with his "front butt."[1] She testified that she did not remember what defendant's "front butt" felt like and that she did not recall what she was wearing.[2] She confirmed on two occasions during cross-examination, however, that defendant had his pants on when his "front butt" touched her "back butt."

The complainant also testified that defendant touched her "boobs" with his hands over her clothes. She testified that this happened only once and that defendant did not touch her body with his hands at any other place. She did not recall how defendant touched her breasts, but she was quite definite that he did not touch her "front butt."

Before trial, the prosecutor filed a notice of intent pursuant to MRE 404(b)(2) to present evidence of a fictional pornographic story that defendant had written. The trial court ruled that the story was admissible. Giving little analysis, it found that the story was relevant to intent, motive, absence of mistake or accident, and to refute fabrication.

The fictional story defendant wrote is very graphic. It depicts teenagers engaging in sexual behavior and incest. It begins with a teenage brother, sister, and female cousin performing sex acts with each other. Later, the father/uncle character also engages in sex acts with the two teenage girls. The story is highly prejudicial.

The prosecutor brought it up on multiple occasions during trial. Not only did she ask every witness about the story, she quoted lengthy portions of it both during her opening statement and during her closing argument. She had a police detective reread a portion of the story to the jury. She told the jury that the story was a "window into defendant's mind."

The jury convicted defendant as charged. The trial court sentenced him to 20 to 40 years in prison. Defendant appealed to the Court of Appeals, which affirmed his convictions in an unpublished opinion per curiam.[3] Judge GLEICHER dissented. We granted defendant's application for leave to appeal.[4]

The key issue on appeal was whether defendant's fictional story was properly admitted in evidence. We review decisions admitting evidence for an abuse of discretion.[5] The trial court admitted the story as other-acts evidence pursuant to MRE 404(b)(1), which states:

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[1] She explained that her "front butt" is where she goes pee and her "back butt" is where she goes poop. When asked if her "back butt" had an inside and an outside, she responded, "Yes." When asked what part of her "back butt" defendant's "front butt" had touched, she responded, "the inside."

[2] At one point she testified that she had clothing on when the incident occurred. Later, she stated that she had a towel wrapped around her.

[3] *People v Novak*, unpublished opinion per curiam of the Court of Appeals, issued January 26, 2010 (Docket No. 284838).

[4] *People v Novak*, 486 Mich 1068 (2010).

[5] *Dep't of Transportation v Vanelslander*, 460 Mich 127, 129 (1999).

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

The Court of Appeals majority concluded that defendant's story did not fall within the scope of MRE 404(b).[6] The dissent disagreed. And at oral argument before this Court, counsel for the prosecution conceded that the Court of Appeals erred in failing to analyze this case under that rule.

In *People v VanderVliet*, this Court articulated a four-part test for evaluating when evidence of past misconduct is admissible:

> First, that the evidence be offered for a proper purpose under Rule 404(b); second, that it be relevant under Rule 402 as enforced through Rule 104(b); third, that the probative value of the evidence is not substantially outweighed by unfair prejudice . . . .[7]

Review of the trial court's decision to admit defendant's fictional story as evidence should be made under this Court's *VanderVliet* test.

The prosecutor offered the story to show that defendant acted in conformity with what he wrote. According to the prosecutor, the story was offered to prove that, if or when defendant touched the complainant's chest, he did so with a sexual intent. Indeed, the story was necessary to prove defendant's intent regarding the second-degree criminal sexual conduct charge because it was the only evidence showing that the alleged touching was done for sexual gratification.

But the purpose for which the evidence was offered was not proper under MRE 404(b). It did not evidence motive, opportunity, intent, preparation, scheme, plan, or system in doing the acts complained of. It did not evidence knowledge, identity or absence of mistake or accident. It did not refute fabrication. Instead, the prosecutor repeatedly used the story as a springboard for broad inferences about defendant's bad character. For example, she questioned the only defense witness at length about the story. In over four pages of trial transcript, the prosecutor attempted to get the witness to conflate the authorship of the story with a general character flaw.

The prosecutor's use of the story shows that she intended it as character evidence designed to convict defendant for what he wrote. In describing the story as "a window into the defendant's mind," she

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[6] *Novak,* unpub op at 2.

[7] *People v VanderVliet*, 444 Mich 52, 55 (1993). The fourth part of the test provided that the trial court may, upon request, provide a limiting instruction to the jury.

specifically and improperly suggested to the jury that defendant possessed a morally repugnant character and a lustful disposition. The only fact that the story tended to prove was that defendant had a preoccupation with incestuous relationships.

In order for evidence to be properly admitted under MRE 404(b), the probative value of the evidence must not be substantially outweighed by unfair prejudice.[8] In this case, the danger of unfair prejudice substantially outweighed the probative value, if any, of defendant's story.

I question the story's probative value. Many people write fictional fantasies but never act them out. In this case, defendant's fictional story does not track the acts he was accused of performing. As the Court of Appeals dissent observed,

> virtually no similarities exist between the sexual acts described in the story and the acts of criminal sexual conduct that defendant allegedly inflicted on [the complainant]. The children described in the story were at least 16-years-old, and most of the story detailed sexual relationships among the children, rather than between the father and his children.[9]

Thus, the probative nature of the evidence is at best very limited.

On the other hand, the substance of the story was overwhelmingly prejudicial. Judge GLEICHER opined that the story

> is a clumsily written, sexually explicit, generally repulsive document that lacks literary or artistic merit. Indisputably, a high likelihood existed that the manual would transgress most of the jurors' norms of decency and morality. The danger of unfair prejudice attending this document far outweighed whatever marginal probative value it may have possessed.[10]

I believe that the trial court abused its discretion by failing to exclude defendant's fictional story on the basis that its extremely prejudicial nature completely overwhelmed any minimal probative value.

Since the trial court erred in admitting the story as evidence, it must be determined whether the error was outcome determinative.[11] I believe that it was. Absent the story, the prosecutor's case was weak. The primary witness against defendant was the nine-year-old complainant whose testimony was far from clear. In fact, it was the inherent weakness

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[8] *Id.*

[9] *Novak*, unpub op at 6 (GLEICHER, J., dissenting). Notwithstanding the fact that most of the story detailed sexual relationships among the children, the prosecutor purposefully chose to focus on a more inflammatory portion of the story involving sexual acts between the father and his teenage daughter.

[10] *Id.* at 7 (GLEICHER, J., dissenting).

[11] *People v Feezel*, 486 Mich 184, 192 (2010).

of her account of events that prompted the prosecutor to rely on defendant's inflammatory fictional story to persuade the jury of defendant's guilt. Accordingly, I would reverse the judgment of the Court of Appeals and remand the case for a new trial.

MICKEL v WILSON, No. 141896; Court of Appeals No. 289037.

YOUNG, C.J. (*concurring*). I concur in the Court's order denying leave to appeal.

I write separately to express my strenuous disagreement with my dissenting colleague's belief that this Court ought to reconsider what remains of the parental immunity doctrine[1] because I vigorously oppose the proposition that "the near-universal existence of liability insurance has attenuated [the] concern that the doctrine's abrogation would endanger intra-family relationships."[2]

No matter how conscientious, parents will inevitably make decisions regarding the care and upbringing of their children that, in hindsight, constitute errors in judgment. Unfortunately, some of these errors may result in harm to a child. However, everyday parental decision-making should not be complicated by the threat of trial lawyers. Permitting a child (or another parent) to sue a parent for an error in judgment because an insurance policy exists does not lead to better parenting—as those who would abolish what remains of parental immunity must posit. In this case, for example, defendant used the restroom and left his daughter momentarily unattended while she played in the shallow water of a lake during a party attended by 30 to 50 people. Tragically, she drowned.[3]

One can be certain that it is not the ordeal of litigation that forms the basis of defendant's regret regarding the outcome of that horrible day. More fundamentally, a monetary judgment against defendant, regardless of the funding source, will not make defendant a better parent to his remaining children. It is axiomatic that not every harm is or should be compensable at law—even when insurance is footing the bill.

Further abrogation of the "parental immunity" doctrine will expose *all* parental decisions regarding the upbringing of their children—however mundane or discretionary—to litigation. However, my dissent-

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[1] *Plumley v Klein*, 388 Mich 1 (1972). *Plumley* abrogated the parental immunity doctrine but retained two exceptions: "(1) where the alleged negligent act involves an exercise of reasonable parental authority over the child; and (2) where the alleged negligent act involves an exercise of reasonable parental discretion with respect to the provision of food, clothing, housing, medical and dental services, and other care." *Id*. at 8. If one of the exceptions applies, the parent is immune.

[2] *Post* at 949.

[3] Plaintiff, defendant's former wife and the mother of the deceased child, sued defendant on behalf of the deceased child for negligent supervision. The Court of Appeals affirmed the trial court's decision to dismiss plaintiff's suit because defendant's conduct fell within the *Plumley* exceptions.

ing colleague argues that this Court should reconsider the validity of the exceptions to the abrogation of parental immunity articulated by this Court in *Plumley*. I believe that those exceptions are worthy of retention.

What remains of the parental immunity doctrine recognizes that the parent-child relationship merits different treatment for purposes of tort litigation than the relationships between strangers or business associates. The *Plumley* exceptions serve vital purposes, such as the "preservation of domestic tranquility and family unity" and "the need to avoid judicial intervention into the core of parenthood and parental discipline . . . ."[4] The exceptions recognize that "[e]ach parent has unique and inimitable methods and attitudes on how children should be supervised. Likewise, each child requires individualized guidance depending on intuitive concerns which only a parent can understand."[5] Thus, although this Court abrogated parental immunity, the *Plumley* exceptions still recognize and preserve the importance of the family unit and the need for its autonomy.[6]

The notion that "the near-universal existence of liability insurance has attenuated [the] concern that the doctrine's abrogation would endanger intrafamily relationships" is a singularly misguided and shocking idea. Its animating value is the view that litigation, in and of itself, serves some universal therapeutic goal. Only a lawyer could believe this. Litigation among family members over family problems is not a positive development for our society for any group other than those whose livelihood depends upon the promotion of litigation. Indeed, the fact that insurance might be available to fund litigation between parents over child rearing disputes is likely to promote collusive suits.

Unlike the dissenting justice, who believes that the doctrine of parental immunity is "ripe for reconsideration,"[7] I do not support treating family members as though they are no different from any other commercial parties to a lawsuit. The family unit is a unique, revered institution under assault from many quarters. This Court ought not be one of its assaulters.

I support retaining the exceptions to the abrogation of parental immunity because the exceptions value the integrity and cohesion of the family rather than promoting litigation. Accordingly, I concur in the Court's order denying the application.

CAVANAGH and HATHAWAY, JJ., would grant leave to appeal.

MARILYN KELLY, J. (*dissenting*). This is a case involving the alleged failure of a father to provide supervision to his three-year-old daughter while she bathed in an Oakland County lake. The child drowned. The legal issue is whether a lawsuit will lie on behalf of the daughter against the father for his alleged negligence. The concurring justice equates my willingness to entertain this legal question with a belief on my part that

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[4] *Hush v Devilbiss Co*, 77 Mich App 639, 645 (1977).

[5] See *Paige v Bing Constr Co*, 61 Mich App 480, 485 (1975).

[6] See *Hush*, 77 Mich App at 646.

[7] *Post* at 951.

family members should be treated like parties to a commercial lawsuit. He suggests that I favor an assault upon the family unit. This is a gross misrepresentation of my position.

My belief is that the Court should grant leave to reconsider the scope and validity of the doctrine of parental immunity for a most appropriate reason: the doctrine is being applied differently in different courts throughout the state, and the Court should clarify its status.

Traditionally, Michigan courts followed the common law doctrine of parental immunity. This precluded children from bringing actions grounded in negligence against their parents.[1] However, in 1972 in the case of *Plumley v Klein*,[2] this Court partially abrogated the doctrine. *Plumley*, an automobile negligence case, noted that the modern trend was toward abrogation and that several states that once accepted the doctrine had abandoned it.[3] It also noted that this Court had already moved toward abrogation and that the near-universal existence of liability insurance has attenuated concern that the doctrine's abrogation would endanger intra-family relationships.[4]

This Court then held that

> [a] child may maintain a lawsuit against his parent for injuries suffered as a result of the alleged ordinary negligence of the parent. Like our sister states, however, we note two exceptions to this new rule of law: (1) where the alleged negligent act involves an exercise of reasonable parental authority over the child; and (2) where the alleged negligent act involves an exercise of reasonable parental discretion with respect to the provision of food, clothing, housing, medical and dental services, and other care.[5]

Although *Plumley* did not entirely abolish the doctrine of parental immunity, it significantly limited it, making immunity the exception rather than the rule. The Court has not revisited the doctrine in 39 years. In the interim, questions have arisen regarding the proper application of what remains of the doctrine. Not surprisingly, lower courts have not always agreed about them.[6]

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[1] *Elias v Collins*, 237 Mich 175 (1926).

[2] *Plumley v Klein*, 388 Mich 1 (1972).

[3] *Id.* at 5-6.

[4] *Id.* at 7.

[5] *Id.* at 8 (citation omitted).

[6] See, e.g., *Mickel v Wilson*, unpublished opinion per curiam of the Court of Appeals, issued August 31, 2010 (Docket No. 289037), p 3 ("We acknowledge that the phrase, 'exercise of reasonable parental authority' has not been consistently interpreted in this Court."). The Court of Appeals also found there to be an "apparent lack of clarity" in this area of the law. *Id.* at 4.

This case presents an example of the inconsistent application that has resulted. Here, defendant is the deceased child's father and plaintiff's former husband. Plaintiff is the mother and personal representative of the child. In that capacity, she sued defendant for negligence and gross negligence.

The trial court applied *Plumley* and granted summary disposition to defendant on the ground of parental immunity. It found that plaintiff's allegations of negligent supervision were barred by language in *Plumley* that provides a parent with immunity where "the alleged negligent act involves an exercise of reasonable parental authority over the child."[7]

Plaintiff appealed to the Court of Appeals claiming that, as a matter of law, the trial court erred in applying the parental immunity doctrine. In a split decision, the Court affirmed the lower court, concluding that it had properly applied the doctrine. Judge GLEICHER dissented and urged this Court to revisit the doctrine with a view to entirely abrogating it.

This case raises a significant question left open in *Plumley*—whether the negligent supervision of a child falls within the ambit of the parental immunity doctrine. As Judge GLEICHER astutely noted in her dissenting opinion, it is questionable whether the *Plumley* Court intended to immunize the negligent supervision of a child:

> Logically, it makes no sense that the Supreme Court in *Plumley* rejected a broad form of "intra-family tort immunity" in "the interests of justice and fairness," yet deliberately maintained broad immunity for parental supervision. The supervision of children consumes most of a parent's time and energy. As the case law since *Plumley* demonstrates, a substantial number of tort claims involve allegations falling under the parental supervision umbrella. But, notwithstanding that parental supervision encompasses an enormous range of regular parental activities, the Supreme Court in *Plumley* did not specifically incorporate the term "supervision" in the list of exceptions to immunity. Instead, the Supreme Court shielded from tort liability a discrete and narrowly drawn list of parental acts: "the provision of food, clothing, housing, medical and dental services, and other care." I cannot conceive why the Supreme Court would expressly maintain immunity for discretionary decisions that occur only occasionally, like deciding whether to take a child to the doctor or dentist, yet neglect to mention that it also meant for immunity to cover the single most frequently performed parental task.[8]

Not only is the doctrine being applied inconsistently but, as Judge GLEICHER's dissent suggests, the Court of Appeals may be applying it in circumstances that fall outside the narrow exceptions promulgated in *Plumley*.

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[7] *Plumley*, 388 Mich at 8.

[8] *Mickel,* unpub op at 2-3 (GLEICHER, J., dissenting) (citations omitted).

This Court has not addressed the doctrine of parental immunity in nearly 40 years. The lack of clarification from the Court has generated confusion and resulted in inconsistent application of the doctrine. Also, as the split Court of Appeals opinion illustrates, a significant question exists about whether parental immunity applies to cases of parents' negligent supervision of their children. For these reasons, I believe that the doctrine of parental immunity is ripe for reconsideration, or at least clarification, by this Court. I would grant leave so that this Court could speak on this issue of jurisprudential significance.

ZAHRA, J., did not participate because he was on the Court of Appeals panel.

HARDER v CASTLE BLUFF APARTMENTS, No. 142616; Court of Appeals No. 298975. We note that, contrary to the analysis provided by the Workers' Compensation Appellate Commission (WCAC), MCL 418.361(1) applies at all times to partially disabled workers, see *Lofton v AutoZone, Inc*, 482 Mich 1005 (2008), but the magistrate in this case found, and the record supports, that the plaintiff did not have the ability to earn wages within his qualifications and training, and the WCAC therefore properly affirmed the magistrate's decision.

CAVANAGH, MARILYN KELLY, and HATHAWAY, JJ., would deny leave to appeal without the further statement found in the majority's order.

PEOPLE v JEFFERY JONES, No. 142685; Court of Appeals No. 294042.

PECORARO v ROSTAGNO-WALLAT, Nos. 142686 and 142687; reported below: 291 Mich App 303.

CAVANAGH and HATHAWAY, JJ., would grant leave to appeal.

MARILYN KELLY, J. (*dissenting*).

This is an action under the Paternity Act[1] in which plaintiff seeks custody rights involving his daughter. The Court of Appeals reversed the trial court judgment and dismissed the case finding that plaintiff lacked standing.

The case presents two issues of jurisprudential significance. The first concerns an order of filiation issued and affirmed in the New York courts holding that plaintiff is the biological parent of the child involved here. The issue is whether the order should be recognized in Michigan courts pursuant to the Full Faith and Credit Clause of the United States Constitution.[2] The second issue is whether the Court of Appeals properly interpreted MCL 722.711(1)(a) when it ruled that the order's validity hinges on the child's legal father being a party in the New York action.

In Michigan, a putative father lacks standing to bring an action under the paternity act unless he can demonstrate that the child in question was born out of wedlock.[3] MCL 722.711(1)(a) provides two methods for the putative father to satisfy standing. The first is to show that the

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[1] MCL 722.711 *et seq*.

[2] US Const, art IV, § 1.

[3] MCL 722.711(1)(a) defines "child born out of wedlock" as a "child begotten and born to a woman who was not married from the conception

mother was not married from the date of the child's conception until the child's birth. The second is to show that the court determined that the child was born or conceived during a marriage but was not an issue of the marriage.

In this case, it is unquestioned that defendants, the child's mother and her husband, were married from the date of the child's conception until her birth. There is also no question that, after the child's birth and before bringing a paternity action in Michigan, plaintiff obtained an order of filiation from a New York court. The order shows that plaintiff is the child's biological father, hence the child is not an issue of the mother's marriage.

The Michigan circuit court found that plaintiff had standing in the paternity act lawsuit by virtue of the New York order of filiation. It afforded the order full faith and credit to show that the child was born while the mother was married to a man who was not the child's biological father.

The Court of Appeals reversed the circuit court on both issues.[4] It relied on *Barnes v Jeudevine*[5] in finding that plaintiff lacked standing. The Court of Appeals found that the fact that the mother's husband was not a party to the New York action was a fatal flaw in the order of filiation. As a consequence, it reasoned, there was no valid prior court determination that the child had been born out of wedlock. It further concluded that, because the mother's husband was not a party, the order was not entitled to full faith and credit by a Michigan court.[6]

Plaintiff appeals in this Court, asserting that the circuit court should have given full faith and credit to the New York order. I am not convinced that the Court of Appeals properly concluded that the order was not entitled to full faith and credit. Moreover, if it was entitled to full faith and credit, the Court of Appeals may have erred in holding that the legal father was a necessary party to the New York proceeding.

After plaintiff lawfully filed his lawsuit seeking the order in New York, the case was finally adjudicated there. If the order is not afforded the protections of the Full Faith and Credit Clause in the paternity action in Michigan, it will have been effectively collaterally attacked in Michigan and rendered useless here.

Defendant argues accurately that plaintiff could not have obtained an order of filiation in Michigan. But that is not the test to determine whether the New York order should be given full faith and credit in this state.[7] Plaintiff did have standing in the New York action. Moreover, the

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to the date of birth of the child, or a child that the court has determined to be a child born or conceived during a marriage but not the issue of that marriage."

[4] *Pecoraro v Rostagno-Wallat*, 291 Mich App 303, 316-317 (2011).

[5] 475 Mich 699 (2006).

[6] *Pecoraro*, 291 Mich App at 317.

[7] " 'In numerous cases this Court has held that credit must be given to the judgment of another state although the forum would not be required to entertain the suit on which the judgment was founded.' . . . Regarding

Paternity Act states that we must give orders of filiation of other states the same effect as if they were obtained in Michigan.[8]

I also question the court-created requirement that the court determination necessary for standing under MCL 722.711(1)(a) must have been made in a prior proceeding between the mother and her husband. This requirement is not found in the language of MCL 722.711(1)(a) or in any other statute.

For the reasons given here, I believe that the Court should grant leave to appeal.

ZAHRA, J., did not participate because he was on the Court of Appeals panel.

Superintending Control Denied June 8, 2011:

LARSON v BOARD OF LAW EXAMINERS, No. 143097.

Leave to Appeal Granted June 15, 2011:

MCCUE v O-N MINERALS, No. 142287; Court of Appeals No. 294661. The parties shall include among the issues to be briefed whether the Court of Appeals erred when it reversed the grant of summary disposition to the defendant by concluding (1) as to the plaintiff's negligence claim, that a reasonable trier of fact could find that the defendant owed a duty to the plaintiff because the defendant had used the state highway in a way that caused the defect at issue or increased the hazard posed by the defect and (2) that the plaintiff stated a claim for public nuisance.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal Entered June 15, 2011:

CEDRONI ASSOCIATES v TOMBLINSON HARBURN ASSOCIATES, No. 142339; reported below: 290 Mich App 577. At oral argument, the parties shall address whether the Court of Appeals erred when it determined that there are genuine issues of material fact as to (1) whether the plaintiff, a disappointed low bidder on a public contract, had a valid business expectancy and (2) whether the defendant architectural firm's communications, made pursuant to its agreement with the contracting school

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judgments, . . . the full faith and credit obligation is exacting. A final judgment of one State, if rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment, qualifies for recognition throughout the land." *Baker v Gen Motors Corp*, 522 US 222, 232-233; 118 S Ct 657; 139 L Ed 2d 580 (1998) (citations omitted).

[8] MCL 722.714b states, "The establishment of paternity under the law of another state has the same effect and may be used for the same purposes as an acknowledgment of paternity or order of filiation under this act."

district, amounted to intentional and improper conduct sufficient to sustain a claim of tortious interference with a business expectancy. The parties may file supplemental briefs within 42 days of the date of this order, but they should not submit mere restatements of their application papers.

The motion for leave to file a brief amicus curiae is granted. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

Request for Advisory Opinion Granted June 15, 2011:

In re REQUEST FOR ADVISORY OPINION REGARDING CONSTITUTIONALITY OF 2011 PA 38, No. 143157. We direct that oral argument on the following questions be heard on Wednesday, September 7, 2011, at 9:30 a.m. MCR 7.302(H)(1). The questions submitted are (1) whether reducing or eliminating the statutory exemption for public-pension incomes as described in MCL 206.30, as amended, impairs accrued financial benefits of a "pension plan [or] retirement system of the state [or] its political subdivisions" under Const 1963, art 9, § 24; (2) whether reducing or eliminating the statutory tax exemption for pension incomes, as described in MCL 206.30, as amended, impairs a contract obligation in violation of Const 1963, art 1, § 10 or US Const, art I, § 10(1); (3) whether determining eligibility for income-tax exemptions on the basis of total household resources, or age and total household resources, as described in MCL 206.30(7) and (9), as amended, creates a graduated income tax in violation of Const 1963, art 9, § 7; and (4) whether determining eligibility for income-tax exemptions on the basis of date of birth, as described in MCL 206.30(9), as amended, violates equal protection of the law under Const 1963, art 1, § 2 or the Fourteenth Amendment of the United States Constitution.

The Attorney General is respectfully requested to submit within 56 days of the date of this order separate briefs arguing that the reduction or elimination of tax exemption for pension incomes contained in 2011 PA 38 and the determination of eligibility of income tax exemptions for pensions on the basis of age are and are not constitutional under the Michigan and United States Constitutions.

Persons or groups interested in the determination of the questions presented in this matter may move the Court for permission to file briefs amicus curiae on either or both sides of the submitted questions.

Leave to Appeal Denied June 15, 2011:

PEOPLE V JEFFERSON, No. 141968; Court of Appeals No. 299667.

WILSON V CRAWFORD, No. 142047; Court of Appeals No. 296136.

GARRISON COMPANY V BISHOP INTERNATIONAL AIRPORT AUTHORITY, No. 142349; Court of Appeals No. 293415.

PEOPLE V SIMMS, No. 142429; Court of Appeals No. 294020.

PEOPLE v BRITTON, No. 142810; Court of Appeals No. 302043.

Summary Disposition June 17, 2011:

PEOPLE v DETLOFF, No. 142319; Court of Appeals No. 300285. Pursuant to MCR 7.302(H)(1), rather than grant leave to appeal, we vacate the defendant's sentence for resisting and obstructing an officer, MCL 750.81d(1). Zero points should have been scored for prior record variable (PRV) 1 pursuant to MCL 777.50(2) and (3). The resulting change in defendant's total PRV score produces a lower sentencing guidelines range. Defendant is therefore entitled to resentencing. See *People v Francisco*, 474 Mich 82 (2006). Therefore, we remand this case to the Oakland Circuit Court for resentencing under properly scored sentencing guidelines. Because we are not persuaded that the remaining questions presented should be reviewed by this Court, leave to appeal with respect to them is denied. We do not retain jurisdiction.

Orders Granting Oral Argument in Cases Pending on Application for Leave to Appeal Entered June 17, 2011:

JOHNSON v HURLEY MEDICAL GROUP, No. 141793; Court of Appeals No. 287587. We direct the clerk to schedule oral argument on whether to grant the application or take other action, limited to the issues whether MCL 600.2301 applies to cases initiated before the amendment of MCL 600.5856 in 2004 and whether the plaintiff in this case should have been allowed to amend her notice of intent. MCR 7.302(H)(1). The parties may file supplemental briefs regarding those issues within 42 days of the date of this order, but they should not submit mere restatements of their application papers.

The Michigan Association for Justice and Michigan Defense Trial Counsel, Inc., 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.

FRAZIER v ALLSTATE INSURANCE COMPANY, Nos. 142545 and 142547; Court of Appeals Nos. 292149 and 293904. At oral argument, the parties shall address (1) whether the plaintiff's injury "was a direct result of physical contact with equipment permanently mounted on the vehicle" within the meaning of MCL 500.3106(1)(b); (2) whether the plaintiff's injury was sustained while "alighting from the vehicle" within the meaning of MCL 500.3106(1)(c); and (3) whether the plaintiff is entitled to attorney fees pursuant to MCL 500.3148(1). The parties may file supplemental briefs within 42 days of the date of this order, but they should not submit mere restatements of their application papers.

Leave to Appeal Denied June 17, 2011:

PEOPLE v BUCKNER, No. 142542; Court of Appeals No. 281384.

MARILYN KELLY and HATHAWAY, JJ., would grant leave to appeal to reconsider *People v Houston*, 473 Mich 399 (2005), for the reasons set forth in Justice CAVANAGH's dissenting opinion in that case.

PEOPLE v FOLEY, No. 142808; Court of Appeals No. 297679.

CUNNINGHAM v CUNNINGHAM, No. 143049; Court of Appeals No. 300224.

Summary Disposition June 22, 2011:

BEEBE v HARTMAN, No. 142315; reported below: 290 Mich App 512. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate part III(B) of the Court of Appeals' analysis, for the reasons stated in the Court of Appeals concurring opinion. In all other respects, leave to appeal is denied, because we are not persuaded that the question presented should be reviewed by this Court before the completion of the proceedings ordered by the Court of Appeals.

HATHAWAY, J., would deny leave to appeal without further action.

Leave to Appeal Granted June 22, 2011:

VELEZ v TUMA, No. 138952; reported below: 283 Mich App 396. The motion for reconsideration of this Court's October 22, 2010, order is considered, and it is granted. We vacate that part of our order that denied the application for leave to appeal the April 16, 2009, judgment of the Court of Appeals. On reconsideration, the application for leave to appeal is considered, and it is granted, limited to the issue whether the Court of Appeals correctly held that the setoff amount in this case was properly set off against the jury verdict, before application of the noneconomic damages cap of MCL 600.1483 and calculation of the final judgment.

PEOPLE v KOLANEK, No. 142695; reported below: 291 Mich App 227. The parties shall address whether, in order to have a valid affirmative defense for the medical use of marijuana under MCL 333.26428(a)(1), a defendant must obtain the required physician statement after the date of enactment of the Michigan Medical Marihuana Act, MCL 333.26421 *et seq*., but before the date of the defendant's arrest.

We further order that this case be argued and submitted to the Court together with the case of *People v Kolanek* (Docket No. 142712), at such future session of the Court as both cases are ready for submission.

The Attorney General, the Criminal Defense Attorneys of Michigan, and the Prosecuting Attorneys Association of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issue presented in this case may move the Court for permission to file briefs amicus curiae.

PEOPLE v KOLANEK, No. 142712; reported below: 291 Mich App 227. The parties shall include among the issues to be briefed (1) whether a defendant is eligible to assert the affirmative defense of medical use of marijuana under MCL 333.26428(a) without first obtaining a valid "registry identification card"; (2) whether the language "[e]xcept as

provided in section 7" in MCL 333.26428(a) requires a defendant to fulfill all the conditions set forth in MCL 333.26424 in order to have a valid defense under MCL 333.26428(a); and (3) whether a defendant may assert the affirmative defense under MCL 333.26428(a) as a defense at trial after a court has denied the defendant's motion to dismiss under MCL 333.26428(b).

We further order that this case be argued and submitted to the Court together with the case of *People v Kolanek* (Docket No. 142695), at such future session of the Court as both cases are ready for submission.

The Attorney General, the Criminal Defense Attorneys of Michigan, and the Prosecuting Attorneys Association of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

In re MORRIS, No. 142759; Court of Appeals No. 299471. By order of April 22, 2011, while retaining jurisdiction, we remanded this case to the Court of Appeals for reconsideration of the respondent father's appeal in light of the confession of error by petitioner, the Department of Human Services, regarding the notice violation under the Indian Child Welfare Act (ICWA), 25 USC 1901 *et seq*. On order of the Court, the Court of Appeals having filed its opinion on remand on May 19, 2011, the application for leave to appeal is again considered, and it is granted, limited to the issue whether the Court of Appeals' "conditional affirmance" remedy is an appropriate method of resolving an ICWA violation.

We further order the Wayne Circuit Court Family Division to appoint attorney Vivek Sankaran of the University of Michigan Law School Child Advocacy Clinic, if feasible, to represent the respondent father in this Court.

The Children's Law, Family Law, and American Indian Law Sections of the State Bar of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issue presented in this case may move the Court for permission to file briefs amicus curiae.

PEOPLE V LARRY KING, No. 142850; reported below: 291 Mich App 503. The parties shall address (1) whether the defendant was immune from arrest and prosecution for manufacturing marijuana under § 4(a) and (d) of the Michigan Medical Marihuana Act, MCL 333.26424(a) and (d), where he possessed a valid registry identification card and he was in possession of an amount of marijuana that did not exceed the amount allowed under the act; (2) whether the presumption under § 4(d) was rebutted by evidence that the defendant did not keep his 12 marijuana plants in an "enclosed, locked facility" under § 4(a), as defined in § 3(c), MCL 333.26423(c); (3) if (2) is answered in the affirmative, whether the defendant may independently assert an affirmative defense under § 8(a), MCL 333.26428(a); and (4) whether the language "[e]xcept as provided in section 7" in § 8(a) required the defendant to fulfill all of the conditions set forth in § 4 in order to have a valid affirmative defense under § 8(a).

The Attorney General, the Criminal Defense Attorneys of Michigan, and the Prosecuting Attorneys Association of Michigan are invited to file

briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

PEOPLE v REESE, No. 142913; Court of Appeals No. 292153. The parties shall address whether the doctrine of imperfect self-defense can mitigate second-degree murder to voluntary manslaughter and, if so, whether the doctrine was appropriately applied to the facts of this case by the Wayne Circuit Court.

The Prosecuting Attorneys Association of Michigan and the Criminal Defense Attorneys of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal Entered June 22, 2011:

ATKINS v SMART, No. 140401; Court of Appeals No. 288461. At oral argument, the parties shall address whether written notice of the plaintiff's no-fault claim, together with SMART's knowledge of facts that could give rise to a tort claim by the plaintiff, constituted written notice of her tort claim sufficient to comply with MCL 124.419. The parties may file supplemental briefs within 42 days of the date of this order, but they should not submit mere restatements of their application papers.

The Michigan Association for Justice and Michigan Defense Trial Counsel, Inc., are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

Leave to Appeal Denied June 22, 2011:

PEOPLE v CROSS, No. 142336; Court of Appeals No. 292669.

PEOPLE v NATHAN JACOBS, No. 142519; Court of Appeals No. 283056.

PEOPLE v KENNETH CARTER, No. 142604; Court of Appeals No. 301121.

PEOPLE v BEKELE, No. 142659; Court of Appeals No. 294592.

Order Granting Motion to Withdraw Application for Leave to Appeal Entered June 22, 2011:

PEOPLE v REDDEN and PEOPLE v TOREY CLARK, Nos. 142044 and 142045; reported below: 290 Mich App 65. On order of the Court, the defendants' motion to withdraw their joint application for leave to appeal the September 14, 2010, judgment of the Court of Appeals is considered, and it is granted. The motion to strike is denied as moot.

Leave to Appeal Denied June 24, 2011:

BROWN v BLOUIR, No. 142159; Court of Appeals No. 291876.

YOUNG, C.J. (*concurring*). We have reached the point again where the Legislature must speak if it wishes to preserve the no-fault act's compromise between the provision of quick, generous insurance benefits without proof of fault and the act's restrictions on access to additional tort recovery. No one actually attempts to justify having both the most generous automobile insurance benefits in the nation *and* a tort system where virtually any auto injury would satisfy the noneconomic damages exception to no-fault. Yet, while *Kreiner v Fischer*[1] preserved that distinction, *McCormick v Carrier*[2] ignored and eliminated it.

Even though I joined and continue to subscribe to Justice MARKMAN's dissenting opinion in *McCormick*, I concur in this Court's decision to deny defendant's application for leave to appeal, which asks this Court to reconsider whether *McCormick* was correctly decided. I write to emphasize Justice MARKMAN's concerns that

> [b]y nullifying the legislative compromise, which was grounded in concerns over excessive litigation, the over-compensation of minor injuries, and the availability of affordable insurance, the Court's decision [in *McCormick*] will resurrect a legal environment in which each of these hazards reappears and threatens the continued fiscal integrity of our no-fault system.[3]

The factual scenario presented here brings to life these concerns.

The reappearance of these hazards that threaten the viability of Michigan's no-fault system does not represent a new development. In *Kreiner v Fischer*, we thoroughly traced the development of this Court's caselaw interpreting MCL 500.3135's provisions governing when a no-fault plaintiff may recover noneconomic damages.[4] From this rocky history, two trends emerge and are noteworthy in consideration of this case. First, this Court's interpretation of the threshold standard for noneconomic recovery, MCL 500.3135, has not been consistent for more than a 30-year span. Even more troubling, the changed interpretations articulated in *DiFranco v Pickard*[5] and *McCormick* represented a significant departure *away* from the interpretation that enforced the Legislature's strict requirements. Second, in response to these changing interpretations, the Legislature has found it necessary to amend the language

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[1] *Kreiner v Fischer*, 471 Mich 109 (2004).

[2] *McCormick v Carrier*, 487 Mich 180 (2010).

[3] *McCormick*, 487 Mich at 227 (MARKMAN, J., dissenting).

[4] *Kreiner*, 471 Mich at 114-122; see also *McCormick*, 487 Mich at 233-259 (MARKMAN, J., dissenting).

[5] *DiFranco v Pickard*, 427 Mich 32 (1986).

used in this statute as the means of compelling Michigan courts to enforce its stated intent limiting noneconomic recovery.[6]

It is a particularly unfortunate development when the Legislature must act to countermand a decision of the Supreme Court where this Court refused to enforce the unambiguous language used in the no-fault statute after a *prior* corrective legislative amendment. The deconstruction of the Legislature's work product that took place in *McCormick* is strikingly similar to the deconstruction *DiFranco* achieved in the past that also necessitated a legislative correction. Demonstrating that history truly does repeat itself, I find it difficult to improve on what this Court stated nearly 30 years ago: "If every case is subject to the potential of litigation on the question of noneconomic loss, for which recovery is still predicated on negligence, perhaps little has been gained by granting benefits for economic loss without regard to fault."[7]

Kreiner provided an accurate construction that appropriately enforced the clear language of MCL 500.3135. Equally as important, *Kreiner* recognized that these provisions affect every Michigan driver due to the mandatory nature of no-fault automobile insurance. Thus, this Court's duty to apply consistently the Legislature's policy choices takes on particular importance because of the direct impact that the Court's decisions have on such a substantial number of Michigan's citizens. *McCormick* has now undone much of this, and as a result produced a regime of seemingly unlimited liability that will require courts to wrestle with the question of what constitutes a "serious impairment of body function."[8] Accordingly, courts may now find compensable in tort as a

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[6] In 1995, the Legislature enacted a bill that amended MCL 500.3135. The purpose of this bill was to "modify tort liability arising out of certain accidents." The necessity of this bill arose only because this Court's decision in *DiFranco* discarded the then-controlling standard implementing the Legislature's limitations on recovery. The *DiFranco* majority overruled *Cassidy v McGovern*, 415 Mich 483 (1982), which was still cooling on the presses. The Legislature's 1995 amendments reinstituted *Cassidy* nearly in its entirety as the governing standard. As the *McCormick* dissent astutely noted, the *McCormick* majority reinstituted what essentially amounted to the *DiFranco* test, notwithstanding the fact that the Legislature made clear that *DiFranco* did not reflect the policy of this state. See *McCormick*, 487 Mich at 239-240 (MARKMAN, J., dissenting).

[7] *Cassidy*, 415 Mich at 500.

[8] It is impossible to conceive that, when the Legislature chose the language "death, serious impairment of body function, or permanent serious disfigurement" as the threshold standard for noneconomic recovery, a majority of this Court would hold, as a matter of law, that an impairment of a body function that merely "influences some of the plaintiff's capacity to live in his or her normal manner of living" meets

matter of law routine injuries not intended by MCL 500.3135 to be compensated beyond the full panoply of benefits otherwise conferred by the no-fault act.

I encourage the Legislature to judge for itself whether the current interpretation provided in *McCormick* for what constitutes a "serious impairment of body function" is truly the interpretation it originally contemplated. Should the Legislature determine that *McCormick* undermines the "grand compromise" of Michigan's unique no-fault act, as I believe it does, that body may find it necessary to correct this Court's *McCormick* construction that, in my opinion, fails to give meaning to the Legislature's policy choices.

CAVANAGH, J. (*concurring*). I concur in the order denying defendant's application for leave to appeal. I write only to respond to Chief Justice YOUNG's concurrence, in which he attacks this Court's recent opinion in *McCormick v Carrier*, 487 Mich 180 (2010).

Impassioned hyperbole aside, an unbiased reading of *McCormick* aptly illustrates that *McCormick* did not resuscitate *DiFranco v Pickard*, 427 Mich 32 (1986), nor did it turn a blind eye to the will of the Legislature.[1] Indeed, *McCormick*'s analysis faithfully applied the clear and unambiguous language of MCL 500.3135. As evidenced by *McCormick*'s analysis, *McCormick* fully recognized the Legislature's adoption of *Cassidy v McGovern*, 415 Mich 483 (1982), where the Legislature indicated an intent to do so through the statute's text and, similarly, "reinstituted" *DiFranco* only where the statute's text actually indicated a legislative intent to do so. *McCormick*, 487 Mich at 220; see, also, *id.* at 191, 197-198, 199, 203, 221-222. Thus, as plainly evidenced by *McCormick*'s scrupulous statutory interpretation, *McCormick* applied the text of the statute, even where it conflicted with the principles announced by the *DiFranco* majority. I enthusiastically invite readers and the Legislature to review the full text of *McCormick* to determine the accuracy of Chief Justice YOUNG's claim that *McCormick* essentially represents a mere reinstatement of *DiFranco*.

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the statutory threshold. See *McCormick*, 487 Mich at 215 (emphasis added). In *McCormick*, plaintiff broke his ankle.

[1] The other concurring statements in this case are mainly mere repetitions of arguments presented in *McCormick*, which were thoroughly considered and rejected by the *McCormick* majority. *McCormick*, 487 Mich at 219-222. As I explained in *McCormick*, the *McCormick* dissent provided little substantive disagreement or criticisms of *McCormick*'s statutory interpretation and, where the dissent actually addressed *McCormick*'s substantive analysis, its criticisms were often based on misunderstandings or overgeneralizations of the opinion's holdings. *Id.* at 219-220. Today, the concurrences' rehashing of their mistaken characterizations of *McCormick* amount to nothing more than yet another attempt to distract courts, parties, and now the Legislature from *McCormick*'s interpretation of MCL 500.3135's actual text. *Id.* at 222.

Not surprisingly, the Chief Justice hypothesizes that *McCormick* will disrupt the Legislature's policy choices and lead us to a parade of horribles. I do not disagree that the no-fault system was designed to remedy certain problems associated with the traditional tort system in the context of automobile accidents. *McCormick*, 487 Mich at 189-190. Nevertheless, the no-fault act *permits* injured persons to potentially recover noneconomic losses in tort when certain statutory requirements are met. And, as I stated before, because *McCormick* is, in my opinion, truer to MCL 500.3135's actual text, *McCormick* more accurately reflects the Legislature's policy considerations than that of *McCormick*'s predecessors. *McCormick*, 487 Mich at 214 & n 26.

McCormick simply acted to align this Court's interpretation of MCL 500.3135 with the statute's text and, as a result, did not eliminate the statute's threshold standard for noneconomic recovery. Indeed, at least according to the *McCormick* dissent, the main dispute between the majority and the dissent was whether *Kreiner*'s temporal requirement was rendered wholly irrelevant by *McCormick*, but that is clearly not the case. Cf. *McCormick*, 487 Mich at 220 n 36; *id.* at 254 (MARKMAN, J., dissenting). *McCormick* simply recognized that the statute does not expressly contain a specific temporal or permanency *requirement*. Thus, as explained in *McCormick*, there is simply no basis to conclude that temporal considerations are irrelevant or that a momentary impairment is sufficient under *McCormick*'s interpretation of MCL 500.3135. *Id.* at 222.[2] Accordingly, just as the no-fault system did not cease before *Kreiner*, I doubt that it will do so in light of *McCormick*.

MARILYN KELLY, J., joined the statement of CAVANAGH, J.

MARKMAN, J. (*concurring*). I concur in the Court's order because remanding a case to the trial court for reconsideration in light of new caselaw is typically the preferred course of action where the trial court has issued a decision in accordance with caselaw that was applicable at the time of the decision, but is no longer applicable. However, I write separately to respond to the Chief Justice's statement in which he asserts that "[w]e have reached the point again where the Legislature must speak if it wishes to preserve the no-fault act's compromise . . . ."

First, I believe it is premature to decide whether this Court should or should not preserve this compromise by reconsidering existing caselaw, in this instance *McCormick v Carrier*, 487 Mich 180 (2010). Neither the trial court nor the Court of Appeals has had an opportunity in this case to

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[2] After a plain reading of *McCormick*, it is clear that the Chief Justice's efforts to minimize the *McCormick* plaintiff's injuries require some shading of the facts. And, to the extent that the Chief Justice implies that a "broken ankle" is not a sufficiently serious injury to meet the statutory threshold, I would simply note that the threshold inquiry requires focusing on, among other things, how much the impairment affects the person's ability to lead his or her normal life, which requires a subjective, person- and fact-specific inquiry. *McCormick,* 487 Mich at 202. And the statute simply "requires that a person's general ability to lead his or her normal life has been *affected*, not destroyed." *Id*. (emphasis in original).

apply *McCormick*. The lower courts have only determined that plaintiff cannot satisfy the "serious impairment" standard of *Kreiner v Fischer*, 471 Mich 109 (2004). If, on remand, the lower courts determine that plaintiff also cannot satisfy the "serious impairment" standard of *McCormick*, then there will be no need at that juncture to reconsider *McCormick*. I would wait until this Court is confronted with a case in which *Kreiner* and *McCormick* compel different outcomes before concluding that this Court is no longer prepared to interpret what the Legislature meant by its "serious impairment" standard until the Legislature has "spoken" again.

Second, where this Court has been confronted with the question whether to reconsider a precedent, it has been our past practice to address this question by assessing the factors set forth in *Robinson v Detroit*, 462 Mich 439 (2000). I would determine whether *McCormick* should be reconsidered only after the *Robinson* factors have been fully evaluated.

Finally, given the Chief Justice's accurate summation of the history of the "serious impairment" standard, it is not clear what is to be achieved by imposing upon the Legislature the obligation to again "speak" its intentions concerning our no-fault laws. As the Chief Justice himself recognizes, the Legislature has already done this repeatedly, and, just as repeatedly, has been reversed by this Court. The Legislature has twice effected compromises, and twice had these compromises reversed by this Court. *McCormick*; *DiFranco v Pickard*, 427 Mich 32 (1986). How many times does the Legislature have to say "we told you we mean a *serious* impairment" before this Court is prepared to interpret a *serious* impairment as requiring a *serious* impairment? Why is it now the Legislature's "turn" to "speak," rather than that of the judiciary, which is charged with saying what the laws of the Legislature mean? Why exactly does the Legislature have to act more than once, or twice, before this Court is prepared to follow its direction? Legislative compromises are often very difficult things to achieve in a large and diverse representative body, and it should not be underestimated just how difficult it is for the Legislature to reenact at will the kind of comprehensive legal reform that it would now have to re-re-enact, before this Court is prepared to exercise its traditional "judicial power." These are questions that should be seriously reflected upon by this Court, but only if, and when, this case returns to this Court following our remand.

As the dissenting justices observed in *McCormick*:

> [T]he majority's decision will almost certainly call into question the long-term economic integrity of the present no-fault system in Michigan. By nullifying the legislative compromise that was struck when the no-fault act was adopted—a compromise grounded in concerns over excessive litigation, the overcompensation of minor injuries, and the availability of affordable insurance—the Court's decision today will restore a legal environment in which each of these hazards reappears and threatens the continued fiscal soundness of our no-fault system. [*McCormick*, 487 Mich at 286-287 (MARKMAN, J., joined by CORRIGAN and YOUNG, JJ., dissenting).]

Because I continue to believe that *McCormick* constitutes a flawed interpretation of the law, and because *McCormick* reverses a compromise of the Legislature seeking to balance reasonable and expedited insurance benefits with reduced tort litigation and reasonable insurance premiums, I would wait until the issues in this case are properly before this Court, before we consider apprising the Legislature that this Court will no longer exercise its traditional judicial authority to "say what the law is" in the context of one of the most far-reaching and consequential of our state's statutes.

I am fully cognizant of the risks of "teeter-totter" justice implicated by this case, and abhor this, but this Court must seriously reflect upon whether such "teeter-tottering" is always to stop in a position that preserves decisions of this Court that are the most resistant to the repeatedly expressed will of the Legislature.

HARRINGTON v SIMPSON, No. 142546; Court of Appeals No. 294365.

MARKMAN, J. (*dissenting*). I would hold this case in abeyance for *Hoffner v Lanctoe*, 489 Mich 877 (2011), a case in which oral arguments are to be scheduled. Both *Hoffner* and the instant case involve the same "unavoidability" aspect of the "open and obvious" doctrine of *Lugo v Ameritech,* 464 Mich 512 (2001). In *Hoffner,* the plaintiff fell on ice that she admittedly saw before she fell as she was entering a fitness center. The Court of Appeals held that the "open and obvious" doctrine did not bar the plaintiff's claim because the danger was "effectively unavoidable." In the instant case, plaintiff slipped and fell on snow in her friend's driveway as she was retrieving a music CD from her parked vehicle. She admitted that she saw the snow before she fell. Again, the Court of Appeals held that the "open and obvious" doctrine did not bar plaintiff's claim because the danger was "effectively unavoidable." In response, the Court of Appeals dissenting judge asserted, "Plaintiff could have visited another day or informed defendant that she would not visit unless and until defendant cleared her driveway. Plaintiff was neither forced to traverse the slippery surface out of personal necessity . . . nor trapped without any alternative means of escape . . . ." Because the "unavoidability" issue is directly implicated in both of these cases, and because there is no apparent reason why the legal standards in these cases should differ, I would abey for *Hoffner*.

Rehearing Denied June 24, 2011:

GREAT WOLF LODGE OF TRAVERSE CITY v PUBLIC SERVICE COMMISSION, Nos. 139541, 139542, 139544, and 139545. Reported at 489 Mich 26.

Reconsideration Denied June 24, 2011:

WIEDYK v POISSON, No. 138260; Court of Appeals No. 280214. Summary disposition at 488 Mich 972.

YOUNG, C.J. (*concurring*). We have reached the point again where the Legislature must speak if it wishes to preserve the no-fault act's compromise between the provision of quick, generous insurance benefits

without proof of fault and the act's restrictions on access to additional tort recovery. No one actually attempts to justify having both the most generous automobile insurance benefits in the nation *and* a tort system where virtually any auto injury would satisfy the noneconomic damages exception to no-fault. Yet, while *Kreiner v Fischer*[1] preserved that distinction, *McCormick v Carrier*[2] ignored and eliminated it.

Even though I joined and continue to subscribe to Justice MARKMAN's dissenting opinion in *McCormick*, I concur in this Court's decision to deny defendant's motion for reconsideration of our order remanding this case in light of *McCormick*, wherein defendant asks this Court to reconsider whether *McCormick* was correctly decided. I write to emphasize Justice MARKMAN's concerns that

> [b]y nullifying the legislative compromise, which was grounded in concerns over excessive litigation, the over-compensation of minor injuries, and the availability of affordable insurance, the Court's decision [in *McCormick*] will resurrect a legal environment in which each of these hazards reappears and threatens the continued fiscal integrity of our no-fault system.[3]

As I noted in my original concurrence to the remand in this case, the factual scenario presented here brings to life these concerns.[4]

The reappearance of these hazards that threaten the viability of Michigan's no-fault system does not represent a new development. In *Kreiner v Fischer*, we thoroughly traced the development of this Court's caselaw interpreting MCL 500.3135's provisions governing when a no-fault plaintiff may recover noneconomic damages.[5] From this rocky history, two trends emerge and are noteworthy in consideration of this case. First, this Court's interpretation of the threshold standard for noneconomic recovery, MCL 500.3135, has not been consistent for more than a 30-year span. Even more troubling, the changed interpretations articulated in *DiFranco v Pickard*[6] and *McCormick* represented a significant departure *away* from the interpretation that enforced the Legislature's strict requirements. Second, in response to these changing interpretations, the Legislature has found it necessary to amend the language used in this statute as the means of compelling Michigan courts to enforce its stated intent limiting noneconomic recovery.[7]

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[1] *Kreiner v Fischer*, 471 Mich 109 (2004).

[2] *McCormick v Carrier*, 487 Mich 180 (2010).

[3] *McCormick*, 487 Mich at 227 (MARKMAN, J., dissenting).

[4] See *Wiedyk v Poisson*, 488 Mich 972, 972 (2010) (YOUNG, J., concurring).

[5] *Kreiner*, 471 Mich at 114-122; see also *McCormick*, 487 Mich at 233-259 (MARKMAN, J., dissenting).

[6] *DiFranco v Pickard*, 427 Mich 32 (1986).

[7] In 1995, the Legislature enacted a bill that amended MCL 500.3135. The purpose of this bill was to "modify tort liability arising out

It is a particularly unfortunate development when the Legislature must act to countermand a decision of the Supreme Court where this Court refused to enforce the unambiguous language used in the no-fault statute after a *prior* corrective legislative amendment. The deconstruction of the Legislature's work product that took place in *McCormick* is strikingly similar to the deconstruction *DiFranco* achieved in the past that also necessitated a legislative correction. Demonstrating that history truly does repeat itself, I find it difficult to improve on what this Court stated nearly 30 years ago: "If every case is subject to the potential of litigation on the question of noneconomic loss, for which recovery is still predicated on negligence, perhaps little has been gained by granting benefits for economic loss without regard to fault."[8]

Kreiner provided an accurate construction that appropriately enforced the clear language of MCL 500.3135. Equally as important, *Kreiner* recognized that these provisions affect every Michigan driver due to the mandatory nature of no-fault automobile insurance. Thus, this Court's duty to apply consistently the Legislature's policy choices takes on particular importance because of the direct impact that the Court's decisions have on such a substantial number of Michigan's citizens. *McCormick* has now undone much of this, and as a result produced a regime of seemingly unlimited liability that will require courts to wrestle with the question of what constitutes a "serious impairment of body function."[9] Accordingly, courts may now find compensable in tort as a matter of law routine injuries not intended by MCL 500.3135 to be compensated beyond the full panoply of benefits otherwise conferred by the no-fault act.

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of certain accidents." The necessity of this bill arose only because this Court's decision in *DiFranco* discarded the then-controlling standard implementing the Legislature's limitations on recovery. The *DiFranco* majority overruled *Cassidy v McGovern*, 415 Mich 483 (1982), which was still cooling on the presses. The Legislature's 1995 amendments reinstituted *Cassidy* nearly in its entirety as the governing standard. As the *McCormick* dissent astutely noted, the *McCormick* majority reinstituted what essentially amounted to the *DiFranco* test, notwithstanding the fact that the Legislature made clear that *DiFranco* did not reflect the policy of this state. See *McCormick*, 487 Mich at 239-240 (MARKMAN, J., dissenting).

[8] *Cassidy*, 415 Mich at 500.

[9] It is impossible to conceive that, when the Legislature chose the language "death, serious impairment of body function, or permanent serious disfigurement" as the threshold standard for noneconomic recovery, a majority of this Court would hold, as a matter of law, that an impairment of a body function that merely "influences some of the plaintiff's capacity to live in his or her normal manner of living" meets the statutory threshold. See *McCormick*, 487 Mich at 215 (emphasis added). In *McCormick*, plaintiff broke his ankle.

I encourage the Legislature to judge for itself whether the current interpretation provided in *McCormick* for what constitutes a "serious impairment of body function" is truly the interpretation it originally contemplated. Should the Legislature determine that *McCormick* undermines the "grand compromise" of Michigan's unique no-fault act, as I believe it does, that body may find it necessary to correct this Court's *McCormick* construction that, in my opinion, fails to give meaning to the Legislature's policy choices.

CAVANAGH, J. (*concurring*). I concur in the order denying defendants' motion for reconsideration. I write only to respond to Chief Justice YOUNG's concurrence, in which he attacks this Court's recent opinion in *McCormick v Carrier*, 487 Mich 180 (2010).

Impassioned hyperbole aside, an unbiased reading of *McCormick* aptly illustrates that *McCormick* did not resuscitate *DiFranco v Pickard*, 427 Mich 32 (1986), nor did it turn a blind eye to the will of the Legislature.[1] Indeed, *McCormick*'s analysis faithfully applied the clear and unambiguous language of MCL 500.3135. As evidenced by *McCormick*'s analysis, *McCormick* fully recognized the Legislature's adoption of *Cassidy v McGovern*, 415 Mich 483 (1982), where the Legislature indicated an intent to do so through the statute's text and, similarly, "reinstituted" *DiFranco* only where the statute's text actually indicated a legislative intent to do so. *McCormick*, 487 Mich at 220; see, also, *id.* at 191, 197-198, 199, 203, 221-222. Thus, as plainly evidenced by *McCormick*'s scrupulous statutory interpretation, *McCormick* applied the text of the statute, even where it conflicted with the principles announced by the *DiFranco* majority. I enthusiastically invite readers and the Legislature to review the full text of *McCormick* to determine the accuracy of Chief Justice YOUNG'S claim that *McCormick* essentially represents a mere reinstatement of *DiFranco*.

Not surprisingly, the Chief Justice hypothesizes that *McCormick* will disrupt the Legislature's policy choices and lead us to a parade of horribles. I do not disagree that the no-fault system was designed to remedy certain problems associated with the traditional tort system in the context of automobile accidents. *McCormick*, 487 Mich at 189-190. Nevertheless, the no-fault act *permits* injured persons to potentially recover noneconomic losses in tort when certain statutory requirements

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First, I believe it is premature to decide whether this Court should or should not preserve this compromise by reconsidering existing caselaw, in this instance *McCormick v Carrier*, 487 Mich 180 (2010). Neither the trial court nor the Court of Appeals has had an opportunity in this case to apply *McCormick*. The lower courts have only determined that plaintiff cannot satisfy the "serious impairment" standard of *Kreiner v Fischer*, 471 Mich 109 (2004). If, on remand, the lower courts determine that plaintiff also cannot satisfy the "serious impairment" standard of *McCormick*, then there will be no need at that juncture to reconsider *McCormick*. I would wait until this Court is confronted with a case in which *Kreiner* and *McCormick* compel different outcomes before conclud-

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As the dissenting justices observed in *McCormick*:

> [T]he majority's decision will almost certainly call into question the long-term economic integrity of the present no-fault system in Michigan. By nullifying the legislative compromise that was struck when the no-fault act was adopted—a compromise grounded in concerns over excessive litigation, the overcompensation of minor injuries, and the availability of affordable insurance—the Court's decision today will restore a legal environment in which each of these hazards reappears and threatens the continued fiscal soundness of our no-fault system. [*McCormick*, 487 Mich at 286-287 (MARKMAN, J., joined by CORRIGAN and YOUNG, JJ., dissenting).]

Because I continue to believe that *McCormick* constitutes a flawed interpretation of the law, and because *McCormick* reverses a compromise of the Legislature seeking to balance reasonable and expedited insurance benefits with reduced tort litigation and reasonable insurance premiums, I would wait until the issues in this case are properly before this Court, before we consider apprising the Legislature that this Court will no

longer exercise its traditional judicial authority to "say what the law is" in the context of one of the most far-reaching and consequential of our state's statutes.

I am fully cognizant of the risks of "teeter-totter" justice implicated by this case, and abhor this, but this Court must seriously reflect upon whether such "teeter-tottering" is always to stop in a position that preserves decisions of this Court that are the most resistant to the repeatedly expressed will of the Legislature.

Summary Disposition June 28, 2011:

PEOPLE v SHERMAN, No. 142722; Court of Appeals No. 301476. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Lapeer Circuit Court for amendment of the presentence investigation report. The defendant challenged certain statements in the presentence investigation report at sentencing and in a motion to correct his sentence. The sentencing judge stated on the record that he did not take the challenged information into account in sentencing, but he did not direct the probation officer to correct or delete the information from the presentence investigation report as required by MCR 6.425(E)(2)(a). The circuit court is further ordered to ensure that the amended presentence investigation report is transmitted to the Department of Corrections. In all other respects, leave to appeal is denied.

ZAHRA, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v CORDARRELL SIMS, No. 142868; Court of Appeals No. 292529. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we reverse, in part, the judgment of the Court of Appeals. The Court of Appeals erred in ordering resentencing based on the scoring of offense variable 13 under MCL 777.43. This Court's decision in *People v Jackson,* 487 Mich 483 (2010), does not require resentencing if the inaccurate score did not affect the applicable sentencing guidelines range. If a scoring error does not alter the guidelines range, resentencing is not required. *People v Francisco,* 474 Mich 82, 89 n 8 (2006). In all other respects, leave to appeal is denied.

Leave to Appeal Denied June 28, 2011:

PEOPLE v COOK, No. 140433; Court of Appeals No. 287411.

NUCULOVIC v HILL, No. 140578; reported below: 287 Mich App 58.

MARILYN KELLY and HATHAWAY, JJ., would grant leave to appeal.

WARD v MICHIGAN STATE UNIVERSITY, No. 140599; reported below: 287 Mich App 76.

CAVANAGH, MARILYN KELLY, and HATHAWAY, JJ., would grant leave to appeal.

OSBORNE v CITY OF PONTIAC, No. 140955; Court of Appeals No. 289313.

MARILYN KELLY and HATHAWAY, JJ., would grant leave to appeal.

ROSE v SMART, No. 141055; Court of Appeals No. 289769.
MARILYN KELLY and HATHAWAY, JJ., would grant leave to appeal.

PEOPLE v TIGHE, No. 141573; Court of Appeals No. 287731.

PEOPLE v BLANKS, No. 141914; Court of Appeals No. 255257.

PEOPLE v BROOKS, No. 141951; Court of Appeals No. 299317.

HINSON v TGI FRIDAY'S, INC, No. 142004; Court of Appeals No. 291768.

PEOPLE v KUSHAWN MILES, No. 142130; Court of Appeals No. 297927.

PEOPLE v PARIS, No. 142136; Court of Appeals No. 296541.

PEOPLE v JAMES BELL, No. 142149; Court of Appeals No. 298635.

PEOPLE v CURTIS JONES, No. 142165; Court of Appeals No. 300014.

PEOPLE v DERAY SMITH, No. 142171; Court of Appeals No. 299374.

FORD v CITY OF DEARBORN, No. 142187; Court of Appeals No. 293040.

COSTA v CITY OF DETROIT, No. 142199; Court of Appeals No. 291451.
ZAHRA, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v LANGFORD, No. 142221; Court of Appeals No. 289934.

PEOPLE v RAYMOND RICHARDSON, No. 142269; Court of Appeals No. 297599.

PEOPLE v WOLFE, No. 142270; Court of Appeals No. 299930.

PEOPLE v SCHRAM, No. 142274; Court of Appeals No. 298892.

PEOPLE v KEENAN KING, No. 142280; Court of Appeals No. 299794.

PEOPLE v DEANDRE ANDERSON, No. 142281; Court of Appeals No. 293574.

CITY OF CHARLOTTE v CRITTENDEN, No. 142283; Court of Appeals No. 298752.

PEOPLE v TIM RICHARDS, No. 142288; Court of Appeals No. 297955.

PEOPLE v FIELDS, No. 142304; Court of Appeals No. 300322.
ZAHRA, J., did not participate because he was on the Court of Appeals panel.

ROBERTS v PINSON, No. 142311; Court of Appeals No. 297973.
ZAHRA, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v REYNOLDS, No. 142316; Court of Appeals No. 299326.

CULLEN v KLEIN, No. 142321; Court of Appeals No. 291810.

PETOSKEY INVESTMENT GROUP v BEAR CREEK TOWNSHIP, Nos. 142347 and 142348; Court of Appeals Nos. 292811 and 294122.

CAVANAGH, J., did not participate due to a familial relationship with counsel of record.

PEOPLE v SPANGLER, No. 142361; Court of Appeals No. 292728.

PEOPLE v JURECKI, No. 142366; Court of Appeals No. 300514.

PEOPLE v NEWHOUSE, No. 142375; Court of Appeals No. 300228.

PEOPLE v JOBEY HENDERSON, No. 142380; Court of Appeals No. 300435.

PEOPLE v MACLIN, No. 142383; Court of Appeals No. 300637.

PEOPLE v ROBERT HOWARD, No. 142395; Court of Appeals No. 294650.

PEOPLE v BUTLER, No. 142399; Court of Appeals No. 297396.

CULLEN v MICHIGAN PEDIATRIC SURGERY ASSOCIATES, No. 142400; Court of Appeals No. 297969.

ZAHRA, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v TINSLEY, No. 142403; Court of Appeals No. 287470.

MYERS v WINKELHAUS, No. 142444; Court of Appeals No. 290542.

PEOPLE v JUNKINS, No. 142489; Court of Appeals No. 293105.

PEOPLE v BARTLEY, No. 142507; Court of Appeals No. 294149.

ZAHRA, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v KERRY MILLER, No. 142518; Court of Appeals No. 293404.

KACHELI CLEANING, INC v PROJECT SMOOTH MICHIGAN, No. 142527; Court of Appeals No. 294265.

PEOPLE v DARIUS SIMS, No. 142544; Court of Appeals No. 284564.

PEOPLE v HENDRIX, No. 142571; Court of Appeals No. 291016.

ZAHRA, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v ANTHONY, No. 142573; Court of Appeals No. 293180.

FUNDERBURK v FIFTH THIRD BANK, No. 142578; Court of Appeals No. 294022.

PEOPLE v WOODS, No. 142587; Court of Appeals No. 294402.

PEOPLE v JOHN SMITH, No. 142591; Court of Appeals No. 300958.

PEOPLE v POOLE, No. 142599; Court of Appeals No. 291389.

PEOPLE v SCHWARTZ, No. 142600; Court of Appeals No. 300595.

PEOPLE v NORMAN CLARK, No. 142606; Court of Appeals No. 301281.

CLIFF v HEATH, No. 142609; Court of Appeals No. 294101.

PEOPLE v MARIO WILLIAMS, No. 142614; Court of Appeals No. 293896.

PEOPLE v MICHAEL SCOTT, No. 142624; Court of Appeals No. 301295.

PEOPLE v WOODARD, No. 142625; Court of Appeals No. 300807.

COLLIE v MUSKEGON COMMUNITY COLLEGE, No. 142626; Court of Appeals No. 293873.

In re PETITION OF CALHOUN COUNTY TREASURER, No. 142634; Court of Appeals No. 293272.

PEOPLE v TYRON DAVIS, No. 142635; Court of Appeals No. 300557.

PEOPLE v COFFEY, No. 142636; Court of Appeals No. 301379.

PEOPLE v NIGEL WRIGHT, No. 142640; Court of Appeals No. 288975.

PEOPLE v PARDO, No. 142649; Court of Appeals No. 301185.

PEOPLE v SHERJUAN HAMILTON, No. 142650; Court of Appeals No. 288048.

PEOPLE v RANDOLPH, No. 142653; Court of Appeals No. 293999.

PEOPLE v OUELLETTE, No. 142657; Court of Appeals No. 301061.

PEOPLE v WATTS, No. 142665; Court of Appeals No. 293970.

PEOPLE v BRIGGS, Nos. 142667 and 142668; Court of Appeals Nos. 290675 and 297576.

PEOPLE v MASHUE, No. 142674; Court of Appeals No. 301104.

PEOPLE v HANIBLE, No. 142675; Court of Appeals No. 295045.

PEOPLE v ERIC SIMS, No. 142683; Court of Appeals No. 294235.
ZAHRA, J., did not participate because he was on the Court of Appeals panel.

DALLAIRE v TREATMENT WORKS, INC, No. 142696; Court of Appeals No. 292971.
HATHAWAY, J., would grant leave to appeal.

PEOPLE v LONNIE SIMS, No. 142700; Court of Appeals No. 301251.

PEOPLE v BOLES, No. 142701; Court of Appeals No. 293592.

PEOPLE v MANLEY, No. 142705; Court of Appeals No. 295044.
ZAHRA, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v BRADLEY, No. 142706; Court of Appeals No. 295049.

ZAHRA, J., did not participate because he was on the Court of Appeals panel.

SAFFALEO v WALGREEN COMPANY, No. 142713; Court of Appeals No. 298470.

TELLIN v FORSYTH TOWNSHIP, No. 142714; reported below: 291 Mich App 692.

PEOPLE v ANDREW SMITH, No. 142716; Court of Appeals No. 301717.

PEOPLE v BRYAN ADAMS, No. 142725; Court of Appeals No. 295027.

PEOPLE v KEVIN WASHINGTON, No. 142732; Court of Appeals No. 294302.
ZAHRA, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v BAGJETT, No. 142735; Court of Appeals No. 294431.

PEOPLE v COX, No. 142738; Court of Appeals No. 301331.

MORK v MORK, No. 142741; Court of Appeals No. 299553.

ZUIDGEEST v ZUIDGEEST, No. 142746; Court of Appeals No. 293924.

PEOPLE v HODGE, No. 142749; Court of Appeals No. 294830.
ZAHRA, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v WHITE, No. 142755; Court of Appeals No. 293233.

PEOPLE v BLAIR, No. 142757; Court of Appeals No. 293734.
ZAHRA, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v WALKER, No. 142758; Court of Appeals No. 292041.
ZAHRA, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v VELASQUEZ, No. 142760; Court of Appeals No. 301808.

PEOPLE v MARK CARTER, No. 142764; Court of Appeals No. 289504.

PEOPLE v MELONIE HAMILTON, No. 142766; Court of Appeals No. 301597.

PEOPLE v COULIER, No. 142768; Court of Appeals No. 295920.

PEOPLE v JOHNS, No. 142769; Court of Appeals No. 301967.

PEOPLE v ROSS, No. 142770; Court of Appeals No. 301644.

PEOPLE v BOHANEN, No. 142772; Court of Appeals No. 295623.

PEOPLE v CHEATHAM, No. 142773; Court of Appeals No. 301713.

PEOPLE v BROWN, No. 142777; Court of Appeals No. 294501.

PEOPLE v ROWE, No. 142779; Court of Appeals No. 301827.

HENNING v HENNING, No. 142780; Court of Appeals No. 302112.

PEOPLE v GREAR, No. 142781; Court of Appeals No. 301631.

PEOPLE v RONALD MARTIN, No. 142782; Court of Appeals No. 293129.

COOPER v SAGINAW SCHOOL DISTRICT, No. 142783; Court of Appeals No. 299579.

PEOPLE v KNUCKLES, No. 142785; Court of Appeals No. 289886.

PEOPLE v CUNNINGHAM, No. 142786; Court of Appeals No. 293134.

PEOPLE v LAMONT THOMAS, No. 142791; Court of Appeals No. 297028.

PEOPLE v BISH, No. 142793; Court of Appeals No. 294920.

PEOPLE v HESTER, No. 142799; Court of Appeals No. 295619.

PEOPLE v SMILEY, No. 142801; Court of Appeals No. 301863.

PEOPLE v DAVENPORT, No. 142804; Court of Appeals No. 295926.

LOFTS ON THE NINE, LLC v AKEY and LOFTS ON THE NINE, LLC v FLOWERS, Nos. 142806 and 142807; Court of Appeals Nos. 294825 and 295977.

PEOPLE v HERSHA, No. 142811; Court of Appeals No. 302157.

NIAMTU v BOUDHA, No. 142812; Court of Appeals No. 292667.

PEOPLE v MAHFOUZ, No. 142820; Court of Appeals No. 301591.

PEOPLE v TODD, No. 142826; Court of Appeals No. 295927.

PEOPLE v CHILDRESS, No. 142827; Court of Appeals No. 301502.

PEOPLE v REID, No. 142828; Court of Appeals No. 301939.

EDWARDS v MCNUTT, No. 142830; Court of Appeals No. 302165.

PEOPLE v LATTING, No. 142831; Court of Appeals No. 302139.

COPUS v MEEMIC INSURANCE COMPANY, No. 142832; reported below: ___ Mich App ___.

DEPARTMENT OF COMMUNITY HEALTH v OESTERLING, No. 142833; Court of Appeals No. 299698.

ANNIE HARRIS v GENERAL MOTORS CORPORATION, No. 142835; Court of Appeals No. 291779.

PEOPLE v HOSKINSON, No. 142836; Court of Appeals No. 290856.

ZAHRA, J., did not participate because he was on the Court of Appeals panel.

MILLER v DEPARTMENT OF CORRECTIONS, No. 142837; Court of Appeals No. 300502.

ALLESEE v BLOOMFIELD TOWNSHIP, No. 142838; Court of Appeals No. 295188.

PEOPLE v TARDY, No. 142839; Court of Appeals No. 301100.

DENNIE v MONTGOMERY, INC, No. 142844; Court of Appeals No. 299530.

PEOPLE v LAWRENCE PARKER, No. 142845; Court of Appeals No. 302278.

PEOPLE v ROBERTS, No. 142847; Court of Appeals No. 293838.

PEOPLE v BALL, No. 142848; Court of Appeals No. 295425.

SCHIEPKE v SMILEY, No. 142858; Court of Appeals No. 293192.
MARILYN KELLY and HATHAWAY, JJ., would grant leave to appeal.

PEOPLE v DONALD SWANIGAN, No. 142859; Court of Appeals No. 294898.

GRIER v ZENELOVIC, No. 142869; Court of Appeals No. 295415.

PEOPLE v MICHAEL CLUESMAN, No. 142870; Court of Appeals No. 301726.

PEOPLE v CURRIN, No. 142872; Court of Appeals No. 294195.

PEOPLE v ESCABALZETA, No. 142878; Court of Appeals No. 302047.

PEOPLE v WALLACE, No. 142880; Court of Appeals No. 295975.

PEOPLE v PAYNE, No. 142884; Court of Appeals No. 302044.
CAVANAGH, J., would grant leave to appeal for the reasons set forth in his dissenting statement in *People v Smith* 488 Mich 193, 202 (2010).

BROGUE v COMCAST, No. 142887; Court of Appeals No. 295422.

LEAPHART v CITY OF DETROIT, No. 142925; Court of Appeals No. 301016.

LEAPHART v FOURMIDABLE GROUP, INC, Nos. 142927 and 142928; Court of Appeals Nos. 301288 and 301338.

KAR v NANDA, No. 142929; reported below: 291 Mich App 284.

PEOPLE v JOSEPH ANDERSON, No. 142964; Court of Appeals No. 302803.

LUESBY v VICTOR, No. 143002; Court of Appeals No. 301290.

Reconsideration Denied June 28, 2011:

HOWELL EDUCATION ASSOCIATION v HOWELL BOARD OF EDUCATION, No. 140929; reported below: 287 Mich App 228. Leave to appeal denied at 488 Mich 1010.
YOUNG, C.J. (*dissenting*). I would grant reconsideration and, upon reconsideration, grant leave to appeal. This is an important case for the jurisprudence of this state, implicating principles of standing and the statutory interpretation of the Freedom of Information Act, and the bench and bar would benefit from a decision of this Court following full briefing and oral argument.

MARKMAN, J., would grant the motion for reconsideration and, on reconsideration, would grant leave to appeal.

ADAIR v UTICA COMMUNITY SCHOOLS, No. 141296; Court of Appeals No. 288286. Leave to appeal denied at 488 Mich 1037.

MARKMAN, J., would grant the motion for reconsideration and, on reconsideration, would reverse the judgment of the Court of Appeals for the reasons set forth in his statement in this case, 488 Mich 1037 (2011).

ZAHRA, J., did not participate because he was on the Court of Appeals panel.

DUMAS v MILLER, Nos. 141355, 141357, 141358, and 141359; Court of Appeals Nos. 279149, 286342, 286343, 286344, and 287143. Leave to appeal denied at 488 Mich 1009.

MARKMAN, J., would grant the motion for reconsideration and, on reconsideration, would grant leave to appeal for the reasons set forth in his dissenting statement in this case. *Dumas v Miller*, 488 Mich 1009, 1009-1010 (2010).

YOUNG, C.J., not participating.

PEOPLE v DONALD WILLIAMS, No. 141376; Court of Appeals No. 295937. Leave to appeal denied at 488 Mich 1045.

PEOPLE v PENA, No. 141409; Court of Appeals No. 296995. Leave to appeal denied at 488 Mich 1045.

PEOPLE v SHANNON, No. 141662; Court of Appeals No. 297258. Leave to appeal denied at 488 Mich 1039.

WELLS FARGO BANK v COOPER, No. 141674; Court of Appeals No. 296792. Leave to appeal denied at 488 Mich 1039.

PEOPLE v CELLEY, No. 141736; Court of Appeals No. 298907. Leave to appeal denied at 488 Mich 1039.

PEOPLE v ESCOBAR, No. 141759; Court of Appeals No. 296246. Leave to appeal denied at 488 Mich 1046.

SCHREUR v DEPARTMENT OF HUMAN SERVICES, No. 141777; reported below: 289 Mich App 1. Summary disposition at 488 Mich 1042.

MARILYN KELLY, J., would grant reconsideration and, on reconsideration, would grant leave to appeal for the reasons set forth in her dissenting statement in this case. *Schreur v Dep't of Human Servs*, 488 Mich 1042, 1043-1045 (2011).

HATHAWAY, J., would grant reconsideration and, on reconsideration, would grant leave to appeal.

PEOPLE v RONNIE WILLIAMS, No. 141953; Court of Appeals No. 290933. Leave to appeal denied at 488 Mich 1047.

RAMSEY v SECURITAS SECURITY SERVICES, No. 142026; Court of Appeals No. 296734. Leave to appeal denied at 488 Mich 1049.

PEOPLE v JIMMY JONES, No. 142115; Court of Appeals No. 298898. Leave to appeal denied at 489 Mich 860.

PEOPLE v GUNN, No. 142335; Court of Appeals No. 292419. Leave to appeal denied at 489 Mich 862.

Summary Disposition June 29, 2011:

OAKLAND COUNTY v DEPARTMENT OF HUMAN SERVICES, No. 141965; Court of Appeals No. 288812. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals and we remand this case to the Court of Claims for entry of an order granting summary disposition to the defendant. The Court of Appeals correctly held that the Court of Claims erred in holding that jurisdiction is vested in the Court of Claims because plaintiff's claim involves a request for money damages from the state. As this Court held in *Parkwood Ltd Dividend Housing Ass'n v State Housing Dev Auth*, 468 Mich 763 (2003), pursuant to MCL 600.6419, the Court of Claims has jurisdiction over tort and contract-based claims against the state, regardless of whether the claims are for money damages or declaratory relief. However, the Court of Appeals erred in holding that jurisdiction is nonetheless vested in the Court of Claims because plaintiff's claim is a contract-based claim. Instead, because plaintiff's claim is a statutory and administrative rule-based claim, grounded respectively in MCL 803.305(1) and Mich Admin Code, R 400.341, jurisdiction is not properly vested in the Court of Claims.

MARILYN KELLY and HATHAWAY, JJ., would grant leave to appeal.

PEOPLE v MCCLANE, No. 142595; Court of Appeals No. 301510. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate the sentence of the Genesee Circuit Court and remand this case to that court for resentencing with directions to score offense variable 9 at zero points. See *People v McGraw*, 484 Mich 120, 133 (2009), which states that "[o]ffense variables must be scored giving consideration to the sentencing offense alone . . . ." In all other respects, leave to appeal is denied. We do not retain jurisdiction.

UMPHREY v GENERAL MOTORS CORPORATION, No. 142694; Court of Appeals No. 299243. Pursuant to MCR 7.302(H)(1), we remand this case to the Workers' Compensation Appellate Commission (WCAC) for additional analysis of the defendant's argument related to the application of MCL 418.361(1). The WCAC erred in summarily rejecting the defendant's contention that an evaluation was required pursuant to *Lofton v AutoZone, Inc,* 482 Mich 1005 (2008). If it is determined that the plaintiff is only partially disabled, then a calculation of wage loss benefits must be made pursuant to MCL 418.361(1), and the WCAC should in that event modify the plaintiff's award accordingly. We do not retain jurisdiction.

HATHAWAY, J., would grant leave to appeal.

VROOMAN v FORD MOTOR COMPANY, No. 142824; Court of Appeals No. 299340. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to

appeal, we vacate the decision of the Workers' Compensation Appellate Commission (WCAC), and we remand this case to the Board of Magistrates for additional findings of fact and conclusions of law, for the reasons stated in the WCAC dissenting opinion. See *Harder v Castle Bluff Apartments*, 489 Mich 951 (2011); *Lofton v AutoZone, Inc,* 482 Mich 1005 (2008).

HATHAWAY, J., would grant leave to appeal.

Leave to Appeal Granted June 29, 2011:

PRINS v MICHIGAN STATE POLICE, No. 142841; reported below: 291 Mich App 586. The parties shall address whether the 180-day statute of limitations in § 10(1) of the Freedom of Information Act, MCL 15.240(1), begins to run on the date the public body produces its final determination to deny a request for a public record or, as the Court of Appeals held, on the date the public body sends out or officially circulates its denial.

The Michigan Municipal League is invited to file a brief amicus curiae. Other persons or groups interested in the determination of the issue presented in this case may move the Court for permission to file briefs amicus curiae.

Leave to Appeal Denied June 29, 2011:

TERLIKOWSKI v PINSON, No. 141908; Court of Appeals No. 296555.

MCLEAN v PHENIX, No. 142154; reported below: 289 Mich App 592.

VERBRUGGHE v SELECT SPECIALTY HOSPITAL-MACOMB COUNTY, INC, No. 142458; Court of Appeals No. 287888.

MARILYN KELLY and HATHAWAY, JJ., would grant leave to appeal.

PEOPLE v MENDOZA, No. 142538; Court of Appeals No. 300885.

PEOPLE v STOVER, No. 142744; Court of Appeals No. 301358.

Reconsideration Denied June 29, 2011:

PEOPLE v BRANDON BELL, No. 142022; Court of Appeals No. 290691. Leave to appeal denied at 488 Mich 1048.

Leave to Appeal Denied July 1, 2011:

GOOEL v OFFICE OF FINANCIAL AND INSURANCE REGULATION, No. 142816; Court of Appeals No. 299842.

Leave to Appeal Denied July 8, 2011:

PEOPLE v HULBEN, No. 142593; Court of Appeals No. 301198.

MARILYN KELLY, J. (*dissenting*). This case presents the issue of whether probation restrictions imposed on defendant, one of which is explicitly based on student safety zone provisions in the Sex Offenders Registration Act (SORA),[1] withstand constitutional scrutiny. Because I believe that the Supreme Court has the responsibility to address this jurisprudentially significant issue, I would grant defendant's application for leave to appeal.

Defendant pled guilty to three counts of possession of child sexually abusive material. He was sentenced to five years' probation, the first year to be served in jail. After sentencing, defendant challenged several conditions of his probation, including one drawn from the student safety zone provisions in SORA. Specifically, defendant challenged the restriction that he "must not reside, work, or be within 1,000 feet of the property of any student safety zone (developmental kindergarten through 12th grade school) unless [he] meet[s] a statutory exemption and ha[s] prior written approval of the field agent."[2] Defendant further challenged the trial court's extrastatutory restriction that he "must not go to or be within 500 feet of parks, municipal swimming pools, playgrounds, child care centers, pre-schools, arcades, or other places primarily used by individuals 17 years or under without prior written approval of the field agent."[3]

The trial court declined to remove these restrictions from the probation order. The Court of Appeals denied defendant's application for leave to appeal. It concluded that defendant's challenge was not ripe for review because defendant had failed to show an actual or imminent injury sufficient to create a live case or controversy. It also noted that defendant's constitutional challenge to the restrictions failed to allege any facts to suggest even an incidental infringement of his constitutional rights.

Defendant subsequently filed an application for leave to appeal in this Court. He claims that the student safety zone restrictions infringe on his constitutional rights to privacy, establish a home, maintain family relationships, travel, and pursue a chosen profession without unreasonable governmental interference. He also contends that the restrictions violate his federal and state due process rights.

Contrary to the terse order issued by the Court of Appeals, it can hardly be said that this case is not ripe for appellate review. The ripeness doctrine prevents the adjudication of hypothetical or contingent claims

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[1] MCL 28.721 *et seq*.

[2] See MCL 28.733(f); MCL 28.734(1)(a) and (b); MCL 28.735(1).

[3] MCL 28.734(1)(a) and (b) prohibit persons required to be registered under SORA from working or loitering within a student safety zone, respectively. MCL 28.733(b) defines "loiter" as "to remain for a period of time and under circumstances that a reasonable person would determine is for the primary purpose of observing or contacting minors." By contrast, the provision in defendant's probation order prohibits him from even *being* within a student safety zone.

before an actual injury has been sustained. As the United States Supreme Court stated in *Thomas v Union Carbide Agricultural Products Co*, a claim is not ripe if it rests on " 'contingent future events that may not occur as anticipated, or indeed may not occur at all.' "[4]

Here, the probation order restrictions are so sweeping that they potentially prevent defendant from such activities as obtaining employment, seeking medical assistance, or traveling to or from his place of worship. His claims are based not on contingent future events, but on the fact that he is barred from certain areas *right now*. Moreover, the scope of these restrictions raises questions such as, How can defendant be aware of every church with a child-care center and of every location primarily used by people under 17 years of age?

As noted, the prohibition against being within 500 feet of parks, municipal pools, playgrounds, child-care centers, or other places primarily used by people under 17 years of age has no statutory basis. Defendant challenges this judicially crafted prohibition as unconstitutional. Because these restrictions in defendant's probation order may not withstand constitutional scrutiny, defendant is entitled to have them addressed by this Court.

In sum, this case is ripe for review. And the Court of Appeals' conclusion that defendant failed to allege facts sufficient to suggest even an incidental infringement of his constitutional rights is highly questionable.[5] Defendant raises issues of first impression in Michigan that deserve the Court's consideration.

For these reasons, I would grant the application for leave to appeal.

CAVANAGH, J., joined the statement of MARILYN KELLY, J.

HATHAWAY, J., would grant leave to appeal.

Summary Disposition July 13, 2011:

PAGEANT HOMES, INC v BRADLEY, No. 142691; Court of Appeals No. 293359. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals. The record below reflects that plaintiff Pageant Homes, Inc.'s arguments on appeal encompassed the issue of whether its lien was discharged because an

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[4] *Thomas v Union Carbide Agricultural Prod Co*, 473 US 568, 580-581 (1985) (citation omitted).

[5] Other state supreme courts have struck down as unconstitutional restrictions that operated as regulatory takings of property without just compensation. See, e.g., *Mann v Georgia Dep't of Corrections*, 282 Ga 754 (2007) (holding that a statute prohibiting the defendant from residing or working within 1,000 feet of a facility where minors would congregate amounted to an unconstitutional taking without adequate compensation); *State v Pollard*, 908 NE2d 1145 (Ind, 2008) (holding that a statutory residency restriction that prohibited the defendant from residing within 1,000 feet of a school, youth program center, or public park was unconstitutional).

affidavit of payment was filed under MCL 570.1203(1) (repealed by 2010 PA 147, now codified at MCL 570.1118a[1]). The Court of Appeals erred in holding otherwise. We note, in this regard, that the statutory qualification contained in MCL 570.1203(1), "to the extent payments have been made," has been held to protect a property owner only up to the amount of the payment. See *DLF Trucking, Inc v Bach*, 268 Mich App 306, 311-312 (2005). We remand this case to the Court of Appeals for further proceedings not inconsistent with this order and for consideration of the issues raised by the parties but not addressed by that court during its initial review of this case. We do not retain jurisdiction.

FROMMERT v TEERA CONSTRUCTION COMPANY, No. 142742; Court of Appeals No. 292097. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate the judgment of the Court of Appeals, and we remand this case to the Court of Appeals for reconsideration in light of *Loweke v Ann Arbor Ceiling & Partition Co, LLC*, 489 Mich 157 (2011).

ZAHRA, J., did not participate because he was on the Court of Appeals panel.

COLEMAN v HDS SERVICES/TRETTCO, INC, No. 142756; Court of Appeals No. 298468. 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.

OSANTOWSKI v DOW CHEMICAL COMPANY, No. 142815; Court of Appeals No. 300707. 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 July 13, 2011:

ATTORNEY GENERAL v BLUE CROSS BLUE SHIELD OF MICHIGAN, Nos. 142670 and 142671; reported below: 291 Mich App 64.

Leave to Appeal Denied July 13, 2011:

LOAR v DEPARTMENT OF HUMAN SERVICES, No. 142237; Court of Appeals No. 294087.

PEOPLE v BRIDINGER, No. 142549; Court of Appeals No. 294616.

PEOPLE v LAGRANT, No. 142731; Court of Appeals No. 300938.

PEOPLE v DIXISON, No. 142813; Court of Appeals No. 294787.

DEBEUL v BARTON MALOW COMPANY, No. 142834; Court of Appeals No. 296094.

Summary Disposition July 15, 2011:

In re PAROLE OF PAQUETTE, Nos. 142709 and 143069; Court of Appeals

No. 301140. 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 appoint the State Appellate Defender Office as counsel to represent the defendant in the Court of Appeals and any subsequent proceeding in this Court. The Court of Appeals is directed to decide this case on an expedited basis.

We note that a similar issue is presented in the cases of *People v Haeger*, 488 Mich 1033 (2011), and *In re Parole of Elias*, 488 Mich 1034 (2011), which we remanded to the Court of Appeals for consideration together, as on leave granted, by orders dated February 2, 2011. We do not retain jurisdiction.

PEOPLE v JEX, No. 143091; Court of Appeals No. 295825. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we reverse that part of the Court of Appeals' judgment holding that the defendant asserted a claim of jurisdictional defect for which he need not demonstrate cause or prejudice. Where the defendant pleaded no contest to home invasion, and agreed as part of the factual basis for his plea that he entered the dwelling without permission, his current claim that he was a colessee of the premises and that he did not need permission to enter the dwelling does not establish a potential jurisdictional defect. The defendant's newly asserted defense could only negate one element of the crime; it would not implicate the very authority of the state to charge him or bring him to trial. *People v New*, 427 Mich 482, 491 (1986). Although the Court of Appeals correctly held that a defendant's claim that his plea was not supported by an adequate factual basis is not waived by a no contest plea, *People v Mitchell*, 431 Mich 744, 749-750 (1988), in this instance the defendant provided an adequate factual basis for his plea at the time he pleaded no contest. He therefore has the burden to establish both good cause for his failure to raise his grounds for relief on appeal, and actual prejudice. MCR 6.508(D)(3)(a) and (b). We remand this case to the Court of Appeals for it to determine whether the defendant has satisfied that burden. We do not retain jurisdiction.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal Entered July 15, 2011:

PEOPLE v RAO, No. 142537; Court of Appeals No. 289343. We direct the clerk to schedule oral argument on whether to grant the application or take other action. MCR 7.302(H)(1). At oral argument, the parties shall address whether the 2009 x-rays and radiology report constitute newly discovered evidence warranting a new trial and whether the evidence, if newly discovered, would have made a different result probable on retrial given the other evidence implicating defendant as the cause of other injuries suffered by the child. The parties may file supplemental briefs within 42 days of the date of this order, but they should not submit mere restatements of their application papers.

Leave to Appeal Denied July 15, 2011:

QUICK COMMUNICATIONS, INC v MICHIGAN BELL TELEPHONE COMPANY, No. 142097; Court of Appeals No. 286679.

MARKMAN, J. (*concurring*). In my judgment, Judge SAAD's dissent in the Court of Appeals correctly analyzed and resolved this case. However, because no party in this highly fact-intensive case sought reversal on this basis, I concur in the order denying leave to appeal.

YOUNG, C.J., and MARY BETH KELLY and ZAHRA, JJ., joined the statement of MARKMAN, J.

TUCKER v PIPITONE, No. 142821; Court of Appeals No. 294754. The Court of Appeals did not err in affirming the Oakland Circuit Court's denial of the motion to dismiss the plaintiff's negligence claim against defendant Richard Carson on the defendant's stated basis that the plaintiff had failed to identify a legal duty that was separate and distinct from the defendant's contractual duties pursuant to *Fultz v Union-Commerce Assoc*, 470 Mich 460, 467 (2004). The Court of Appeals correctly held that the plaintiff had alleged a separate and distinct common-law duty on the part of the defendant to use ordinary care in order to avoid physical harm to foreseeable persons in the execution of his undertakings. *Loweke v Ann Arbor Ceiling & Partition Co, LLC*, 489 Mich 157 (2011).

HATHAWAY, J., would deny leave to appeal without the further statements found in the majority's order.

Summary Disposition July 20, 2011:

PEOPLE v STEPHEN HILL, No. 142253; Court of Appeals No. 300350. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted.

Leave to Appeal Denied July 20, 2011:

ULRICH v FARM BUREAU INSURANCE, No. 141190; reported below: 288 Mich App 310.

CAVANAGH, MARILYN KELLY, and HATHAWAY, JJ., would grant leave to appeal.

JOHNSON v DETROIT MEDICAL CENTER, No. 142388; reported below: 291 Mich App 165.

HATHAWAY, J., would grant leave to appeal.

PEOPLE v CROW, No. 142397; Court of Appeals No. 293645.

PEOPLE v FORD, No. 142468; Court of Appeals No. 298473.

HATHAWAY, J., not participating. Justice HATHAWAY recuses herself and will not participate in this case as she was the presiding trial court judge. See MCR 2.003(B).

ZAHRA, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v SIRDAREAN ADAMS, No. 142517; Court of Appeals No. 287034.

SHOUNEYIA v SHOUNEYIA, No. 142681; reported below: 291 Mich App 318.

PEOPLE v CRAWFORD, No. 142711; Court of Appeals No. 290422.

CAVANAGH, J., would grant leave to appeal.

MARILYN KELLY, J., would grant leave to appeal for the reasons stated in the Court of Appeals dissenting opinion.

AUTO CLUB GROUP INSURANCE COMPANY v SMITH, No. 142724; Court of Appeals No. 294697.

HATHAWAY, J., would grant leave to appeal.

PEOPLE v ROACH, No. 142788; Court of Appeals No. 294356.

MARILYN KELLY, J., would grant leave to appeal.

PEOPLE v WARE, No. 142794; Court of Appeals No. 301913.

PEOPLE v BINGLEY, No. 142876; Court of Appeals No. 292227.

BEAUCH v E L HOLLINGSWORTH & COMPANY, No. 142959; Court of Appeals No. 299890.

MARILYN KELLY and HATHAWAY, JJ., would grant leave to appeal.

PEOPLE v SECRETO, No. 142976; Court of Appeals No. 301672.

Summary Disposition July 22, 2011:

PEOPLE v FINNIE, No. 142877; Court of Appeals No. 295997. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate as moot that part of the Court of Appeals' judgment that remands this case to the Wayne Circuit Court to allow the defendant the opportunity to move for withdrawal of his plea or for resentencing. The defendant has successfully completed the 18-month sentence imposed under the Holmes Youthful Trainee Act, MCL 762.11 *et seq*., and the charge has been dismissed. In all other respects, leave to appeal is denied.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal Entered July 22, 2011:

MCCAHAN v BRENNAN, No. 142765; reported below: 291 Mich App 430. We direct the clerk to schedule oral argument on whether to grant the application or take other action. MCR 7.302(H)(1). At oral argument, the parties shall address whether the plaintiff's failure to comply with the notice requirement of MCL 600.6431(3) foreclosed her claim against the University of Michigan Regents. The parties may file supplemental briefs within 42 days of the date of this order, but they should not submit mere restatements of their application papers.

Leave to Appeal Denied July 22, 2011:

PEOPLE v FREEZE, No. 142177; Court of Appeals No. 299228.

YOUNG, C.J. (*concurring*). Even assuming, without deciding, that an attorney renders ineffective assistance of counsel where he fails to advise his client that the client will be required to register under the Sex Offenders Registration Act (SORA) if he pleads guilty, see *People v Fonville*, 291 Mich App 363 (2011), defendant in this case cannot demonstrate prejudice necessary to accord relief. See *Strickland v Washington*, 466 US 668 (1984); *People v Carbin*, 463 Mich 590 (2001). As the Berrein Circuit Court determined at a hearing conducted pursuant to *People v Ginther*, 390 Mich 436 (1973), even though defense counsel advised defendant that counsel was unaware whether defendant would have to register as a sex offender if he pleaded guilty to two counts of possessing child sexually abusive material and one count of using a computer to commit the crime, defendant nevertheless pleaded guilty with the actual knowledge that he might have to register as a sex offender. Because, by his own admission, defendant agreed to plead guilty with the knowledge that SORA registration might be required, he cannot demonstrate a reasonable probability that the result of the proceeding would have been different even if counsel had informed him of the mandatory SORA registration requirements.

MARKMAN and MARY BETH KELLY, JJ., joined the statement of YOUNG, C.J.

MARILYN KELLY, J., would remand this case to the trial court for reconsideration in light of *People v Fonville*, 291 Mich App 363 (2011).

ZAHRA, J., did not participate because he was on the Court of Appeals panel.

In re RIDLING/RIDLING-FOSTER/FOSTER MINORS, Nos. 143270, 143271, 143304, and 143305; Court of Appeals Nos. 299729 and 299730.

HARMON v DAVIS, No. 141888; Court of Appeals No. 297968.

CAVANAGH and HATHAWAY, JJ., would grant leave to appeal.

MARILYN KELLY, J. (*dissenting*). I dissent from the order denying plaintiff's application for leave to appeal. This child custody case involves issues of great jurisprudential significance, including (1) the scope of the "equitable parent" doctrine established in *Atkinson v Atkinson*[1] and interpreted by this Court in *Van v Zahorik*,[2] (2) whether *Van*'s interpretation of the Child Custody Act (CCA)[3] violates plaintiff's constitutional rights, and (3) whether the combined effect of the CCA and the marriage amendment of the Michigan Constitution unlawfully denies plaintiff standing.[4] The application for leave to appeal should be granted.

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[1] *Atkinson v Atkinson*, 160 Mich App 601 (1987).

[2] *Van v Zahorik*, 460 Mich 320 (1999).

[3] MCL 722.21 *et seq*.

[4] Const 1963, art 1, § 25.

FACTS AND PROCEDURAL HISTORY

Plaintiff and defendant had a same-gender domestic relationship for 19 years, during which time defendant bore three children through artificial insemination. The relationship ended in 2008, and plaintiff moved out of their shared residence. A period of shared parenting ensued, although the parties disagree about its length and about whether they had an agreement concerning parenting time. Eventually, defendant refused plaintiff any parenting time.

Plaintiff filed a petition seeking enforcement of what she alleged had been the parties' agreed custody arrangement and parenting time. She alleged that they had a "*de facto* legal custody arrangement" from the time she moved out of their home until September 2009. Plaintiff further claimed that, after that date, defendant had unreasonably refused to allow her any parenting time with their children. Plaintiff later amended her petition to raise numerous constitutional claims and request a court determination that she has standing as a parent to seek custody of and parenting time with the children.

After argument of counsel, the court ruled that plaintiff lacked standing as a "third person" under the CCA. It opined that she might have standing as a "natural parent" on the basis of her past assumption of parental obligations. Thus, it scheduled an evidentiary hearing to determine whether the parties had an agreement that both would raise the children. The court indicated that, if they had such an agreement, it would hold a best-interests hearing to determine custody, support, and parenting time issues.

Defendant sought leave to appeal in the Court of Appeals, which reversed the trial court's decision by peremptory order. It held that plaintiff did not have standing under any theory.[5] On remand, the trial court dismissed the case.

LEGAL BACKGROUND

The CCA defines "parent" as "the natural or adoptive parent of a child"[6] and a "third person" as "an individual other than a parent."[7] MCL 722.26c sets forth the circumstances in which a third person may bring an action for custody under the CCA.[8]

In *Atkinson*, the Court of Appeals recognized the doctrine of equitable parenthood. Under that doctrine, Michigan courts recognize a legal relationship between a de facto parent and a child "when [the de facto parent] desires such recognition and is willing to support the child [and]

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[5] *Harmon v Davis*, unpublished order of the Court of Appeals, entered July 8, 2010 (Docket No. 297968).

[6] MCL 722.22(h).

[7] MCL 722.22(j).

[8] MCL 722.26c provides in relevant part:

> (1) A third person may bring an action for custody of a child if the court finds either of the following:
>
> (a) Both of the following:

wants the reciprocal rights of custody or visitation afforded to a parent."[9]

This Court considered the scope of the equitable-parent doctrine in *Van*.[10] The majority declined to extend the equitable-parent doctrine to parties who were never married to one another. Because the CCA provided no basis for the children's de facto father to sue for custody, the majority concluded that he lacked standing to bring a paternity action.[11]

In 2004, Michigan voters approved Proposal 2, the marriage amendment to the Michigan Constitution, now article 1, § 25. It provides that "the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose."

ISSUES RAISED

Plaintiff raises several related claims in asserting that she has standing to seek custody of the minor children in this case. First, she claims that the Court of Appeals erroneously interpreted *Van* as excluding her from consideration as a natural parent under the CCA. Plaintiff argues that, because Michigan law recognizes the equitable-parent doctrine, she is entitled to the benefit of that doctrine because she is a de facto parent of the children.

Second, plaintiff alleges that *Van*'s interpretation of the CCA's standing requirements violates her equal protection and due process rights. Moreover, she asserts that *Van*'s interpretation of the CCA is unconstitutional because that interpretation, coupled with the subse-

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(*i*) The child was placed for adoption with the third person under the adoption laws of this or another state, and the placement order is still in effect at the time the action is filed.

(*ii*) After the placement, the child has resided with the third person for a minimum of 6 months.

(b) All of the following:

(*i*) The child's biological parents have never been married to one another.

(*ii*) The child's parent who has custody of the child dies or is missing and the other parent has not been granted legal custody under court order.

(*iii*) The third person is related to the child within the fifth degree by marriage, blood, or adoption.

MCL 722.26b(1) also grants "a guardian or limited guardian of a child" standing to bring a CCA action. Because plaintiff is not and has never been a guardian of the children who are the subject of this dispute, MCL 722.26b is irrelevant to the instant case.

[9] *Atkinson*, 160 Mich App at 610.

[10] I dissented from the majority opinion in *Van*, as did Justice BRICKLEY, joined by Justice CAVANAGH. *Van*, 460 Mich at 342 (KELLY, J., dissenting); *id*. at 338 (BRICKLEY, J., dissenting).

[11] *Id*. at 331 (majority opinion).

quent enactment of the marriage amendment, leaves no legal way for her to acquire standing. This is so because, to have standing as a parent under the CCA, one must qualify as a natural parent or an adoptive parent. Plaintiff cannot legally marry defendant in this state, and Michigan does not currently allow second-parent adoption. Thus, plaintiff contends, the current legal scheme is irrationally discriminatory in that it discriminates against plaintiff and others who are similarly situated.

CONCLUSION

Plaintiff's application raises significant constitutional questions that this Court has not yet considered. Courts across the country are grappling with similar issues.[12] Their jurisprudential significance is underscored by the fact that the ACLU Fund of Michigan and Family Watch International have already filed briefs amicus curiae.

Yet the majority today declines to consider plaintiff's arguments and lets stand a peremptory order from the Court of Appeals that does not address plaintiff's constitutional claims. This case cries out for a ruling by the state's highest court.

PEOPLE v JOHNSTON, No. 142843; Court of Appeals No. 302290.

MARILYN KELLY, J. (*dissenting*). I dissent from the order denying defendant's application for leave to appeal because I believe that offense variable (OV) 10 was improperly scored. As I stated in my concurring statement in *People v Brandt*, 489 Mich 875, 876 (2011), OV 10 contemplates a living human victim; an institutional victim cannot be a vulnerable victim as contemplated by the definition of "vulnerability" in MCL 777.40(3)(c). Accordingly, zero points should have been assessed for OV 10. Since the resulting change in defendant's total OV score would produce a lower recommended minimum sentence range under the sentencing guidelines, I would vacate defendant's sentence and remand the case for resentencing with instructions to the trial judge to assess zero points for OV 10. See *People v Francisco*, 474 Mich 82 (2006).

CAVANAGH, J., joined the statement of MARILYN KELLY, J.

In re ALEXANDER, No. 143235; Court of Appeals No. 300484.

Leave to Appeal Denied July 25, 2011:

PEOPLE v MCCLENDON, No. 141174; Court of Appeals No. 296850.

ZAHRA, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v REGINAL SHORT, No. 141822; Court of Appeals No. 292288.

TREMBLAY v CIVIL SERVICE COMMISSION, No. 141957; Court of Appeals No. 298038.

PEOPLE v KASKE, No. 142208; Court of Appeals No. 299548.

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[12] See, e.g, *VC v MJB*, 163 NJ 200 (2000); *Jones v Barlow*, 154 P3d 808 (Utah, 2007).

PEOPLE v PARPART, No. 142212; Court of Appeals No. 297960.

PEOPLE v CHRISTOPHER FRANKLIN, No. 142255; Court of Appeals No. 300114.

PEOPLE v PHILLIPS, No. 142296; Court of Appeals No. 298046.

PEOPLE v CHRISTOPHER MCCRAY, No. 142340; Court of Appeals No. 298626.

PEOPLE v ROBERT MURRAY, No. 142346; Court of Appeals No. 292694.

PEOPLE v BOLDEN, No. 142405; Court of Appeals No. 300165.

PEOPLE v GREENBERG, No. 142407; Court of Appeals No. 299674.

PEOPLE v FLOYD, No. 142415; Court of Appeals No. 298817.

PEOPLE v MICHAEL DAVIS, No. 142416; Court of Appeals No. 298318.

PEOPLE v MARCUS SWANIGAN, No. 142418; Court of Appeals No. 296735.

PEOPLE v MORRIS, No. 142419; Court of Appeals No. 298096.

PEOPLE v SWEEZER, No. 142422; Court of Appeals No. 300606.

PEOPLE v ALFIERO, No. 142426; Court of Appeals No. 299561.

PEOPLE v TELLO, No. 142445; Court of Appeals No. 300832.

PEOPLE v ERVIN, No. 142454; Court of Appeals No. 300448.

PEOPLE v DANTE WELLS, No. 142467; Court of Appeals No. 298134.

PEOPLE v LOCKRIDGE, No. 142472; Court of Appeals No. 300088.

PEOPLE v ANTWAIN WILLIAMS, No. 142476; Court of Appeals No. 298541.

MERRICK v STATE EMPLOYEES' RETIREMENT SYSTEM, No. 142477; Court of Appeals No. 298751.

PEOPLE v SPICER, No. 142491; Court of Appeals No. 300849.

PEOPLE v DEWALD, No. 142496; Court of Appeals No. 298961.

PEOPLE v BARKER, No. 142502; Court of Appeals No. 294252.

PEOPLE v CARDELL JONES, No. 142510; Court of Appeals No. 299550.

GLIS v KAUL GLOVE AND MANUFACTURING COMPANY, No. 142514; Court of Appeals No. 293682.

PEOPLE v DENNIS KING, No. 142523; Court of Appeals No. 293325.

ZAHRA, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v JUSTLY JOHNSON, No. 142526; Court of Appeals No. 298189.

PEOPLE v ARMY, No. 142530; Court of Appeals No. 297804.

GENERAL MOTORS CORPORATION v DEPARTMENT OF TREASURY, No. 142533; reported below: 290 Mich App 355.

MARKMAN, J. (*dissenting*). I would grant leave to appeal to address whether: (a) the Due Process Clause of Const 1963, art 1, § 17 states anything different concerning the constitutionality of retroactive application of state tax laws than does Amendment V or XIV of the United States Constitution; and (b) whether it is relevant in enacting retroactive tax laws that the Legislature asserting that such laws are "curative," and intended to express the "original intent of the Legislature," is not the Legislature that enacted the laws in question, but rather a subsequent Legislature.

PEOPLE v AUSTIN, No. 142559; Court of Appeals No. 298883.

PEOPLE v LICEAGA, No. 142576; Court of Appeals No. 300429.

PEOPLE v MARK PORTER, No. 142577; Court of Appeals No. 300142.

PEOPLE v AURICH, No. 142597; Court of Appeals No. 300374.

PEOPLE v MARVIN JOHNSON, No. 142601; Court of Appeals No. 300131.

PEOPLE v BRANDON MILES, No. 142628; Court of Appeals No. 299886.

PEOPLE v HATHORN, No. 142652; Court of Appeals No. 294571.

TAYLOR v TAYLOR, No. 142660; Court of Appeals No. 295594.

ZAHRA, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v GIACALONE, No. 142664; Court of Appeals No. 300656.

PEOPLE v RALEIGH JOHNSON, No. 142669; Court of Appeals No. 293094.

PEOPLE v BHATTAL, No. 142672; Court of Appeals No. 290739.

ZAHRA, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v KENNEDY, No. 142676; Court of Appeals No. 300951.

PEOPLE v HERRON, No. 142718; Court of Appeals No. 301342.

PEOPLE v MARION, No. 142726; Court of Appeals No. 293440.

PEOPLE v SAMPSON, No. 142727; Court of Appeals No. 299995.

GRIEVANCE ADMINISTRATOR v MACDONALD, No. 142729.

PEOPLE v KAUFMAN, No. 142733; Court of Appeals No. 295366.

PEOPLE v MORLEY, No. 142734; Court of Appeals No. 298015.

CHRYCZYK v JUHAS, No. 142747; Court of Appeals No. 294348.

PEOPLE v MONTEZ, No. 142748; Court of Appeals No. 293547.

PEOPLE v CARL DIXON, No. 142771; Court of Appeals No. 295550.

PEOPLE v HAMEL, No. 142776; Court of Appeals No. 301686.

PEOPLE v DEREK JONES, No. 142789; Court of Appeals No. 298938.

PEOPLE v GERALD SMITH, No. 142797; Court of Appeals No. 301836.

LAKE COUNTY v POLICE OFFICERS ASSOCIATION OF MICHIGAN, No. 142803; Court of Appeals No. 293044.

PEOPLE v COCHREN, No. 142817; Court of Appeals No. 301888.

PEOPLE v MCGHEE, No. 142823; Court of Appeals No. 294140.

PEOPLE v ARREGUIN, No. 142852; Court of Appeals No. 294065.

FORD MOTOR COMPANY v DEPARTMENT OF TREASURY, No. 142853; Court of Appeals No. 294411.

RAJEWSKI v SECURITAS SERVICES USA, INC, No. 142854; Court of Appeals No. 299464.

PEOPLE v CORY SWANIGAN, No. 142856; Court of Appeals No. 293069.

MORSE v CONSUMERS ENERGY, No. 142864; Court of Appeals No. 292688.

PEOPLE v WILLIE SMITH, No. 142867; Court of Appeals No. 302242.

HANNEWALD v SCHWERTFEGER, No. 142873; Court of Appeals No. 295589.

PEOPLE v MORTON, No. 142885; Court of Appeals No. 302179.

PEOPLE v ANTHONY MARTIN, No. 142886; Court of Appeals No. 295245.

PEOPLE v GURNSEY, No. 142890; Court of Appeals No. 300535.

PEOPLE v PRINGLE, No. 142891; Court of Appeals No. 299586.

PEOPLE v MORROW, No. 142892; Court of Appeals No. 296053.

PEOPLE v HURICK, No. 142893; Court of Appeals No. 295533.

PEOPLE v HAYES, No. 142898; Court of Appeals No. 295142.

PEOPLE v ARTHEDEUS HIGGINS, No. 142900; Court of Appeals No. 295675.

PEOPLE v SANFORD, No. 142903; Court of Appeals No. 295326.

PEOPLE v FRANCE, No. 142907; Court of Appeals No. 301996.

PEOPLE v KINNEE, No. 142911; Court of Appeals No. 302061.

PEOPLE v JAQUAN WILSON, No. 142921; Court of Appeals No. 302030.

PEOPLE v DAMOND ARMSTRONG, No. 142924; Court of Appeals No. 295293.

HORVATH v HRT ENTERPRISES, No. 142926; Court of Appeals No. 292304.

ZAHRA, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v GREENLEE, No. 142938; Court of Appeals No. 296061.

PEOPLE v BREEDING, No. 142939; Court of Appeals No. 291554.

PEOPLE v FREDERICK, No. 142940; Court of Appeals No. 295091.

PEOPLE v WILLIAM JACOBS, No. 142945; Court of Appeals No. 295760.

PEOPLE v DEONTAE DAVIS, No. 142946; Court of Appeals No. 290131.

PEOPLE v SOARES, No. 142947; Court of Appeals No. 273333.

PEOPLE v KEVIN PORTER, No. 142948; Court of Appeals No. 302425.

PEOPLE v CHARLES, No. 142951; Court of Appeals No. 301999.

PEOPLE v YOUNG, No. 142961; Court of Appeals No. 302541.

PEOPLE v JERRY CARTER, No. 142963; Court of Appeals No. 300826.

PEOPLE v HAYES, No. 142966; Court of Appeals No. 295143.

RESIDENTIAL FUNDING COMPANY v FIFTH THIRD BANK, No. 142968; Court of Appeals No. 294564.

PEOPLE v GRIMMER, No. 142969; Court of Appeals No. 295271.

HAMPEL v WORKERS' COMPENSATION APPELLATE COMMISSION, No. 142970; Court of Appeals No. 302049.

ROBINSON v MCCUE, No. 142971; Court of Appeals No. 295572.

PEOPLE v ANTHONY ADAMS, No. 142972; Court of Appeals No. 301468.

SHEFFMAN v MICHIGAN FARM BUREAU, No. 142973; Court of Appeals No. 288587.

PEOPLE v PAGE, No. 142977; Court of Appeals No. 302759.

PEOPLE v VICUNA, No. 142978; Court of Appeals No. 298652.

PEOPLE v LOMBARDO, No. 142979; Court of Appeals No. 302070.

PEOPLE v ALTON JONES, No. 142981; Court of Appeals No. 298708.

PEOPLE v DERRICK DAVIS, No. 142982; Court of Appeals No. 295396.

STALEC v STEPHENS, No. 142987; Court of Appeals No. 295656.

MEEMIC INSURANCE COMPANY v DETROIT EDISON COMPANY, Nos. 142990 and 142991; Court of Appeals Nos. 295294 and 296036.

PEOPLE v SIENDWICZ, No. 142992; Court of Appeals No. 302551.

PEOPLE v MASON, No. 142998; Court of Appeals No. 285254.

PEOPLE v HICKEY, No. 143000; Court of Appeals No. 285253.

PEOPLE v CAMEL, No. 143008; Court of Appeals No. 302171.

PEOPLE v HUNT, No. 143021; Court of Appeals No. 295967.

PEOPLE v MADGE MATTHEWS, No. 143025; Court of Appeals No. 302375.

GRABOW v MACOMB TOWNSHIP, No. 143026; Court of Appeals No. 293711.

PEOPLE v SOSBY, No. 143029; Court of Appeals No. 302039.

PEOPLE v MERIWEATHER, No. 143032; Court of Appeals No. 292133.

PEOPLE v LACY, No. 143033; Court of Appeals No. 295724.

PEOPLE v DONAHEE, No. 143041; Court of Appeals No. 296050.

PEOPLE v RHINES, No. 143042; Court of Appeals No. 296649.

PEOPLE v STOVER, No. 143072; Court of Appeals No. 295590.

PEOPLE v MCWILLIAMS, No. 143119; Court of Appeals No. 301504.

CITY OF RIVERVIEW v DEPARTMENT OF ENVIRONMENTAL QUALITY, Nos. 143301 and 143302; Court of Appeals Nos. 301549 and 302903.

Reconsideration Denied July 25, 2011:

FARLEY v CARP, Nos. 140572, 140573, and 140574; reported below: 287 Mich App 1. Leave to appeal denied at 489 Mich 864.

CAVANAGH, MARILYN KELLY, and HATHAWAY, JJ., would grant reconsideration and, on reconsideration, would grant the application for leave to appeal.

MARK CHABAN, PC v GETSINGER, No. 141398; Court of Appeals No. 282481 Leave to appeal denied at 488 Mich 1045.

PEOPLE v SEIBA, No. 141622; Court of Appeals No. 286104. Leave to appeal denied at 488 Mich 1055.

BURT v DEPARTMENT OF TREASURY, No. 141885; Court of Appeals No. 290868. Leave to appeal denied at 488 Mich 1047.

PEOPLE v RAAR, No. 142039; Court of Appeals No. 298536. Leave to appeal denied at 489 Mich 896.

STATE FARM MUTUAL INSURANCE COMPANY v BROE REHABILITATION SERVICES, INC, No. 142046; reported below: 289 Mich App 277. Leave to appeal denied at 489 Mich 860.

ZDRAVKOVSKI v GAN GONY, INC, No. 142066; Court of Appeals No. 291735. Leave to appeal denied at 489 Mich 860.

PEOPLE v DEANDRE KING, No. 142166; Court of Appeals No. 297561. Leave to appeal denied at 489 Mich 896.

PEOPLE v HAMMOND, No. 142211; Court of Appeals No. 291359. Leave to appeal denied at 489 Mich 861.

ZAHRA, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v DELL, No. 142230; Court of Appeals No. 297930. Leave to appeal denied at 489 Mich 897.

SALENBEIN v ARROW UNIFORM RENTAL LIMITED PARTNERSHIP, Nos. 142232 and 142233; Court of Appeals Nos. 291517 and 291543. Leave to appeal denied at 489 Mich 862.

PEOPLE v JADIDNOURI, No. 142328; Court of Appeals No. 293560. Leave to appeal denied at 489 Mich 898.

SPECIAL ORDERS

SPECIAL ORDERS

In this section are orders of the Supreme Court
(other than orders entered in cases before the Court)
of general interest to the bench and bar of the state.

Orders Entered March 22, 2011:

PROPOSED AMENDMENTS OF RULES 3.911 AND 3.915.

On order of the Court, this is to advise that the Court is considering amendments of Rule 3.911 and Rule 3.915 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at www.courts.michigan.gov/supremecourt/resources/administrative/ph.htm.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[Additions are indicated by underlining
and deletions are indicated by strikeover.]

RULE 3.911. JURY.

(A) [Unchanged.]

(B) Jury Demand. A party who is entitled to a trial by jury may demand a jury by filing a written demand with the court ~~within:~~

~~(1) 14 days after the court gives notice of the right to jury trial, or~~

~~(2) 14 days after an appearance by an attorney or lawyer-guardian ad litem, whichever is later, but~~ no later than 21 days before trial.

The court may excuse a late filing in the interest of justice.

(C) [Unchanged.]

RULE 3.915. ASSISTANCE OF ATTORNEY.

(A) [Unchanged.]

(B) Child Protective Proceedings.

(1) Respondent.

(a) Advice and Right to Counsel. At respondent's first court appearance, the court shall advise the respondent of the right to retain an attorney to represent the respondent at any hearing conducted pursuant to these rules and that

(i) the respondent has the right to a court appointed attorney at any hearing conducted pursuant to these rules, including the preliminary hearing, if the respondent is financially unable to retain an attorney, and,

(ii) if the respondent is not represented by an attorney, the respondent may request a court-appointed attorney at any later hearing.

(b) Appointment of an Attorney. The court shall appoint an attorney to represent the respondent at any hearing, including the preliminary hearing, conducted pursuant to these rules if

(i) the respondent requests appointment of an attorney, and

(ii) it appears to the court, following an examination of the record, through written financial statements, or otherwise, that the respondent is financially unable to retain an attorney.

(c) The respondent may waive the right to the assistance of an attorney, except that the court shall not accept the waiver by a respondent who is a minor when a parent, guardian, legal custodian, or guardian ad litem objects to the waiver.

(2) Child.

(a) The court must appoint a lawyer-guardian ad litem to represent the child at every hearing, including the preliminary hearing. The child may not waive the assistance of a lawyer-guardian ad litem. The duties of the lawyer-guardian ad litem are as provided by MCL 712A.17d. At each hearing, the court shall inquire whether the lawyer-guardian ad litem has met or had contact with the child, as required by the court or MCL 712A.17d(1)(d) and if the lawyer-guardian ad litem has not met or had contact with the child, the court shall require the lawyer-guardian ad litem to state, on the record, the reasons for failing to do so.

(b) If a conflict arises between the lawyer-guardian ad litem and the child regarding the child's best interests, the court may appoint an attorney to represent the child's stated interests.

(C)-(E) [Unchanged.]

Staff Comment: The proposed amendment of MCR 3.911 would eliminate the 14-day time frame during which a demand for jury must be made. The proposed revision of MCR 3.915 would clarify that counsel should be appointed for a parent even at the preliminary hearing of a child protective proceeding.

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

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on these proposals may be sent to the Supreme Court Clerk in writing or electronically by July 1, 2011, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2011-04. Your comments and the comments of others will be posted at www.courts.mi.gov/supremecourt/resources/administrative/index.htm.

PROPOSED AMENDMENTS OF RULES 1.1, 1.2, 1.3, 1.4, 1.5, 1.6, 1.7, 1.9, 1.13, 1.14, 1.15, 1.16, 1.17, 3.2, 4.1, 4.3, 5.2, AND 8.4 OF THE MICHIGAN RULES OF PROFESSIONAL CONDUCT.

On order of the Court, this is to advise that the Court is considering amendments of Rules 1.1, 1.2, 1.3, 1.4, 1.5, 1.6, 1.7, 1.9, 1.13, 1.14, 1.15, 1.16, 1.17, 3.2, 4.1, 4.3, 5.2, and 8.4 of the Michigan Rules of Professional Conduct of the Michigan Court Rules. Before determining whether the

proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at www.courts.michigan.gov/supremecourt.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[Additions are indicated by underlining
and deletions are indicated by strikeover.]

RULE 1.1. COMPETENCE.

A lawyer shall provide competent representation to a client. A lawyer shall not:

(a) handle a legal matter which the lawyer knows or should know that the lawyer is not competent to handle, without associating with a lawyer who is competent to handle it;

(b) handle a legal matter without preparation adequate in the circumstances; or

(c) neglect a legal matter entrusted to the lawyer.

If a lawyer provides legal advice or legal assistance in an emergency, the assistance should be limited to that reasonably necessary in the circumstances.

Comment:

LEGAL KNOWLEDGE AND SKILL

In determining whether a lawyer is able to provide competent representation in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter, and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.

A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

In an emergency, a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation or association with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances, for ill-considered action under emergency conditions can jeopardize the client's interest.

A lawyer may offer representation where the requisite level of competence can be achieved by reasonable preparation. This applies as well to a lawyer who is appointed as counsel for an unrepresented person. See also Rule 6.2.

THOROUGHNESS AND PREPARATION

Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more elaborate treatment than matters of lesser consequence.

MAINTAINING COMPETENCE

To maintain the requisite knowledge and skill, a lawyer should engage in continuing study and education. If a system of peer review has been established, the lawyer should consider making use of it in appropriate circumstances.

RULE 1.2. SCOPE OF REPRESENTATION.

(a) A lawyer shall seek the lawful objectives of a client through reasonably available means permitted by law and these rules. A lawyer does not violate this rule by acceding to reasonable requests of opposing counsel that do not prejudice the rights of the client, by being punctual in fulfilling all professional commitments, or by avoiding offensive tactics. A lawyer shall abide by a client's decision whether to accept an offer of settlement or mediation evaluation of a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, with respect to a plea to be entered, whether to waive jury trial, and whether the client will testify. In representing a client, a lawyer may, where permissible, exercise professional judgment to waive or fail to assert a right or position of the client.

(b) A lawyer shall assume responsibility for technical and legal tactical issues, but should defer to the client about matters that do not directly pertain to the case, such as expenses to be incurred or concerns the client may express regarding third parties who may be affected adversely.

~~(b)~~(c) A lawyer may limit the objectives of the representation if the client consents after consultation.

~~(c)~~(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is illegal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good-faith effort to determine the validity, scope, meaning, or application of the law.

~~(d)~~(e) When a lawyer knows that a client expects assistance not permitted by the Rules of Professional Conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct.

Comment:

SCOPE OF REPRESENTATION

Both the lawyer and the client have authority and responsibility in the objectives and means of representation. The client has ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. Within those limits, a client also has a right to consult with the lawyer about the means to be used in pursuing those objectives. At the same time, a lawyer is not required to pursue objectives or employ means simply because a client may wish that the lawyer do so. A clear distinction between objectives and means sometimes cannot be drawn, and in many cases the client-lawyer relationship partakes of a joint undertaking. ~~In questions of means, the lawyer should assume responsibility for technical and legal tactical issues, but should defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected.~~

In a case in which the client appears to be suffering mental disability, the lawyer's duty to abide by the client's decisions is to be guided by reference to Rule 1.14.

INDEPENDENCE FROM CLIENT'S VIEWS OR ACTIVITIES

Legal representation should not be denied to people who are unable to afford legal services or whose cause is controversial or the subject of popular disapproval. By the same token, representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social, or moral views or activities.

SERVICES LIMITED IN OBJECTIVES OR MEANS

The objectives or scope of services provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. For example, a retainer may be for a specifically defined purpose. Representation provided through a legal-aid agency may be subject to limitations on the types of cases the agency handles. When a lawyer has been retained by an insurer to represent an insured, the representation may be limited to matters related to the insurance coverage. The terms upon which representation is undertaken may exclude specific objectives or means. Such limitations may exclude objectives or means that the lawyer regards as repugnant or imprudent.

An agreement concerning the scope of representation must accord with the Rules of Professional Conduct and other law. Thus, the client may not be asked to agree to representation so limited in scope as to

violate Rule 1.1, or to surrender the right to terminate the lawyer's services or the right to settle litigation that the lawyer might wish to continue.

ILLEGAL, FRAUDULENT AND PROHIBITED TRANSACTIONS

A lawyer is required to give an honest opinion about the actual consequences that appear likely to result from a client's conduct. The fact that a client uses advice in a course of action that is illegal or fraudulent does not, of itself, make a lawyer a party to the course of action. However, a lawyer may not knowingly assist a client in illegal or fraudulent conduct. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which an illegal act or fraud might be committed with impunity.

When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is not permitted to reveal the client's wrongdoing, except where permitted by Rule 1.6. However, the lawyer is required to avoid furthering the purpose, for example, by suggesting how it might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposes is legally proper but then discovers is illegal or fraudulent. Withdrawal from the representation, therefore, may be required.

Where the client is a fiduciary, the lawyer may be charged with special obligations in dealings with a beneficiary.

Paragraph (c) applies whether or not the defrauded party is a party to the transaction. Hence, a lawyer should not participate in a sham transaction; for example, a transaction to effectuate criminal or fraudulent escape of tax liability. Paragraph (c) does not preclude undertaking a criminal defense incident to a general retainer for legal services to a lawful enterprise. The last clause of paragraph (c) recognizes that determining the validity or interpretation of a statute or regulation may require a course of action involving disobedience of the statute or regulation or of the interpretation placed upon it by governmental authorities.

RULE 1.3. DILIGENCE.

A lawyer shall act with reasonable diligence and promptness in representing a client, including providing clarification, preferably in writing, about when and whether a client-lawyer relationship exists.

Comment:

A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and may take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. However, a lawyer is not bound to press for every advantage that might be realized for a client. A lawyer has professional discretion in determining the means by which a matter should be pursued. See Rule 1.2. A lawyer's workload should be controlled so that each matter can be handled adequately.

Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the

passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness.

Unless the relationship is terminated as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client. If a lawyer's employment is limited to a specific matter, the relationship terminates when the matter has been resolved. If a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal. Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so. For example, if a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the client but has not been specifically instructed concerning pursuit of an appeal, the lawyer should advise the client of the possibility of appeal before relinquishing responsibility for the matter.

RULE 1.4. COMMUNICATION.

(a) A lawyer shall keep a client reasonably informed about the status of a matter and comply promptly with reasonable requests for information. A lawyer shall notify the client promptly of all settlement offers, mediation evaluations, and proposed plea bargains.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

(c) A lawyer may not withhold information from the client to serve the lawyer's own interest or convenience.

Comment:

The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued to the extent the client is willing and able to do so. For example, a lawyer negotiating on behalf of a client should provide the client with facts relevant to the matter, inform the client of communications from another party, and take other reasonable steps that permit the client to make a decision regarding an offer from another party. A lawyer who receives an offer of settlement or a mediation evaluation in a civil controversy, or a proffered plea bargain in a criminal case, must promptly inform the client of its substance. See Rule 1.2(a). Even when a client delegates authority to the lawyer, the client should be kept advised of the status of the matter.

Adequacy of communication depends in part on the kind of advice or assistance involved. For example, in negotiations where there is time to explain a proposal, the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation, a lawyer should explain the general strategy and prospects of success and ordi-

narily should consult the client on tactics that might injure or coerce others. On the other hand, a lawyer ordinarily cannot be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests and consistent with the client's overall requirements as to the character of representation.

Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from mental disability. See Rule 1.14. When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the organization. See Rule 1.13. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client. Practical exigency may also require a lawyer to act for a client without prior consultation.

WITHHOLDING INFORMATION

In some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. ~~A lawyer may not withhold information to serve the lawyer's own interest or convenience.~~ Rules or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client. Rule 3.4(c) directs compliance with such rules or orders.

RULE. 1.5 FEES.

(a) A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee. A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. The factors to be considered in determining the reasonableness of a fee include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

(b) A lawyer shall not enter into an agreement that may induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest. A lawyer shall not perform the lawyer's duties using inefficient or wasteful procedures in order to exploit a fee arrangement.

~~(b)~~(c) When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation.

~~(c)~~(d) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or by other law. A contingent-fee agreement shall be in writing and shall state the method by which the fee is to be determined. Upon conclusion of a contingent-fee matter, the lawyer shall provide the client with a written statement of the outcome of the matter and, if there is a recovery, show the remittance to the client and the method of its determination. See also MCR 8.121 for additional requirements applicable to some contingent-fee agreements.

~~(d)~~(e) A lawyer shall not enter into an arrangement for, charge, or collect a contingent fee in a domestic relations matter or in a criminal matter.

~~(e)~~(f) A division of a fee between lawyers who are not in the same firm may be made only if:

(1) the client is advised of and does not object to the participation of all the lawyers involved; and

(2) the total fee is reasonable.

Comment:

BASIS OR RATE OF FEE

When the lawyer has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee. In a new client-lawyer relationship, however, an understanding as to the fee should be promptly established. It is not necessary to recite all the factors that underlie the basis of the fee, but only those that are directly involved in its computation. It is sufficient, for example, to state that the basic rate is an hourly charge or a fixed amount or an estimated amount, or to identify the factors that may be taken into account in finally fixing the fee. When developments occur during the representation that render an earlier estimate substantially inaccurate, a revised estimate should be provided to the client. A written statement concerning the fee reduces the possibility of misunderstanding. Furnishing the client with a simple memorandum or a copy of the lawyer's customary fee schedule is sufficient if the basis or rate of the fee is set forth.

TERMS OF PAYMENT

A lawyer may require advance payment of a fee, but is obliged to return any unearned portion. See Rule 1.16(d). A lawyer may accept property in payment for services, such as an ownership interest in an

enterprise, providing this does not involve acquisition of a proprietary interest in the cause of action or subject matter of the litigation contrary to Rule 1.8(j). However, a fee paid in property instead of money may be subject to special scrutiny because it involves questions concerning both the value of the services and the lawyer's special knowledge of the value of the property.

An agreement may not be made whose terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest. For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required, unless the situation is adequately explained to the client. Otherwise, the client might have to bargain for further assistance in the midst of a proceeding or transaction. However, it is proper to define the extent of services in light of the client's ability to pay. A lawyer should not exploit a fee arrangement based primarily on hourly charges by using wasteful procedures. When there is doubt whether a contingent fee is consistent with the client's best interest, the lawyer should offer the client alternative bases for the fee and explain their implications. Applicable law may impose limitations on contingent fees, such as a ceiling on the percentage. See MCR 8.121.

DIVISION OF FEE

A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well, and most often is used when the fee is contingent and the division is between a referring lawyer and a trial specialist. Paragraph (e) permits the lawyers to divide a fee on agreement between the participating lawyers if the client is advised and does not object. It does not require disclosure to the client of the share that each lawyer is to receive.

DISPUTES OVER FEES

If a procedure has been established for resolution of fee disputes, such as an arbitration or mediation procedure established by the bar, the lawyer should conscientiously consider submitting to it. Law may prescribe a procedure for determining a lawyer's fee, for example, in representation of an executor or administrator, of a class, or of a person entitled to a reasonable fee as part of the measure of damages. The lawyer entitled to such a fee and a lawyer representing another party concerned with the fee should comply with the prescribed procedure.

RULE 1.6. CONFIDENTIALITY OF INFORMATION.

(a) "Confidence" refers to information protected by the client-lawyer privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

(b) Except when permitted under paragraph (c), a lawyer shall not knowingly:

(1) reveal a confidence or secret of a client;

(2) use a confidence or secret of a client to the disadvantage of the client; or

(3) use a confidence or secret of a client for the advantage of the lawyer or of a third person, unless the client consents after full disclosure.

Except as otherwise provided in Rule 1.6, a lawyer is prohibited from disclosing a client's confidences after the lawyer's withdrawal from representing the client.

(c) A lawyer may reveal:

(1) confidences or secrets with the consent of the client or clients affected, but only after full disclosure to them;

(2) confidences or secrets when permitted or required by these rules, or when required by law or by court order;

(3) confidences and secrets to the extent reasonably necessary to rectify the consequences of a client's illegal or fraudulent act in the furtherance of which the lawyer's services have been used;

(4) the intention of a client to commit a crime and the information necessary to prevent the crime; and

(5) confidences or secrets necessary to establish or collect a fee, or to defend the lawyer or the lawyer's employees or associates against an accusation of wrongful conduct. However, disclosure under this provision should be no greater than the lawyer reasonably believes is necessary to vindicate innocence, and disclosure should be made in a manner that limits access to the information to the tribunal or other persons who need to know it.

(d) A lawyer shall exercise reasonable care to prevent employees, associates, and others whose services are utilized by the lawyer from disclosing or using confidences or secrets of a client, except that a lawyer may reveal the information allowed by paragraph (c) through an employee.

Comment:

The lawyer is part of a judicial system charged with upholding the law. One of the lawyer's functions is to advise clients so that they avoid any violation of the law in the proper exercise of their rights.

The observance of the ethical obligation of a lawyer to hold inviolate confidential information of the client not only facilitates the full development of facts essential to proper representation of the client, but also encourages people to seek early legal assistance.

Almost without exception, clients come to lawyers in order to determine what their rights are and what is, in the maze of laws and regulations, deemed to be legal and correct. The common law recognizes that the client's confidences must be protected from disclosure. Upon the basis of experience, lawyers know that almost all clients follow the advice given and that the law is upheld.

A fundamental principle in the client-lawyer relationship is that the lawyer maintain confidentiality of information relating to the represen-

tation. The client is thereby encouraged to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter.

The principle of confidentiality is given effect in two related bodies of law, the client-lawyer privilege (which includes the work-product doctrine) in the law of evidence and the rule of confidentiality established in professional ethics. The client-lawyer privilege applies in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule applies to confidences and secrets as defined in the rule. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law. See also *Scope, ante*, ~~p M 1-18~~.

The requirement of maintaining confidentiality of information relating to representation applies to government lawyers who may disagree with the policy goals that their representation is designed to advance.

AUTHORIZED DISCLOSURE

A lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation, except to the extent that the client's instructions or special circumstances limit that authority. In litigation, for example, a lawyer may disclose information by admitting a fact that cannot properly be disputed, or, in negotiation, by making a disclosure that facilitates a satisfactory conclusion.

Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers, or unless the disclosure would breach a screen erected within the firm in accordance with Rules 1.10(b), 1.11(a), or 1.12(c).

DISCLOSURE ADVERSE TO CLIENT

The confidentiality rule is subject to limited exceptions. In becoming privy to information about a client, a lawyer may foresee that the client intends to commit a crime. To the extent a lawyer is prohibited from making disclosure, the interests of the potential victim are sacrificed in favor of preserving the client's confidences even though the client's purpose is wrongful. To the extent a lawyer is required or permitted to disclose a client's purposes, the client may be inhibited from revealing facts which would enable the lawyer to counsel against a wrongful course of action. A rule governing disclosure of threatened harm thus involves balancing the interests of one group of potential victims against those of another. On the assumption that lawyers generally fulfill their duty to advise against the commission of deliberately wrongful acts, the public is better protected if full and open communication by the client is encouraged than if it is inhibited.

Generally speaking, information relating to the representation must be kept confidential as stated in paragraph (b). However, when the client is or will be engaged in criminal conduct or the integrity of the lawyer's

own conduct is involved, the principle of confidentiality may appropriately yield, depending on the lawyer's knowledge about and relationship to the conduct in question, and the seriousness of that conduct. Several situations must be distinguished.

First, the lawyer may not counsel or assist a client in conduct that is illegal or fraudulent. See Rule 1.2(c). Similarly, a lawyer has a duty under Rule 3.3(a)(4) not to use false evidence. This duty is essentially a special instance of the duty prescribed in Rule 1.2(c) to avoid assisting a client in illegal or fraudulent conduct. The same is true of compliance with Rule 4.1 concerning truthfulness of a lawyer's own representations.

Second, the lawyer may have been innocently involved in past conduct by the client that was criminal or fraudulent. In such a situation the lawyer has not violated Rule 1.2(c), because to "counsel or assist" criminal or fraudulent conduct requires knowing that the conduct is of that character. Even if the involvement was innocent, however, the fact remains that the lawyer's professional services were made the instrument of the client's crime or fraud. The lawyer, therefore, has a legitimate interest in being able to rectify the consequences of such conduct, and has the professional right, although not a professional duty, to rectify the situation. Exercising that right may require revealing information relating to the representation. Paragraph (c)(3) gives the lawyer professional discretion to reveal such information to the extent necessary to accomplish rectification. However, the constitutional rights of defendants in criminal cases may limit the extent to which counsel for a defendant may correct a misrepresentation that is based on information provided by the client. See comment to Rule 3.3.

Third, the lawyer may learn that a client intends prospective conduct that is criminal. Inaction by the lawyer is not a violation of Rule 1.2(c), except in the limited circumstances where failure to act constitutes assisting the client. See comment to Rule 1.2(c). However, the lawyer's knowledge of the client's purpose may enable the lawyer to prevent commission of the prospective crime. If the prospective crime is likely to result in substantial injury, the lawyer may feel a moral obligation to take preventive action. When the threatened injury is grave, such as homicide or serious bodily injury, a lawyer may have an obligation under tort or criminal law to take reasonable preventive measures. Whether the lawyer's concern is based on moral or legal considerations, the interest in preventing the harm may be more compelling than the interest in preserving confidentiality of information relating to the client. As stated in paragraph (c)(4), the lawyer has professional discretion to reveal information in order to prevent a client's criminal act.

It is arguable that the lawyer should have a professional obligation to make a disclosure in order to prevent homicide or serious bodily injury which the lawyer knows is intended by the client. However, it is very difficult for a lawyer to "know" when such a heinous purpose will actually be carried out, for the client may have a change of mind. To require disclosure when the client intends such an act, at the risk of professional discipline if the assessment of the client's purpose turns out to be wrong, would be to impose a penal risk that might interfere with the lawyer's resolution of an inherently difficult moral dilemma.

The lawyer's exercise of discretion requires consideration of such factors as magnitude, proximity, and likelihood of the contemplated wrong; the nature of the lawyer's relationship with the client and with those who might be injured by the client; the lawyer's own involvement in the transaction; and factors that may extenuate the conduct in question. Where practical, the lawyer should seek to persuade the client to take suitable action. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to the purpose. A lawyer's decision not to make a disclosure permitted by paragraph (c) does not violate this rule.

Where the client is an organization, the lawyer may be in doubt whether contemplated conduct will actually be carried out by the organization. Where necessary to guide conduct in connection with this rule, the lawyer should make an inquiry within the organization as indicated in Rule 1.13(b).

Paragraph (c)(3) does not apply where a lawyer is employed after a crime or fraud has been committed to represent the client in matters ensuing therefrom.

WITHDRAWAL

If the lawyer's services will be used by the client in materially furthering a course of criminal or fraudulent conduct, the lawyer must withdraw, as stated in Rule 1.16(a)(1).

~~After withdrawal the lawyer is required to refrain from making disclosure of the client's confidences, except as otherwise provided in Rule 1.6.~~ Neither this rule nor Rule 1.8(b) nor Rule 1.16(d) prevents the lawyer from giving notice of the fact of withdrawal, and the lawyer may also withdraw or disaffirm any opinion, document, affirmation, or the like.

DISPUTE CONCERNING LAWYER'S CONDUCT

Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. The lawyer's right to respond arises when an assertion of complicity or other misconduct has been made. Paragraph (c)(5) does not require the lawyer to await the commencement of an action or proceeding that charges complicity or other misconduct, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend, of course, applies where a proceeding has been commenced. Where practicable and not prejudicial to the lawyer's ability to establish the defense, the lawyer should advise the client of the third party's assertion and request that the client respond appropriately. ~~In any event, disclosure should be no greater than the lawyer reasonably believes is necessary to vindicate innocence, the disclosure should be made in a manner which limits access to the information to the tribunal or other persons having a need to know it, and a~~Appropriate protective

orders or other arrangements should be sought by the lawyer to the fullest extent practicable to protect against unnecessary disclosure of a confidence or secret.

If the lawyer is charged with wrongdoing in which the client's conduct is implicated, the rule of confidentiality should not prevent the lawyer from defending against the charge. Such a charge can arise in a civil, criminal, or professional disciplinary proceeding, and can be based on a wrong allegedly committed by the lawyer against the client, or on a wrong alleged by a third person, for example, a person claiming to have been defrauded by the lawyer and client acting together.

A lawyer entitled to a fee is permitted by paragraph (c)(5) to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary. As stated above, the lawyer must make every effort practicable to avoid unnecessary disclosure of information relating to a representation, to limit disclosure to those having the need to know it, and to obtain protective orders or make other arrangements minimizing the risk of disclosure.

DISCLOSURES OTHERWISE REQUIRED OR AUTHORIZED

The scope of the client-lawyer privilege is a question of law. If a lawyer is called as a witness to give testimony concerning a client, absent waiver by the client, paragraph (b)(1) requires the lawyer to invoke the privilege when it is applicable. The lawyer must comply with the final orders of a court or other tribunal of competent jurisdiction requiring the lawyer to give information about the client.

The Rules of Professional Conduct in various circumstances permit or require a lawyer to disclose information relating to the representation. See Rules 2.2, 2.3, 3.3 and 4.1. In addition to these provisions, a lawyer may be obligated or permitted by other provisions of law to give information about a client. Whether another provision of law supersedes Rule 1.6 is a matter of interpretation beyond the scope of these rules, but a presumption should exist against such a supersession.

FORMER CLIENT

The duty of confidentiality continues after the client-lawyer relationship has terminated. See Rule 1.9.

RULE 1.7. CONFLICT OF INTEREST: GENERAL RULE.

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

(2) each client consents after consultation.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

(c) A lawyer shall not allow the lawyer's business interests to affect the lawyer's representation of a client.

(d) A lawyer shall not represent multiple defendants in a criminal case unless the risk of adverse effect is minimal and the requirements of paragraph (b) are met.

Comment:

LOYALTY TO A CLIENT

Loyalty is an essential element in the lawyer's relationship to a client. An impermissible conflict of interest may exist before representation is undertaken, in which event the representation should be declined. The lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and nonlitigation matters the parties and issues involved and to determine whether there are actual or potential conflicts of interest.

If such a conflict arises after representation has been undertaken, the lawyer should withdraw from the representation. See Rule 1.16. Where more than one client is involved and the lawyer withdraws because a conflict arises after representation, whether the lawyer may continue to represent any of the clients is determined by Rule 1.9. See also Rule 2.2(c). As to whether a client-lawyer relationship exists or, having once been established, is continuing, see comment to Rule 1.3 and *Scope, ante*; ~~p M 1-18~~.

As a general proposition, loyalty to a client prohibits undertaking representation directly adverse to that client without that client's consent. Paragraph (a) expresses that general rule. Thus, a lawyer ordinarily may not act as advocate against a person the lawyer represents in some other matter, even if it is wholly unrelated. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only generally adverse, such as competing economic enterprises, does not require consent of the respective clients. Paragraph (a) applies only when the representation of one client would be directly adverse to the other.

Loyalty to a client is also impaired when a lawyer cannot consider, recommend, or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests. The conflict in effect forecloses alternatives that would otherwise be available to the client. Paragraph (b) addresses such situations. A possible conflict does not itself preclude the representation. The critical questions are the likelihood that a conflict will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client. Consideration should be given to whether the client wishes to accommodate the other interest involved.

CONSULTATION AND CONSENT

A client may consent to representation notwithstanding a conflict.

However, as indicated in paragraph (a)(1) with respect to representation directly adverse to a client, and paragraph (b)(1) with respect to material limitations on representation of a client, when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. When more than one client is involved, the question of conflict must be resolved as to each client. Moreover, there may be circumstances where it is impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent.

LAWYER'S INTERESTS

The lawyer's own interests should not be permitted to have adverse effect on representation of a client. For example, a lawyer's need for income should not lead the lawyer to undertake matters that cannot be handled competently and at a reasonable fee. See Rules 1.1 and 1.5. If the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. A lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed interest.

CONFLICTS IN LITIGATION

Paragraph (a) prohibits representation of opposing parties in litigation. Simultaneous representation of parties whose interests in litigation may conflict, such as coplaintiffs or codefendants, is governed by paragraph (b). An impermissible conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party, or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal cases as well as civil. The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one codefendant. On the other hand, common representation of persons having similar interests is proper if the risk of adverse effect is minimal and the requirements of paragraph (b) are met. Compare Rule 2.2 involving intermediation between clients.

Ordinarily, a lawyer may not act as advocate against a client the lawyer represents in some other matter, even if the other matter is wholly unrelated. However, there are circumstances in which a lawyer may act as advocate against a client. For example, a lawyer representing an enterprise with diverse operations may accept employment as an advocate against the enterprise in an unrelated matter if doing so will not adversely affect the lawyer's relationship with the enterprise or conduct of the suit and if both clients consent upon consultation. By the same token, government lawyers in some circumstances may represent government employees in proceedings in which a government agency is the opposing party. The propriety of concurrent representation can depend

on the nature of the litigation. For example, a suit charging fraud entails conflict to a degree not involved in a suit for a declaratory judgment concerning statutory interpretation.

INTEREST OF PERSON PAYING FOR A LAWYER'S SERVICE

A lawyer may be paid from a source other than the client if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty to the client. See Rule 1.8(f). For example, when an insurer and its insured have conflicting interests in a matter arising from a liability insurance agreement, and the insurer is required to provide special counsel for the insured, the arrangement should assure the special counsel's professional independence. So also, when a corporation and its directors or employees are involved in a controversy in which they have conflicting interests, the corporation may provide funds for separate legal representation of the directors or employees if the clients consent after consultation and the arrangement ensures the lawyer's professional independence.

OTHER CONFLICT SITUATIONS

Conflicts of interest in contexts other than litigation sometimes may be difficult to assess. Relevant factors in determining whether there is potential for adverse effect include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that actual conflict will arise, and the likely prejudice to the client from the conflict if it does arise. The question is often one of proximity and degree.

For example, a lawyer may not represent multiple parties in a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference of interest among them.

Conflict questions may also arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may arise. In estate administration the identity of the client may be a question of law. The lawyer should make clear the relationship to the parties involved.

A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the two roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board, and the possibility of the corporation's obtaining legal advice from another lawyer in such situations. If there is material risk that the dual role will compromise the lawyer's independence of professional judgment, the lawyer should not serve as a director.

CONFLICT CHARGED BY AN OPPOSING PARTY

Resolving questions of conflict of interest is primarily the responsibility of the lawyer undertaking the representation. In litigation, a court

may raise the question when there is reason to infer that the lawyer has neglected the responsibility. In a criminal case, inquiry by the court is generally required when a lawyer represents multiple defendants. See MCR 6.101(C)(4). Where the conflict is such as clearly to call in question the fair or efficient administration of justice, opposing counsel may properly raise the question. Such an objection should be viewed with caution, however, for it can be misused as a technique of harassment. See *Scope, ante*, ~~p M 1-18~~.

RULE 1.9. CONFLICT OF INTEREST: FORMER CLIENT.

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation.

(b) Unless the former client consents after consultation, a lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated has previously represented a client

(1) whose interests are materially adverse to that person, and

(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter.

(c) If a person seeks to disqualify a lawyer on the basis of an alleged violation of paragraph (b), the burden of proof rests on the lawyer whose disqualification is sought.

~~(c)~~(d) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client.

(e) If a lawyer moves from one firm to another and is subsequently subject to a motion for disqualification on the basis of imputed or vicarious disqualification as a result of the move, determination of the claim of disqualification should be made by evaluating the functions of preservation of confidentiality and avoidance of positions adverse to the client.

Comment:

After termination of a client-lawyer relationship, a lawyer may not represent another client except in conformity with this rule. The principles in Rule 1.7 determine whether the interests of the present and former client are adverse. Thus, a lawyer could not properly seek to rescind on behalf of a new client a contract drafted on behalf of the former client. So also a lawyer who has prosecuted an accused person could not properly represent the accused in a subsequent civil action against the government concerning the same transaction.

The scope of a "matter" for purposes of this rule may depend on the facts of a particular situation or transaction. The lawyer's involvement in a matter can also be a question of degree. When a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests clearly is prohibited. On the other hand, a lawyer who recurrently handled a type of problem for a former client is not precluded from later representing another client in a wholly distinct problem of that type even though the subsequent representation involves a position adverse to the prior client. Similar considerations can apply to the reassignment of military lawyers between defense and prosecution functions within the same military jurisdiction. The underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question.

LAWYERS MOVING BETWEEN FIRMS

When lawyers have been associated in a firm but then end their association, the problem is more complicated. First, the client previously represented must be reasonably assured that the principle of loyalty to the client is not compromised. Second, the rule of disqualification should not be so broadly cast as to preclude other persons from having reasonable choice of legal counsel. Third, the rule of disqualification should not unreasonably hamper lawyers from forming new associations and taking on new clients after having left a previous association. In this connection, it should be recognized that today many lawyers practice in firms, that many, to some degree, limit their practice to one field or another, and that many move from one association to another several times in their careers. If the concept of imputed disqualification were applied with unqualified rigor, the result would be radical curtailment of the opportunity of lawyers to move from one practice setting to another and of the opportunity of clients to change counsel.

Reconciliation of these competing principles in the past has been attempted under two rubrics. One approach has been to seek rules of disqualification per se. For example, it has been held that a partner in a law firm is conclusively presumed to have access to all confidences concerning all clients of the firm. Under this analysis, if a lawyer has been a partner in one law firm and then becomes a partner in another law firm, there is a presumption that all confidences known by a partner in the first firm are known to all partners in the second firm. This presumption might properly be applied in some circumstances, especially where the client has been extensively represented, but may be unrealistic where the client was represented only for limited purposes. Furthermore, such a rigid rule exaggerates the difference between a partner and an associate in modern law firms.

The other rubric formerly used for dealing with vicarious disqualification is the appearance of impropriety proscribed in Canon 9 of the former Michigan Code of Professional Responsibility. Two problems can arise under this rubric. First, the appearance of impropriety might be understood to include any new client-lawyer relationship that might make a former client feel anxious. If that meaning were adopted, disqualification would become little more than a question of subjective

judgment by the former client. Second, since "impropriety" is undefined, the term "appearance of impropriety" begs the question. Thus, the problem of imputed disqualification cannot readily be resolved either by simple analogy to a lawyer practicing alone or by the very general concept of appearance of impropriety.

A rule based on a functional analysis is more appropriate for determining the question of vicarious disqualification. Two functions are involved: preserving confidentiality and avoiding positions adverse to a client.

Under Rule 1.10(b), screening may be employed to preserve the confidences of a client when a lawyer has moved from one firm to another. Rule 1.10(b) applies not just to cases in which a lawyer's present and former firms are involved on the date the lawyer moves. The paragraph also applies where the lawyer's present firm later wishes to enter a case from which the lawyer is barred because of information acquired while associated with the prior firm.

CONFIDENTIALITY

Preserving confidentiality is a question of access to information. Access to information, in turn, is essentially a question of fact in particular circumstances. The determination of that question of fact can be aided by inferences, deductions, or assumptions that reasonably may be made about the way in which lawyers work together. A lawyer may have general access to files of all clients of a law firm and may regularly participate in discussions of their affairs; it should be inferred that such a lawyer in fact is privy to all information about all the firm's clients. In contrast, another lawyer may have access to the files of only a limited number of clients and participate in discussion of the affairs of no other clients; in the absence of information to the contrary, it should be inferred that such a lawyer in fact is privy to information about the clients actually served but not those of other clients.

Application of paragraph (b) depends on a situation's particular facts. ~~In any such inquiry, the burden of proof should rest upon the lawyer whose disqualification is sought.~~

Rule 1.10(b), incorporating paragraph (b) of this rule, operates to disqualify the firm only when the lawyer involved has actual knowledge of information protected by Rules 1.6 and 1.9(c). Thus, if a lawyer while with one firm acquired no knowledge of information relating to a particular client of the firm, and that lawyer later joined another firm, neither the lawyer individually nor the second firm is disqualified from representing another client in the same or a related matter even though the interests of the two clients conflict. See Rule 1.10(c) for the restrictions on a firm once a lawyer has terminated association with the firm.

Independent of the question of disqualification of a firm, a lawyer changing professional association has a continuing duty to preserve confidentiality of information about a client formerly represented. See Rule 1.6.

ADVERSE POSITIONS

The second aspect of loyalty to a client is the lawyer's obligation to decline subsequent representations involving positions adverse to a

former client arising in substantially related matters. This obligation requires abstention from adverse representation by the individual lawyer involved, but does not properly entail abstention of other lawyers through imputed disqualification. Thus, if a lawyer left one firm for another, the new affiliation would not preclude the firms involved from continuing to represent clients with adverse interests in the same or related matters, so long as the conditions of Rule 1.10(b) and (c) have been met.

Information acquired by the lawyer in the course of representing a client may not subsequently be used or revealed by the lawyer to the disadvantage of the client. However, the fact that a lawyer has once served a client does not preclude the lawyer from using generally known information about that client when later representing another client.

Disqualification from subsequent representation is for the protection of clients and can be waived by them. A waiver is effective only if there is disclosure of the circumstances, including the lawyer's intended role in behalf of the new client.

With regard to an opposing party raising a question of conflict of interest, see comment to Rule 1.7. With regard to disqualification of a firm with which a lawyer is or was formerly associated, see Rule 1.10.

RULE 1.13. ORGANIZATION AS CLIENT.

(a) A lawyer employed or retained to represent an organization represents the organization as distinct from its directors, officers, employees, members, shareholders, or other constituents. When officers or employees of the organization make decisions, the decisions ordinarily must be accepted by the lawyer even if the lawyer doubts the utility or prudence of the decisions.

(b) The duties of a lawyer that are defined in this rule apply to a client that is a governmental organization. Because public business is involved, it may be there is a different balance that should be considered between the duty to maintain confidentiality and the duty to assure that a wrongful act is prevented or rectified.

~~(b)~~(c) If a lawyer for an organization knows that an officer, employee, or other person associated with the organization is engaged in action, intends to act, or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization, and the apparent motivation of the person involved, the policies of the organization concerning such matters, and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization. Such measures may include among others:

(1) asking reconsideration of the matter;

(2) advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization; and

(3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act in behalf of the organization as determined by applicable law.

~~(c)~~(d) When the organization's highest authority insists upon action, or refuses to take action, that is clearly a violation of a legal obligation to the organization or a violation of law which reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, the lawyer may take further remedial action that the lawyer reasonably believes to be in the best interest of the organization. Such action may include revealing information otherwise protected by Rule 1.6 only if the lawyer reasonably believes that

(1) the highest authority in the organization has acted to further the personal or financial interests of members of that authority which are in conflict with the interests of the organization; and

(2) revealing the information is necessary in the best interest of the organization.

~~(d)~~(e) In dealing with an organization's directors, officers, employees, members, shareholders, or other constituents, a lawyer shall explain the identity of the client when the lawyer believes that such explanation is necessary to avoid misunderstandings on their part.

~~(e)~~(f) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders, or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

Comment:

THE ENTITY AS THE CLIENT

In transactions with their lawyers, clients who are individuals can speak and decide for themselves, finally and authoritatively. In transactions between an organization and its lawyer, however, the organization can speak and decide only through agents, such as its officers or employees. In effect, the client-lawyer relationship is maintained through an intermediary between the client and the lawyer. This fact requires the lawyer under certain conditions to be concerned whether the intermediary legitimately represents the client.

~~When officers or employees of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful.~~ Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province. However, different considerations arise when the lawyer knows that the organization may be substantially injured by action of an officer or employee that is in violation of law. In such a circumstance, it may be reasonably necessary for the lawyer to ask the officer, employee, or other agent to reconsider the matter. If that fails, or if the matter is of sufficient

seriousness and importance to the organization, it may be reasonably necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. Clear justification should exist for seeking review over the head of the officer or employee normally responsible for it. The stated policy of the organization may define circumstances and prescribe channels for such review, and a lawyer should encourage formulation of such a policy. Even in the absence of organization policy, however, the lawyer may have an obligation to refer a matter to higher authority, depending on the seriousness of the matter and whether the officer in question has apparent motives to act at variance with the organization's interest. Review by the chief executive officer or by the board of directors may be required when the matter is of importance commensurate with their authority. At some point it may be useful or essential to obtain an independent legal opinion.

In an extreme case, it may be reasonably necessary for the lawyer to refer the matter to the organization's highest authority. Ordinarily, that is the board of directors or similar governing body. However, applicable law may prescribe that under certain conditions highest authority reposes elsewhere, for example, in the independent directors of a corporation. The ultimately difficult question is whether the lawyer should be permitted to circumvent the organization's highest authority when it persists in a course of action that is clearly violative of law or a legal obligation to the organization and that is likely to result in substantial injury to the organization.

In such a situation, if the lawyer can take remedial action without a disclosure of information that might adversely affect the organization, the lawyer as a matter of professional discretion may take such actions as the lawyer reasonably believes to be in the best interest of the organization. For example, a lawyer for a close corporation may find it reasonably necessary to disclose misconduct by the board to the shareholders. However, taking such action could entail disclosure of information relating to the representation with consequent risk of injury to the client. When such is the case, the organization is threatened by alternative injuries: the injury that may result from the governing board's action or refusal to act, and the injury that may result if the lawyer's remedial efforts entail disclosure of confidential information. The lawyer may pursue remedial efforts even at the risk of disclosure in the circumstances stated in subparagraphs (c)(1) and (c)(2).

RELATION TO OTHER RULES

The authority and responsibility provided in Rules 1.13(b) and (c) are concurrent with the authority and responsibility provided in other rules. In particular, this rule does not limit the lawyer's authority under Rule 1.6, the responsibilities to the client under Rules 1.8 and 1.16 and the responsibilities of the lawyer under Rule 3.3 or 4.1. If the lawyer's services are being used by an organization to further an illegal act or fraud by the organization, Rule 1.2(c) can be applicable. In connection with complying with Rule 1.2(c), 3.3 or 4.1, or exercising the discretion conferred by Rule 1.6(c), a lawyer for an organization may be in doubt whether the conduct will actually be carried out by the organization. To

guide conduct in such circumstances, the lawyer ordinarily should make inquiry within the organization as indicated in Rule 1.13(b).

When the lawyer involved is a member of a firm, the firm's procedures may require referral of difficult questions to a superior in the firm. In that event, Rule 5.2 may be applicable.

UNINCORPORATED ASSOCIATIONS

The duty defined in this rule applies to unincorporated associations.

GOVERNMENTAL AGENCY

~~The duty defined in this rule applies to governmental organizations. However, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful official act is prevented or rectified because public business is involved. In addition,~~Duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulations. Therefore, defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context. In some circumstances, it may be a specific agency, but in others it may be the government as a whole. For example, if the action or failure to act involves the head of a bureau, the department of which the bureau is a part may be the client for purpose of this rule. With these qualifications, the lawyer's substantive duty to the client and reasonable courses of action are essentially the same as when the client is a private organization.

CLARIFYING THE LAWYER'S ROLE

The fact that the organization is the client may be quite unclear to the organization's officials and employees. An organization official accustomed to working with the organization's lawyer may forget that the lawyer represents the organization and not the official. The result of such a misunderstanding can be embarrassing or prejudicial to the individual if, for example, the situation is such that the client-lawyer privilege will not protect the individual's communications to the lawyer. The lawyer should take reasonable care to prevent such consequences. The measures required depend on the circumstances. In routine legal matters, a lawyer for a large corporation does not have to explain to a corporate official that the corporation is the client. On the other hand, if the lawyer is conducting an inquiry involving possible illegal activity, a warning might be essential to prevent unfairness to a corporate employee. See also Rule 4.3.

DUAL REPRESENTATION

Paragraph (e) recognizes that a lawyer for an organization may also represent a principal officer or major shareholder. Such common representation, although often undertaken in practice, can entail serious potential conflicts of interest.

DERIVATIVE ACTIONS

Under generally prevailing law, the shareholders or members of a corporation may bring suit to compel the directors to perform their legal

obligations in the supervision of the organization. Members of unincorporated associations have essentially the same right. Such an action may be brought nominally by the organization, but usually is, in fact, a legal controversy over management of the organization.

The question can arise whether counsel for the organization may defend such an action. The proposition that the organization is the lawyer's client does not alone resolve the issue. Most derivative actions are a normal incident of an organization's affairs, to be defended by the organization's lawyer like any other suit. However, if the claim involves serious charges of wrongdoing by those in control of the organization, a conflict may arise between the lawyer's duty to the organization and the lawyer's relationship with the board. In those circumstances, Rule 1.7 governs whether independent counsel should represent the directors.

RULE 1.14. CLIENT UNDER A DISABILITY.

(a) When a client's ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority or mental disability or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) A lawyer may seek the appointment of a guardian or take other protective action with respect to a client only when the lawyer reasonably believes that the client cannot adequately act in the client's own interest.

(c) If a legal representative has been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client. If the person has no guardian or legal representative, the lawyer often must act de facto as guardian. If the lawyer represents the guardian as distinct from the ward, and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct.

Comment:

The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client is a minor or suffers from a mental disorder or disability, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular, an incapacitated person may have no power to make legally binding decisions. Nevertheless, a client lacking legal competence often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. Furthermore, to an increasing extent the law recognizes intermediate degrees of competence. For example, children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody. So also, it is recognized that some persons of advanced age can be quite capable of handling routine financial matters while needing special legal protection concerning major transactions.

The fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect. ~~If the~~

~~person has no guardian or legal representative, the lawyer often must act de facto as guardian.~~ Even if the person ~~does have~~has a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication.

~~If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client.~~ If a legal representative has not been appointed for the client, the lawyer should see to such an appointment where it would serve the client's best interests. Thus, if a disabled client has substantial property that should be sold for the client's benefit, effective completion of the transaction ordinarily requires appointment of a legal representative. In many circumstances, however, appointment of a legal representative may be expensive or traumatic for the client. Evaluation of these considerations is a matter of professional judgment on the lawyer's part.

~~If the lawyer represents the guardian as distinct from the ward, and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct. See Rule 1.2(c).~~

If the lawyer seeks the appointment of a legal representative for the client, the filing of the request itself, together with the facts upon which it is predicated, may constitute the disclosure of confidential information which could be used against the client. If the court to whom the matter is submitted thereafter determines that a legal representative is not necessary, the harm befalling the client as the result of the disclosure may be irreparable. Consequently, consideration should be given to initially filing the petition seeking the appointment of a legal representative ex parte so that the court can decide how best to proceed to minimize the potential adverse consequences to the client by, for example, issuing a protective order limiting the disclosure of the confidential information upon which the request is predicated.

DISCLOSURE OF THE CLIENT'S CONDITION

Rules of procedure in litigation generally provide that minors or persons suffering mental disability shall be represented by a guardian or next friend if they do not have a general guardian. However, disclosure of the client's disability can adversely affect the client's interests. For example, raising the question of disability could, in some circumstances, lead to proceedings for involuntary commitment. The lawyer's position in such cases is an unavoidably difficult one. The lawyer may seek guidance from an appropriate diagnostician.

RULE 1.15. SAFEKEEPING PROPERTY.

(a) Definitions.

(1) "Allowable reasonable fees" for IOLTA accounts are per check charges, per deposit charges, a fee in lieu of a minimum balance, federal deposit insurance fees, sweep fees, and a reasonable IOLTA account administrative or maintenance fee. All other fees are the responsibility of, and may be charged to, the lawyer maintaining the IOLTA account. Fees or charges in excess of the interest or dividends earned on the account for

any month or quarter shall not be taken from interest or dividends earned on other IOLTA accounts or from the principal of the account.

(2) An "eligible institution" for IOLTA accounts is a bank or savings and loan association authorized by federal or state law to do business in Michigan, the deposits of which are insured by an agency of the federal government, or is an open-end investment company registered with the Securities and Exchange Commission authorized by federal or state law to do business in Michigan. The eligible institution must pay no less on an IOLTA account than the highest interest rate or dividend generally available from the institution to its non-IOLTA customers when the IOLTA account meets the same minimum balance or other eligibility qualifications. Interest or dividends and fees shall be calculated in accordance with the eligible institution's standard practice, but institutions may elect to pay a higher interest or dividend rate and may elect to waive any fees on IOLTA accounts.

(3) "IOLTA account" refers to an interest- or dividend-bearing account, as defined by the Michigan State Bar Foundation, at an eligible institution from which funds may be withdrawn upon request as soon as permitted by law. An IOLTA account shall include only client or third person funds that cannot earn income for the client or third person in excess of the costs incurred to secure such income while the funds are held.

(4) "Non-IOLTA account" refers to an interest- or dividend-bearing account from which funds may be withdrawn upon request as soon as permitted by law in banks, savings and loan associations, and credit unions authorized by federal or state law to do business in Michigan, the deposits of which are insured by an agency of the federal government. Such an account shall be established as:

(A) a separate client trust account for the particular client or matter on which the net interest or dividend will be paid to the client or third person, or

(B) a pooled client trust account with subaccounting by the bank or savings and loan association or by the lawyer, which will provide for computation of net interest or dividend earned by each client or third person's funds and the payment thereof to the client or third person.

(5) "Lawyer" includes a law firm or other organization with which a lawyer is professionally associated.

(b) A lawyer shall:

(1) promptly notify the client or third person when funds or property in which a client or third person has an interest is received;

(2) preserve complete records of such account funds and other property for a period of five years after termination of the representation; and

(3) promptly pay or deliver any funds or other property that the client or third person is entitled to receive, except as stated in this rule or otherwise permitted by law or by agreement with the client or third person, and, upon request by the client or third person, promptly render a full accounting regarding such property.

(c) When two or more persons (one of whom may be the lawyer) claim interest in the property, it shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.

(d) A lawyer shall hold property of clients or third persons in connection with a representation separate from the lawyer's own property. All client or third person funds shall be deposited in an IOLTA or non-IOLTA account. Other property shall be identified as such and appropriately safeguarded.

(e) In determining whether client or third person funds should be deposited in an IOLTA account or a non-IOLTA account, a lawyer shall consider the following factors:

(1) the amount of interest or dividends the funds would earn during the period that they are expected to be deposited in light of (a) the amount of the funds to be deposited; (b) the expected duration of the deposit, including the likelihood of delay in the matter for which the funds are held; and (c) the rates of interest or yield at financial institutions where the funds are to be deposited;

(2) the cost of establishing and administering non-IOLTA accounts for the client or third person's benefit, including service charges or fees, the lawyer's services, preparation of tax reports, or other associated costs;

(3) the capability of financial institutions or lawyers to calculate and pay income to individual clients or third persons; and

(4) any other circumstances that affect the ability of the funds to earn a net return for the client or third person.

(f) A lawyer may deposit the lawyer's own funds in a client trust account only in an amount reasonably necessary to pay financial institution service charges or fees or to obtain a waiver of service charges or fees.

(g) Legal fees and expenses that have been paid in advance shall be deposited in a client trust account and may be withdrawn only as fees are earned or expenses incurred. A lawyer shall not delay remittance of funds received from third persons as a way to coerce a client to accept a lawyer's statement of payable fees and expenses.

(h) No interest or dividends from the client trust account shall be available to the lawyer.

(i) The lawyer shall direct the eligible institution to:

(1) remit the interest and dividends from an IOLTA account, less allowable reasonable fees, if any, to the Michigan State Bar Foundation at least quarterly;

(2) transmit with each remittance a report that shall identify each lawyer for whom the remittance is sent, the amount of remittance attributable to each IOLTA account, the rate and type of interest or dividends applied, the amount of interest or dividends earned, the amount and type of fees deducted, if any, and the average account balance for the period in which the report is made; and

(3) transmit to the depositing lawyer a report in accordance with normal procedures for reporting to its depositors.

(j) A lawyer's good-faith decision regarding the deposit or holding of such funds in an IOLTA account is not reviewable by a disciplinary body. A lawyer shall review the IOLTA account at reasonable intervals to determine whether changed circumstances require the funds to be deposited prospectively in a non-IOLTA account.

Comment:

A lawyer should hold property of others with the care required of a professional fiduciary. Securities should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances. All property which is the property of a client or a third person should be kept separate from the lawyer's business and personal property and, if funds, should be kept in one or more trust accounts. Separate trust accounts may be warranted when administering estate funds or acting in similar fiduciary capacities.

Lawyers often receive from third persons funds from which the lawyer's fee will be paid. If there is risk that the client may divert the funds without paying the fee, the lawyer is not required to remit the portion from which the fee is to be paid. However, a lawyer may not hold funds to coerce a client into accepting the lawyer's contention. The disputed portion of the funds should be kept in trust and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds shall be promptly distributed.

A third person, such as a client's creditors, may have a just claim against funds or other property in a lawyer's custody. A lawyer may have a duty under applicable law to protect such a third-party claim against wrongful interference by the client, and accordingly may refuse to surrender the property to the client. However, a lawyer should not unilaterally assume to arbitrate a dispute between the client and the third person.

The obligations of a lawyer under this rule are independent of those arising from activity other than rendering legal services. For example, a lawyer who serves as an escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction.

RULE 1.16. DECLINING OR TERMINATING REPRESENTATION.

(a) A lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion. Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the Rules of Professional Conduct or other law;

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or

(3) the lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client, or if:

(1) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

(2) the client has used the lawyer's services to perpetrate a crime or fraud;

(3) the client insists upon pursuing an objective that the lawyer considers repugnant or imprudent;

(4) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(5) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(6) other good cause for withdrawal exists.

(c) When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

If the client is mentally incompetent and wishes to discharge his lawyer, the lawyer should make special effort to help the client consider the consequences and, in an extreme case, may initiate proceedings for a conservatorship or similar protection of the client.

(d) Upon termination of representation, a lawyer shall take reasonable steps to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled, and refunding any advance payment of fee that has not been earned. Even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client. The lawyer may retain papers relating to the client to the extent permitted by law.

Comment:

~~A lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion.~~

MANDATORY WITHDRAWAL

A lawyer ordinarily must decline or withdraw from representation if the client demands that the lawyer engage in conduct that is illegal or violates the Rules of Professional Conduct or other law. The lawyer is not obliged to decline or withdraw simply because the client suggests such a course of conduct; a client may make such a suggestion in the hope that a lawyer will not be constrained by a professional obligation.

When a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority. See also Rule 6.2. Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. The court may wish an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation.

The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient.

DISCHARGE

A client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services. Where future dispute about the withdrawal may be anticipated, it may be advisable to prepare a written statement reciting the circumstances.

Whether a client can discharge appointed counsel may depend on applicable law. A client seeking to do so should be given a full explanation of the consequences. These consequences may include a decision by the appointing authority that appointment of successor counsel is unjustified, thus requiring the client to represent himself.

If the client is mentally incompetent, the client may lack the legal capacity to discharge the lawyer, and in any event the discharge may be seriously adverse to the client's interests. ~~The lawyer should make special effort to help the client consider the consequences and, in an extreme case, may initiate proceedings for a conservatorship or similar protection of the client.~~ See Rule 1.14.

OPTIONAL WITHDRAWAL

A lawyer may withdraw from representation in some circumstances. The lawyer has the option to withdraw if it can be accomplished without material adverse effect on the client's interests. Withdrawal is also justified if the client persists in a course of action that the lawyer reasonably believes is illegal or fraudulent, for a lawyer is not required to be associated with such conduct even if the lawyer does not further it. Withdrawal is also permitted if the lawyer's services were misused in the past even if that would materially prejudice the client. The lawyer also may withdraw where the client insists on a repugnant or imprudent objective.

A lawyer may withdraw if the client refuses to abide by the terms of an agreement relating to the representation, such as an agreement concerning fees or court costs, or an agreement limiting the objectives of the representation.

ASSISTING THE CLIENT UPON WITHDRAWAL

~~Even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client.~~ The lawyer may retain papers as security for a fee only to the extent permitted by law.

Whether a lawyer for an organization may under certain unusual circumstances have a legal obligation to the organization after withdrawing or being discharged by the organization's highest authority is beyond the scope of these rules.

RULE 1.17. SALE OF A LAW PRACTICE.

(a) A lawyer or a law firm may sell or purchase a private law practice, including good will, pursuant to this rule. A lawyer participating in the sale of a law practice is subject to the ethical standards that apply when involving another lawyer in the representation of a client. These include,

for example, the seller's obligation to act competently in identifying a purchaser qualified to assume the representation of the client and the purchaser's obligation to undertake the representation competently, MRPC 1.1, the obligation to avoid disqualifying conflicts and to secure client consent after consultation for those conflicts that can be waived, MRPC 1.7, and the obligation to protect information relating to the representation, MRPC 1.6 and 1.9. A seller may agree to transfer matters in one legal field to one purchaser, while transferring matters in another legal field to a separate purchaser. However, a lawyer may not sell individual files piecemeal.

(b) The fees charged clients shall not be increased by reason of the sale, and a purchaser shall not pass on the cost of good will to a client. The purchaser may, however, refuse to undertake the representation unless the client consents to pay fees regularly charged by the purchaser for rendering substantially similar services to other clients prior to the initiation of the purchase negotiations.

(c) Actual written notice of a pending sale shall be given at least 91 days prior to the date of the sale to each of the seller's clients, and the notice shall include:

(1) notice of the fact of the proposed sale;

(2) the identity of the purchaser;

(3) the terms of any proposed change in the fee agreement permitted under paragraph (b);

(4) notice of the client's right to retain other counsel or to take possession of the file; and

(5) notice that the client's consent to the transfer of the client's file to the purchaser will be presumed if the client does not retain other counsel or otherwise object within 90 days of receipt of the notice.

If the purchaser has identified a conflict of interest that the client cannot waive and that prohibits the purchaser from undertaking the client's matter, the notice shall advise that the client should retain substitute counsel to assume the representation and arrange to have the substitute counsel contact the seller.

(d) If a client cannot be given actual notice as required in paragraph (c), the representation of that client may be transferred to the purchaser only upon entry of an order so authorizing by a judge of the judicial circuit in which the seller maintains the practice. The seller or the purchaser may disclose to the judge *in camera* information relating to the representation only to the extent necessary to obtain an order authorizing the transfer of a file.

(e) The sale of the good will of a law practice may be conditioned upon the seller ceasing to engage in the private practice of law for a reasonable period of time within the geographical area in which the practice had been conducted.

Comment:

This rule permits a selling lawyer or law firm to obtain compensation for the reasonable value of a private law practice in the same manner as withdrawing partners of law firms. See MRPC 5.4 and 5.6. This rule does not apply to the transfer of responsibility for legal representation from

one lawyer or firm to another when such transfers are unrelated to the sale of a practice; for transfer of individual files in other circumstances, see MRPC 1.5(e) and 1.16. Admission to or retirement from a law partnership or professional association, retirement plans and similar arrangements, and a sale of tangible assets of a law practice, do not constitute a sale or purchase governed by this rule.

~~A lawyer participating in the sale of a law practice is subject to the ethical standards that apply when involving another lawyer in the representation of a client. These include, for example, the seller's obligation to act competently in identifying a purchaser qualified to assume the representation of the client and the purchaser's obligation to undertake the representation competently, MRPC 1.1, the obligation to avoid disqualifying conflicts and to secure client consent after consultation for those conflicts that can be waived, MRPC 1.7, and the obligation to protect information relating to the representation, MRPC 1.6 and 1.9.~~

If approval of the substitution of the purchasing attorney for the selling attorney is required by the rules of any tribunal in which a matter is pending, such approval must be obtained before the matter can be included in the sale, MRPC 1.16. See also MCR 2.117(C).

All the elements of client autonomy, including the client's absolute right to discharge a lawyer and transfer the representation to another, survive the sale of the practice.

SELLING ENTIRE PRACTICE

When a lawyer is closing a private practice, the lawyer may negotiate with a purchaser for the reasonable value of the practice that has been developed by the seller. ~~A seller may agree to transfer matters in one legal field to one purchaser, while transferring matters in another legal field to a separate purchaser. However, a lawyer may not sell individual files piecemeal.~~ A seller closing a practice to accept employment with another firm may take certain matters to the new employer while selling the remainder of the practice.

Although the rule contemplates the sale of substantially all of the law practice, a seller retiring from private practice generally may continue to represent a small number of clients while transferring the balance of the practice.

The seller remains responsible for handling all client matters until the files are transferred under this rule.

TERMINATION OF PRACTICE BY THE SELLER

The rule allows the parties to agree that the seller cease practice in the geographical area for a reasonable time as a condition of the sale. In certain situations, a blanket prohibition on the seller's practice would not be appropriate or warranted, such as a judicial appointee who might subsequently be defeated for reelection, or a seller elected full-time prosecutor. The parties should be allowed to negotiate, for instance, whether any geographical or duration restrictions apply to the seller's employment as a lawyer on the staff of a public agency or of a legal services entity that provides legal services to the poor, or as inside counsel to a business.

CONFLICTS

The practice may be sold to one or more lawyers or firms, provided that the seller assures that all clients are afforded competent representation. Since the number of client matters and their nature directly bear on the valuation of good will and therefore directly relate to selling the law practice, conflicts that cannot be waived by the client and that prevent the prospective purchaser from undertaking the client's matter should be determined promptly. If the purchaser identifies a conflict that the client cannot waive, information should be provided to the client to assist in locating substitute counsel. If the conflict can be waived by the client, the purchaser should explain the implications and determine whether the client consents to the purchaser undertaking the representation. Initial screening with regard to conflicts, for the purpose of determining the good will of the practice, need be no more intrusive than conflict screening of a walk-in prospective client at the purchaser's firm.

CLIENT CONFIDENCES, CONSENT, AND NOTICE

Negotiations between the seller and prospective purchaser prior to disclosure of information relating to a specific representation of an identifiable client can be conducted in a manner that does not violate the confidentiality provisions of MRPC 1.6, just as preliminary discussions are permissible concerning the possible association of another lawyer or mergers between firms, with respect to which client consent is not required. Providing the purchaser access to client-specific information relating to the representation and to the file, however, requires client consent. The rule provides that before such information can be disclosed by the seller to the purchaser the client must be given actual written notice of the fact of the contemplated sale, including the identity of the purchaser, and must be told that the decision to consent or make other arrangements must be made within 90 days. If nothing is heard from the client within that time, consent to the transfer of the client's file to the identified purchaser is presumed.

A lawyer or law firm ceasing to practice cannot be required to remain in practice because some clients cannot be given actual notice of the proposed purchase. Since these clients are not available to consent to the purchase or direct any other disposition of their files, the rule requires an order from a judge of the judicial circuit in which the seller maintains the practice, authorizing their transfer or other disposition. The court can be expected to determine whether reasonable efforts to locate the client have been exhausted, and whether the absent client's legitimate interests will be served by authorizing the transfer of the file so that the purchaser may continue the representation. Preservation of client confidences requires that the petition for a court order be considered in camera.

The client should be told the identity of the purchaser before being asked to consent to disclosure of confidences and secrets or to consent to transfer of the file.

MCR 9.119(G) provides a mechanism for handling client matters when a lawyer dies and there is no one else at the firm to take responsibility for the file.

FEE ARRANGEMENTS BETWEEN CLIENT AND PURCHASER

Paragraph (b) is intended to prohibit a purchaser from charging the former clients of the seller a higher fee than the purchaser is charging the purchaser's existing clients. The sale may not be financed by increases in fees charged the clients of the practice that is purchased. Existing agreements between the seller and the client as to fees and the scope of the work must be honored by the purchaser, unless the client consents after consultation.

Adjustments for differences in the fee schedules of the seller and the purchaser should be made between the seller and purchaser in valuing good will, and not between the client and the purchaser. The purchaser may, however, advise the client that the purchaser will not undertake the representation unless the client consents to pay the higher fees the purchaser usually charges. To prevent client financing of the sale, the higher fee the purchaser may charge must not exceed the fees charged by the purchaser for substantially similar service rendered prior to the initiation of the purchase negotiations.

DECEASED LAWYER

Even though a nonlawyer seller representing the estate of a deceased lawyer is not subject to the Michigan Rules of Professional Conduct, a lawyer who participates in a sale of a law practice must conform to this rule. Therefore, the purchasing lawyer can be expected to see that its requirements are met.

RULE 3.2. EXPEDITING LITIGATION.

A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client. Delay should not be indulged merely for the convenience of the advocates, or for the purpose of frustrating an opposing party's attempt to obtain rightful redress or repose.

Realizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client.\und

Comment:

Although a judge bears the responsibility of assuring the progress of a court's docket, dilatory practices by a lawyer can bring the administration of justice into disrepute. ~~Delay should not be indulged merely for the convenience of the advocates, or for the purpose of frustrating an opposing party's attempt to obtain rightful redress or repose.~~ It is not a justification that delay ~~similar conduct~~ is often tolerated by the bench and bar. Even though it causes delay, a course of action is proper if a competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay. ~~Realizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client.~~

RULE 4.1. TRUTHFULNESS IN STATEMENTS TO OTHERS.

In the course of representing a client, a lawyer shall not knowingly make a false statement of material fact or law to a third person. A false statement may include the failure to make a statement in circumstances in which silence is equivalent to making a statement.

Comment:

MISREPRESENTATION

A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false.

STATEMENTS OF FACT

This rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud.

FRAUD BY CLIENT

~~Making a false statement may include the failure to make a statement in circumstances in which silence is equivalent to making such a statement Thus,~~Where~~where~~ the lawyer has made a statement that the lawyer believed to be true when made but later discovers that the statement was not true, in some circumstances failure to correct the statement may be equivalent to making a statement that is false. When the falsity of the original statement by the lawyer resulted from reliance upon what was told to the lawyer by the client and if the original statement if left uncorrected may further a criminal or fraudulent act by the client, the provisions of Rule 1.6(c)(3) give the lawyer discretion to make the disclosure necessary to rectify the consequences.

RULE 4.3. DEALING WITH AN UNREPRESENTED PERSON.

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not

(a) give advice to an unrepresented person other than the advice to obtain counsel.

(b) state or imply that the lawyer is disinterested.

When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

Comment:

An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. ~~During the course of a lawyer's representation of a client, the lawyer should not give advice to an unrepresented person other than the advice to obtain counsel.~~

RULE 5.2. RESPONSIBILITIES OF A SUBORDINATE LAWYER.

(a) A lawyer is bound by the rules of professional conduct notwithstanding that the lawyer acted at the direction of another person.

(b) When lawyers in a supervisor-subordinate relationship encounter a matter involving professional judgment as to ethical duty, the supervisor may assume responsibility for making the judgment. A subordinate lawyer does not violate the rules of professional conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

Comment:

Although a lawyer is not relieved of responsibility for a violation by the fact that the lawyer acted at the direction of a supervisor, that fact may be relevant in determining whether a lawyer had the knowledge required to render conduct a violation of the rules. For example, if a subordinate filed a frivolous pleading at the direction of a supervisor, the subordinate would not be guilty of a professional violation unless the subordinate knew of the document's frivolous character.

When lawyers in a supervisor-subordinate relationship encounter a matter involving professional judgment as to ethical duty, the supervisor may assume responsibility for making the judgment. Otherwise a consistent course of action or position could not be taken. If the question can reasonably be answered only one way, the duty of both lawyers is clear and they are equally responsible for fulfilling it. However, if the question is reasonably arguable, someone has to decide upon the course of action. That authority ordinarily reposes in the supervisor, and a subordinate may be guided accordingly. For example, if a question arises whether the interests of two clients conflict under Rule 1.7, the supervisor's reasonable resolution of the question should protect the subordinate professionally if the resolution is subsequently challenged.

RULE 8.4. MISCONDUCT.

(a) It is professional misconduct for a lawyer to:

~~(a)~~(1) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

~~(b)~~(2) engage in conduct involving dishonesty, fraud, deceit, misrepresentation, or violation of the criminal law, where such conduct reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer;

~~(c)~~(3) engage in conduct that is prejudicial to the administration of justice;

~~(d)~~(4) state or imply an ability to influence improperly a government agency or official; or

~~(e)~~(5) knowingly assist a judge or judicial officer in conduct that is a violation of the Code of Judicial Conduct or other law.

(b) A lawyer who holds public office assumes legal responsibilities beyond those of nonlawyer citizens.

Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of wilful failure to file an income tax return. However, some kinds of offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery

and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

A lawyer may refuse to comply with an obligation imposed by law upon a good-faith belief that no valid obligation exists. The provisions of Rule 1.2(c) concerning a good-faith challenge to the validity, scope, meaning, or application of the law apply to challenges of legal regulation of the practice of law. See also Rule 3.4(c).

~~Lawyers holding public office assume legal responsibilities going beyond those of other citizens.~~ A lawyer's abuse of public office can suggest an inability to fulfill the professional role of attorney. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent, and such as officer, director, or manager of a corporation or other organization.

Staff Comment: The proposed amendments of MRPC 1.1, 1.2, 1.3, 1.4, 1.5, 1.6, 1.7, 1.9, 1.13, 1.14, 1.15, 1.16, 1.17, 3.2, 4.1, 4.3, 5.2, and 8.4 would incorporate language from the comments of these rules into the rule itself.

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

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on these proposals may be sent to the Supreme Court Clerk in writing or electronically by July 1, 2011, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2011-05. Your comments and the comments of others will be posted at www.courts.mi.gov/supremecourt/resources/administrative/index.htm.

Orders Entered April 5, 2011:

PROPOSED AMENDMENT OF MCR 2.117.

On order of the Court, the proposed amendment of Rule 2.117 of the Michigan Court Rules having been published for comment at 488 Mich 1403 (2010), and an opportunity having been provided for comment in writing and at a public hearing, the Court declines to adopt the proposed amendment. This administrative file is closed without further action. File No. 2007-18.

PROPOSED AMENDMENT OF MCR 2.203.

On order of the Court, the proposed amendment of Rule 2.203 of the Michigan Court Rules having been published for comment at 488 Mich 1404 (2010), and an opportunity having been provided for comment in

writing and at a public hearing, the Court declines to adopt the proposed amendment. This administrative file is closed without further action. File No. 2008-32.

PROPOSED AMENDMENTS OF MCR 6.425 AND 7.210.

On order of the Court, the proposed amendments of Rule 6.425 and Rule 7.210 of the Michigan Court Rules having been published for comment at 488 Mich 1409 (2010), and an opportunity having been provided for comment in writing and at a public hearing, the Court declines to adopt the proposed amendments. This administrative file is closed without further action. File No. 2008-10.

Orders Entered May 3, 2011:

PROPOSED AMENDMENT OF MCR 2.511.

On order of the Court, this is to advise that the Court is considering an amendment of Rule 2.511 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at: www.courts.mi.gov/supremecourt/resources/administrative/ph.htm.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[Additions are indicated by underlining
and deletions are indicated by strikeover.]

RULE 2.511. IMPANELING THE JURY.

(A)-(B) [Unchanged.]

(C) Examination of Jurors; Discharge of Unqualified Juror. The court may conduct the examination of prospective jurors or may permit the attorneys to do so. When the court finds that a person in attendance at court as a juror is not qualified to serve as a juror, the court shall discharge him or her from further attendance and service as a juror. Exemption from jury service is the privilege of the person exempt, not a ground for challenge.

(D) Challenges for Cause. The parties may challenge jurors for cause, and the court shall rule on each challenge. A juror challenged for cause may be directed to answer questions pertinent to the inquiry. It is grounds for a challenge for cause that the person:

~~(1) is not qualified to be a juror;~~

~~(2)~~(1) is biased for or against a party or attorney;

~~(3)~~(2) shows a state of mind that will prevent the person from rendering a just verdict, or has formed a positive opinion on the facts of the case or on what the outcome should be;

~~(4)~~(3) has opinions or conscientious scruples that would improperly influence the person's verdict;

~~(5)~~(4) has been subpoenaed as a witness in the action;

~~(6)~~(5) has already sat on a trial of the same issue;

~~(7)~~(6) has served as a grand or petit juror in a criminal case based on the same transaction;

~~(8)~~(7) is related within the ninth degree (civil law) of consanguinity or affinity to one of the parties or attorneys;

~~(9)~~(8) is the guardian, conservator, ward, landlord, tenant, employer, employee, partner, or client of a party or attorney;

~~(10)~~(9) is or has been a party adverse to the challenging party or attorney in a civil action, or has complained of or has been accused by that party in a criminal prosecution;

~~(11)~~(10) has a financial interest other than that of a taxpayer in the outcome of the action;

~~(12)~~(11) is interested in a question like the issue to be tried.

~~Exemption from jury service is the privilege of the person exempt, not a ground for challenge.~~

(E)-(H) [Unchanged.]

Staff Comment: Because MCL 600.1337 requires a court to discharge an unqualified juror regardless whether a party challenges the juror for cause, the proposed amendment of MCR 2.511 would eliminate the provision from the list of challenges that may be made for cause, and instead would clarify that the discharge must be made when the court learns that the juror is not qualified to serve. This clarification would foreclose the possibility that an unqualified juror could be allowed to sit because no one challenged his or her qualification.

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

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on this proposal may be sent to the Supreme Court Clerk in writing or electronically by September 1, 2011, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2010-11. Your comments and the comments of others will be posted at www.courts.mi.gov/supremecourt/resources/administrative/index.htm.

PROPOSED AMENDMENT OF RULE 1.5 OF THE MICHIGAN RULES OF PROFESSIONAL CONDUCT.

On order of the Court, this is to advise that the Court is considering an amendment of Rule 1.5 of the Michigan Rules of Professional Conduct. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter will be considered at a public hearing. The notices and agendas for public hearings are posted at: www.courts.michigan.gov/supremecourt/resources/administrative/ph.htm.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[Additions are indicated by underlining and deletions are indicated by strikeover.]

RULE 1.5. FEES.

(a)-(b) [Unchanged.]

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or by other law. A contingent-fee agreement shall be in writing and shall state the method by which the fee is to be determined. The agreement also shall state the amount or percentage of fees to be divided or shared among or between lawyers who are not in the same firm. Upon conclusion of a contingent-fee matter, the lawyer shall provide the client with a written statement of the outcome of the matter and, if there is a recovery, show the remittance to the client and the method of its determination. See also MCR 8.121 for additional requirements applicable to some contingent-fee agreements.

(d) A lawyer shall not enter into an arrangement for, charge, or collect a contingent fee in a domestic relations matter or in a criminal matter.

(e) A division of a fee between lawyers who are not in the same firm may be made only if:

(1) the client is advised of and does not object to the participation of all the lawyers involved, and approves the amount or percentage of fees to be divided or shared among the lawyers; and

(2) the total fee is reasonable.

(f) Except as otherwise allowed under this rule, a lawyer who refers a case to another lawyer in exchange for a portion of any award under subsection (e) is limited to a maximum referral fee of 25 percent of the amount recovered. However, if the referring attorney participates in the case to an extent that a greater percentage of the amount recovered should be allowed as a reflection of the referring attorney's substantial input of time or cost, or assumption of risk, the referring attorney's share of fees may exceed the maximum referral fee as agreed by the receiving attorney and as approved by the court in which the proceeding takes place.

Staff Comment: The proposed amendment of MRPC 1.5 generally would limit a referral fee to 25 percent of the amount recovered in a case subject to a contingent fee agreement. The maximum fee could be increased if the referring attorney provides substantial input that merits such increased percentage.

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

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on these proposals may be sent to the Supreme Court Clerk in writing or electronically by September 1, 2011,

at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2010-07. Your comments and the comments of others will be posted at www.courts.mi.gov/supremecourt/resources/administrative/index.htm.

Order Entered May 17, 2011:

PROPOSED AMENDMENT OF MCR 3.501.

On order of the Court, notice of the proposed amendment of Rule 3.501 of the Michigan Court Rules having been published for comment at 488 Mich 1415 (2010), and an opportunity provided for comment in writing and at a public hearing held May 11, 2011, the Court has declined to adopt either proposal and the file has been closed without further action. File No. 2008-18.

Orders Entered June 14, 2011:

PROPOSED MICHIGAN STANDARDS FOR IMPOSING LAWYER SANCTIONS.

On order of the Court, notice of the proposed amendment of the Michigan Standards for Imposing Lawyer Sanctions having been published for comment, and an opportunity provided for comment in writing and at a public hearing held September 29, 2005, the Court declines to adopt the proposal and the file is closed without further action. File No. 2002-29. [Proposal published for comment at 469 Mich 1206 (2003)—REPORTER.]

PROPOSED AMENDMENTS OF RULE 7.202 AND PROPOSED ADOPTION OF ADMINISTRATIVE ORDER NO. 2011-XX.

On order of the Court, this is to advise that the Court is considering two alternative proposals. Alternative A is a proposed amendment of Rule 7.202 of the Michigan Court Rules. Alternative B is a proposed administrative order. Before determining whether either alternative should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposals or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at www.courts.michigan.gov/supremecourt/resources/administrative/ph.htm.

Publication of these proposals does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

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

ALTERNATIVE A

RULE 7.202. DEFINITIONS.

For purposes of this subchapter:

(1)-(5) [Unchanged.]

(6) "final judgment" or "final order" means:

(a) [Unchanged.]

(b) In a criminal case,

(i) an order dismissing the case;

(ii) the original sentence imposed following conviction;

(iii) a sentence imposed following the granting of a motion for resentencing;

(iv) a sentence imposed, or order entered, by the trial court following a remand from an appellate court in a prior appeal of right; ~~or~~

(v) a sentence imposed following revocation of probation; or

(vi) an order suppressing or excluding substantial and material evidence, upon certification by the prosecuting attorney that the evidence is essential to the prosecution of the case. If an appeal following such a certification results in an affirmance of the trial court, the state shall be barred from prosecuting the defendant for the same offense or offenses except upon a showing of newly discovered evidence that the state could not, with reasonable diligence, have discovered before filing the appeal.

ALTERNATIVE B

Proposed Adoption of
Administrative Order No. 2011-X
(Stay of Proceedings on
Appeal from Orders Suppressing
Prosecution Evidence)

On order of the Court, the following order is effective XXXXXX, 2011.

The issue of how to proceed on appeal in a criminal case in which the trial court has ordered suppression of a prosecutor's evidence has created occasional problems for courts and litigants. A prosecutor whose evidence is suppressed may wish to appeal that ruling. However, if the trial court or the Court of Appeals refuses to grant a stay while resolution of the appeal from the suppression order is pending, the case would proceed to trial without the suppressed evidence. This is a problem because jeopardy attaches when the jury is sworn, which then prohibits the case from being retried if the trial court's determination would have been overturned on appeal. Prosecutors have dismissed cases before appealing the suppression decision to avoid this double jeopardy problem. If the case is voluntarily dismissed, appellate courts no longer have jurisdiction to consider the underlying appellate issue whether the trial court correctly suppressed the evidence.

To encourage efficient consideration of appellate issues and prompt determination of appeals of lower court suppression orders, the courts of this state should be allowed to consider appeals of suppression orders.

Therefore, in a criminal case in which a prosecutor's evidence has been suppressed, and where the prosecutor desires to appeal that ruling, the trial court or Court of Appeals shall grant a stay of proceedings at the request of the prosecutor, pending resolution of the prosecutor's application for leave to appeal. The prosecutor must pursue the appeal as expeditiously as practicable, and the Court of Appeals shall consider the matter under the same priority as that granted to an interlocutory criminal appeal under MCR 7.213(C)(1). If the defendant is incarcerated, the defendant may request that the trial court reconsider whether pretrial release is appropriate.

Staff Comment: Alternative A, the proposed amendment of MCR 7.202 would establish that an order suppressing material and substantial evidence is considered a final order, and therefore subject to an appeal by right. By contrast, Alternative B, a proposed administrative order, would establish a right to a mandatory stay while a prosecutor pursues interlocutory appeal of a trial court's decision to suppress a prosecutor's evidence. These proposals were prompted by the Court's decision in *People v Richmond*, 486 Mich 29 (2010), in which the Court held that a prosecutor's decision to move to dismiss the prosecutor's case makes the case moot on appeal.

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

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be sent to the Supreme Court Clerk in writing or electronically by October 1, 2011, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2008-36. Your comments and the comments of others will be posted at www.courts.mi.gov/supremecourt/resources/administrative/index.htm.

Orders Entered June 28, 2011:

PROPOSED AMENDMENTS OF MRE 606 AND MCR 2.512.

On order of the Court, this is to advise that the Court is considering amendments of Rule 606 of the Michigan Rules of Evidence and Rule 2.512 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at www.courts.michigan.gov/supremecourt/resources/administrative/ph.htm.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[Additions are indicated by underlining and deletions are indicated by strikeover.]

RULE 606. COMPETENCY OF JUROR AS WITNESS.

(a) At the trial. A member of the jury may not testify as a witness before that jury in the trial of the case in which the juror is sitting. No objection need be made in order to preserve the point.

(b) Inquiry into validity of verdict or indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith. But a juror may testify about (1) whether extraneous prejudicial information was improperly brought to the jury's attention, (2) whether any outside influence was improperly brought to bear upon any juror, or (3) whether there was a mistake in entering the verdict onto the verdict form. A juror's affidavit or evidence of any statement by the juror may not be received on a matter about which the juror would be precluded from testifying.

RULE 2.512. RENDERING VERDICT.

(A)-(D) [Unchanged.]

(E) Attorneys, parties, or anyone acting for them or on their behalf shall not, without filing a formal motion therefore with the court and securing the court's permission, interrogate jurors in civil or criminal cases, either in person or in writing, in an attempt to determine the basis for any verdict rendered or to secure other information concerning the deliberations of the jury or any members thereof. The court itself may conduct such interrogation in lieu of granting permission to the movant.

Staff Comment: This proposal is intended to provide guidance (similar to FRE 606[b]) about the scope of inquiry that jurors may be subject to following a verdict and establish a procedure by which postverdict contact with jurors may be sought.

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

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be sent to the Supreme Court Clerk in writing or electronically by October 1, 2011, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2010-12. Your comments and the comments of others will be posted at www.courts.mi.gov supremecourt/resources/administrative/index.htm.

PROPOSED AMENDMENT OF MCR 6.001.

On order of the Court, this is to advise that the Court is considering an amendment of Rule 6.001 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to

suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at www.courts.michigan.gov/supremecourt/resources/administrative/ph.htm.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[Additions are indicated by underlining and deletions are indicated by strikeover.]

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

(A) Felony Cases. The rules in subchapters 6.000-6.500 govern matters of procedure in criminal cases cognizable in the circuit courts and in courts of equivalent criminal jurisdiction, and are applicable after indictment or information and shall not be operative before or during any preliminary hearing.

(B) Misdemeanor Cases. MCR 6.001-6.004, 6.005(B) and (C), 6.006, 6.102(D) and (F), 6.106, 6.125, 6.427, 6.445(A)-(G), and the rules in subchapters 6.600-6.800 govern matters of procedure in criminal cases cognizable in the district courts.

(C)-(E) [Unchanged.]

Staff Comment: The intent of this proposed amendment is to clarify that discovery, which is not allowed under subsection (B) in criminal cases cognizable in the district courts, may be allowed after indictment or information following the preliminary hearing.

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

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be sent to the Supreme Court Clerk in writing or electronically by October 1, 2011, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2010-13. Your comments and the comments of others will be posted at www.courts.mi.gov/supremecourt/resources/administrative/index.htm.

PROPOSED AMENDMENT OF SUBCHAPTER 7.100 OF THE MICHIGAN COURT RULES.

On order of the Court, this is to advise that the Court is considering amendment of Subchapter 7.100 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at www.courts.michigan.gov/supremecourt/resources/administrative/ph.htm.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[The following proposal to amend Subchapter 7.100 of the Michigan Court Rules is presented as it was submitted to this Court by the Appellate Practice Section in its entirety below. While some of the language of the current subchapter has been retained, this proposal, if adopted, would replace the current language of Subchapter 7.100. Therefore, changes are not identified in underlining and overstriking.]

SUBCHAPTER 7.100. APPEALS TO CIRCUIT COURT.

RULE 7.101. SCOPE OF RULES.

(A) Scope of Rules. The rules in this subchapter govern appeals to the circuit court.

(B) Rules Do Not Affect Jurisdiction. These rules do not restrict or enlarge the appellate jurisdiction of the circuit court.

Committee Comment

The revised subchapter 7.100 is modeled after the rules governing appeals to the Court of Appeals in subchapter 7.200. MCR 7.102 lists definitions applicable to this subchapter. MCR 7.103 outlines the appellate jurisdiction of the circuit court. This new subchapter is then organized into general and specific rules. MCR 7.104 through MCR 7.115 are general rules applicable to all circuit court appeals. MCR 7.116 through MCR 7.122 supplement the general rules and apply to categories of agency appeals.

MCR 7.101(A) changes former MCR 7.101(A)(1) to reflect that the general rules of this subchapter apply to all circuit court appeals, unless specific agency rules state differently.

MCR 7.101(B) is based on former MCR 7.101(A)(3).

RULE 7.102. DEFINITIONS.

For purposes of this subchapter:

(1) "agency" means any governmental entity other than a "trial court," the decisions of which are subject to appellate review in the circuit court;

(2) "appeal" means judicial review by the circuit court of a judgment, order, or decision of a "trial court" or "agency," even if the statute or constitutional provision authorizing circuit court appellate review uses a term other than "appeal." "Appeal" does not include actions commenced under the Freedom of Information Act, MCL 15.231 *et seq.*, proceedings described in MCR 3.302 through MCR 3.306, and motions filed under MCR 6.110(H);

(3) "appeal fee" means the fee required to be paid to the circuit court upon filing an appeal and any fee required to be paid to the "trial court" or "agency" in conjunction with the appeal;

(4) "clerk" means clerk of the court;

(5) "court" means the circuit court;

(6) "date of filing" means the date of receipt of a document by the "clerk;"

(7) "entry" is as defined in MCR 7.204(A);

(8) "final judgment" or "final order" is as defined in MCR 7.202(6);

(9) "probate register" means clerk of the probate court; and

(10) "trial court" means the district, probate, or municipal court from which the "appeal" is taken.

Committee Comment

MCR 7.102 is a new provision defining several terms used in subchapter 7.100. It is based on MCR 7.202.

Subrule (1) provides a broad definition of "agency" that differs from the definition in former MCR 7.105(A)(1). In addition to state agencies, the new definition includes county and local governmental entities such as zoning boards of appeals and concealed weapon licensing boards.

The new definition of "appeal" in MCR 7.102(2) reflects former MCR 7.101(A)(2) and clarifies that certain proceedings and motions are not appeals.

Subrule (4) clarifies that the term "clerk" refers to the office of the clerk of the court instead of courtroom personnel.

Subrules (5) and (10) establish that the term "court" refers to the circuit court acting in its appellate capacity, while the term "trial court" refers to the court from which the appeal is taken.

RULE 7.103. APPELLATE JURISDICTION OF THE CIRCUIT COURT.

(A) Appeal of Right. The circuit court has jurisdiction of an appeal of right filed by an aggrieved party from the following:

(1) a final judgment or final order of a district or municipal court, except a judgment based on a plea of guilty or nolo contendere;

(2) a final order of a probate court under MCR 5.801(C);

(3) a final order or decision of an agency governed by the Administrative Procedures Act, MCL 24.201 *et seq.*; and

(4) a final order or decision of an agency from which an appeal of right to the circuit court is provided by law.

(B) Appeal by Leave. The circuit court may grant leave to appeal from: (1)

(1) a judgment or order of a trial court when

(a) no appeal of right exists, or

(b) an appeal of right could have been taken but was not timely filed;

(2) a final order or decision of an agency from which an appeal by leave to the circuit court is provided by law;

(3) an interlocutory order or decision of an agency if an appeal of right would have been available for a final order or decision and if waiting to appeal of right would not be an adequate remedy;

(4) a final order or decision of an agency if an appeal of right was not timely filed and a statute authorizes a late appeal; and

(5) a decision of the Michigan Parole Board to grant parole.

Committee Comment

MCR 7.103 is new and is based on MCR 7.203.

Subrule (A)(1) provides that the circuit court has appellate jurisdiction over district and municipal court final judgments and orders. Because municipal courts are now courts of record from which transcripts are available, this subrule eliminates former MCR 7.102's requirement that the circuit court retry the issues. Appeals from municipal courts, like appeals from district court, are now reviewed on the trial court record.

Subrule (A)(2) reflects the fact that the circuit court's jurisdiction over an appeal of right from the probate court is limited to final orders designated in MCR 5.801(C). The circuit court does not have appellate jurisdiction over final orders in probate court estate or trust proceedings.

MCR 7.103(B)(1) is based on former MCR 7.103(A).

Subrules (B)(2) through (5) are new and specify the categories of agency decisions from which the circuit court may grant leave to appeal.

RULE 7.104. FILING APPEAL OF RIGHT.

(A) Time Requirements. The time limit for an appeal of right is jurisdictional. See MCR 7.103(A). Time is computed as provided in MCR 1.108. An appeal of right to the circuit court must be taken within:

(1) 21 days or the time allowed by statute after entry of the judgment, order, or decision appealed, or

(2) 21 days after the entry of an order denying a motion for new trial, a motion for rehearing or reconsideration, or a motion for other relief from the judgment, order, or decision, if the motion was filed within:

(a) the initial 21-day period, or

(b) further time the trial court or agency may have allowed during that 21-day period.

(3) If a criminal defendant requests appointment of an attorney within 21 days after entry of the judgment of sentence, an appeal of right must be taken within 21 days after entry of an order:

(a) appointing or denying the appointment of an attorney, or

(b) denying a timely filed motion described in subrule (2).

(B) Manner of Filing. To vest the circuit court with jurisdiction in an appeal of right, an appellant must file with the clerk of the circuit court within the time for taking an appeal:

(1) the claim of appeal, and

(2) the circuit court's appeal fee, unless the appellant is indigent.

(C) Claim of Appeal.

(1) *Form*.

(a) The caption of a claim of appeal shall comply with MCR 2.113(C)(1).

(b) In an appeal from a trial court, the claim of appeal should name the parties in the same order as they appear in the trial court, with the added designation "appellant" or "appellee."

(2) *Content.* The claim should state:

"[*name of appellant(s)*] claim[s] an appeal from the [*judgment or order*] entered on [*date*] in the [*name of trial court*] by [*name of judge*]."

(3) *Signature*. The appellant or the appellant's attorney must date and sign the claim of appeal.

(D) Other Documents. The appellant shall file the following documents with the claim of appeal:

(1) a copy of the judgment, order, or decision appealed;

(2) a copy of the certificate of the court reporter or recorder or a statement that the transcript has been ordered, in which case the certificate of the court reporter or recorder must be filed within 7 days. If there is nothing to be transcribed, the appellant must file a statement so indicating;

(3) in an agency appeal, a copy of a written request or order for a certified copy of the record to be sent to the circuit court;

(4) a copy of any appeal bond;

(5) proof that money, property, or documents have been delivered or deposited as required by law;

(6) a copy of the register of actions, if any;

(7) proof that the appeal fee of the trial court or agency has been tendered;

(8) anything else required by law to be filed; and

(9) proof that a copy of the claim of appeal and other documents required by this subrule were served on all parties, the trial court or agency, and any other person or officer entitled by law to notice of the appeal.

(E) Service Requirements in Trial Court or Agency. Within the time for taking the appeal, the appellant shall serve in the trial court or agency from which the appeal is taken:

(1) a copy of the claim of appeal;

(2) any fee required by law;

(3) any bond required by law as a condition for taking the appeal;

(4) in an agency appeal, a copy of a written request for a certified copy of the record to be sent to the circuit court; and

(5) unless there is nothing to be transcribed, the certificate of the court reporter or recorder or a statement that the transcript has been ordered and payment for it made or secured. If a statement is filed, the certificate of the court reporter or recorder must be filed within 7 days.

(F) Appearance. Within 14 days after being served with the claim of appeal, the appellee shall file an appearance in the circuit court identifying the individual appellate attorneys. An appellee who does not file an appearance is not entitled to notice of further proceedings.

Committee Comment

MCR 7.104 revises the procedure for filing an appeal of right set forth in former MCR 7.101. It is largely based on MCR 7.204, the rule governing appeals of right in the Court of Appeals.

The time requirements of subrules (A)(1) and (2)(a) are drawn from MCR 7.204(A)(1)(a) and (b). MCR 7.104(A)(1) and (2) are similar to former MCR 7.101(B)(1). Unless a specific rule provides otherwise, the

new subrules explicitly apply to appeals from agencies as well as trial courts. MCR 7.104(A)(2)(b) is a new provision that is based on MCR 7.204(A)(1)(b). It clarifies that when a trial court or agency orders an extension of time in which to file a postjudgment motion, that order does not extend the time for filing a claim of appeal unless it was entered within the initial 21-day period. MCR 7.104(A)(3) is new. It specifies the time for taking an appeal of right when an indigent defendant in a criminal case has requested appointed appellate counsel.

Subrule (B) is based on MCR 7.204(B). It is consistent with former MCR 7.101(C)(1), except that it includes a provision recognizing the waiver of the circuit court's appeal fee when the appellant is indigent. See MCR 2.002(D).

MCR 7.104(C)(1) is a new provision that covers the contents of the caption of a claim of appeal. Subrules (C)(2) and (3) retain the form of a claim of appeal found in former MCR 7.101(C)(1), with two exceptions. First, subrule (C)(2) adds a requirement that the claim of appeal state the name of the trial judge. Second, because subrule (C)(1)(a) incorporates the caption requirements of MCR 2.113(C)(1), subrule (C)(3) eliminates the requirement that the appellant or the appellant's attorney supply an address and telephone number under his or her signature.

Subrules (D) and (E) adopt a procedure similar to MCR 7.204(C) and (E). This departs from former MCR 7.101(C) in many respects. The new MCR 7.104(D) adds several items that must be filed with the claim of appeal in the circuit court. Former MCR 7.101(C)(1) did not require attachment of any items when the claim of appeal was filed in the circuit court. MCR 7.104(D)(8) requires the appellant to file with the claim of appeal proof that the claim of appeal and all mandated attachments were served on all parties, the trial court or agency, and any other person or officer entitled by law to notice of the appeal. This differs from former MCR 7.101(C)(3), which did not require service of the claim of appeal on the appellee and other persons until 7 days after the claim was filed in the circuit court. The new procedure repeals the previously required statement concerning any appeal bond, fees paid, and other acts performed under MCR 7.101(C)(3)(b).

Unlike former MCR 7.101(C)(2)(e), MCR 7.104(E) no longer requires the appellant to file exhibits in his or her possession with the trial court. Under the new MCR 7.109(C), the offering parties maintain exhibits in their possession unless otherwise ordered. Moreover, while MCR 7.104(E)(3) obligates the appellant to file in the trial court or agency "any bond required by law as a condition for taking the appeal," the revised subchapter 7.100 eliminates the previous "bond for costs" under former MCR 7.101(C)(2)(b). This "bond for costs" was mandated in all appeals not arising from civil infractions, criminal cases, or summary proceedings for the possession of premises. In agency appeals, MCR 7.104(E)(4) now requires the appellant to file a written request with the agency to send a certified copy of the record to the circuit court.

While MCR 7.104(F) is largely consistent with former MCR 7.101(D)(1), it deletes the requirement that appellees file exhibits in their possession with the trial court. Under MCR 7.109(C), appellees maintain the exhibits they offered in their possession unless otherwise ordered.

RULE 7.105. APPLICATION FOR LEAVE TO APPEAL.

(A) Time Requirements. An application for leave to appeal must be filed with the clerk of the circuit court within:

(1) 21 days or the time allowed by statute after entry of the judgment, order, or decision appealed, or

(2) 21 days after the entry of an order denying a motion for new trial, a motion for rehearing or reconsideration, or a motion for other relief from the judgment, order, or decision if the motion was filed within:

(a) the initial 21-day period, or

(b) such further time as the trial court or agency may have allowed during that 21-day period.

(3) If a criminal defendant, who has pled guilty or nolo contendere, requests appointment of an attorney within 21 days after entry of the judgment or sentence, an application must be filed within 21 days after entry of an order:

(a) appointing or denying the appointment of an attorney, or

(b) denying a timely filed motion described in subrule (2).

(B) Manner of Filing. To apply for leave to appeal, the appellant must file:

(1) a signed application for leave to appeal:

(a) stating the date and nature of the judgment, order, or decision appealed;

(b) concisely reciting the appellant's allegations of error and the relief sought;

(c) setting forth a concise argument in support of the appellant's position on each issue that conforms with MCR 7.212(C); and

(d) if the order appealed is interlocutory, setting forth facts showing how the appellant would suffer substantial harm by awaiting final judgment before taking an appeal;

(2) a copy of the judgment, order, or decision appealed and the opinion or findings of the trial court or agency;

(3) if the appeal is from a trial court, a copy of the register of actions;

(4) if the appeal is from an agency, a copy of the written request or order for a certified copy of the record to be sent to the circuit court;

(5) unless waived by stipulation of the parties or court order, a copy of certain transcripts as follows:

(a) in an appeal relating to an evidentiary hearing in a civil or criminal case, the transcript of the evidentiary hearing, including the opinion or findings of the court that conducted the hearing;

(b) in an appeal challenging jury instructions, the transcript of the entire charge to the jury;

(c) in an appeal from a judgment in a criminal case entered pursuant to a plea of guilty or nolo contendere, the transcripts of the plea and sentence;

(d) in an appeal from an order granting or denying a new trial, the portion of the transcript permitting the circuit court to determine whether the trial court's decision on the motion was for a legally recognized reason based on arguable support in the record;

(e) in an appeal raising a sentencing issue, the transcript of the sentencing proceeding and the transcript of any hearing on a motion related to sentencing;

(f) in an appeal raising any other issue, the portion of the transcript substantiating the existence of the issue, objections or lack thereof, arguments of counsel, and any comment or ruling of the trial judge; or

(g) if the transcript is not yet available, the appellant must file a copy of the certificate of the court reporter or recorder or a statement that a transcript has been ordered, in which case the certificate of the court reporter or recorder must be filed within 7 days. If there is nothing to be transcribed, the appellant must file a statement so indicating within 7 days;

(6) proof that a copy of the application was served on all other parties and that a notice of the filing of the application was filed with the trial court or agency. If service cannot be reasonably accomplished, the appellant may ask the circuit court to prescribe service under MCR 2.107(E); and

(7) the circuit court's appeal fee, unless the appellant is indigent.

(C) Answer. Any other party in the case may file, within 14 days of service of the application:

(1) a signed answer to the application conforming to MCR 7.212(D), and

(2) proof that a copy was served on all other parties.

(D) Decision.

(1) There is no oral argument unless directed by the court.

(2) Absent good cause, the court shall decide the application within 28 days of the filing date.

(3) The court may grant or deny leave to appeal or grant other relief. The court shall promptly serve a copy of the order on the parties and the trial court or agency.

(4) If an application is granted, MCR 7.104 governs further proceedings, except that:

(a) the filing of a claim of appeal is not required,

(b) the appellant must complete the acts required by MCR 7.104(D) and (E) within 7 days after the entry of the order granting leave to appeal, and

(c) an appellee may file a claim of cross appeal within 14 days after service of the order granting leave to appeal.

(5) Unless otherwise ordered, the appeal is limited to the issues raised in the application.

(E) Immediate Consideration. When an appellant requires a decision on an application in fewer than 28 days, the appellant must file a motion for immediate consideration concisely stating why an immediate decision is required.

(F) Late Appeal.

(1) When an appeal of right or an application for leave was not timely filed, the appellant may file an application as prescribed under subrule (B) accompanied by a statement of facts explaining the delay. The answer

may challenge the claimed reasons for the delay. The circuit court may consider the length of and the reasons for the delay in deciding whether to grant the application.

(2) A late application may not be filed more than 6 months after entry of:

(a) the order, judgment, or decision appealed;

(b) an order denying a motion for a new trial, a motion for rehearing or reconsideration, or a motion for other relief from the judgment, order, or decision, if the motion was timely filed; or

(c) an order denying a motion for new trial under MCR 6.610(H) or a motion to withdraw a plea under MCR 6.610(E)(7).

Committee Comment

MCR 7.105 is primarily drawn from MCR 7.205, the rule governing applications for leave to appeal in the Court of Appeals. It replaces former MCR 7.103 and includes more detailed procedures than the former rule.

The 21-day time requirement of subrule (A)(1) is consistent with former MCR 7.103(B)(1). Subrule (A)(2) is a new provision that tolls the time for filing an application for leave to appeal upon timely filing of certain motions.

Subrule (B) lists the items to be included in an application for leave to appeal and largely corresponds to MCR 7.205(B). Subrule (B)(1)(c) makes the Court of Appeals' briefing requirements applicable to circuit court applications. Unlike former MCR 7.103(B), subrule 7.105(B)(5) requires production or ordering of the transcript with the application, unless waived. The subrule eliminates the requirement of former MCR 7.103(B)(4) that an application be noticed for hearing in the circuit court.

Subrule (C) adds a provision explicitly allowing an answer to an application. It also makes the Court of Appeals' briefing requirements applicable to the answer.

Subrules (D)(1) and (2) are new. Subrule (D)(1) specifies that there is no oral argument on an application for leave to appeal unless the circuit court directs otherwise. Subrule (D)(2) requires a decision on the application within 28 days of the filing date absent good cause.

In addition to continuing that part of former MCR 7.103(B)(5) allowing the circuit court to grant or deny leave to appeal, subrule 7.105(D)(3) tracks MCR 7.205(D)(2) in permitting the circuit court to grant other relief as appropriate. Subrule (D)(4) is consistent with former MCR 7.103(C), except for the transcript production deadline.

Subrule (E) allows an appellant to move for immediate consideration when a decision on an application for leave to appeal is needed in fewer than 28 days. The subrule leaves matters such as the time to file an answer and briefing open for determination by the circuit court as circumstances warrant.

Subrule (F)(1) is based on MCR 7.205(F)(1) and former MCR 7.103(B)(6). The 6-month deadline for filing a late appeal set forth in subrule (F)(2) is also taken from former MCR 7.103(B)(6). Subrules (F)(2)(b) and (c) are new. Subrule (F)(2)(b) is intended to clarify when the 6-month period ends in instances where the party seeking leave to appeal filed a timely motion in the trial court or agency seeking reconsideration

of the order or decision being appealed. Subrule (F)(2)(c) is intended to clarify when the 6-month period ends in criminal cases in which the defendant has moved for a new trial or to withdraw a plea under MCR 6.610.

RULE 7.106. CROSS APPEALS.

(A) Right of Cross Appeal.

(1) Any appellee may file a cross appeal when:

(a) an appeal of right is filed, or

(b) the circuit court grants leave to appeal.

(2) If there is more than one plaintiff or defendant in a civil action and one party appeals, any other party may file a cross appeal against all or any of the other parties as well as against the party who first appealed. If the cross appeal operates against a party not affected by the first appeal or in a manner different from the first appeal, that party may file a further cross appeal.

(B) Time Requirements. A cross appeal must be filed with the clerk of the circuit court within 14 days after the claim of appeal is served on the cross appellant or the order granting leave to appeal is entered.

(C) Manner of Filing. To file a cross appeal, the cross appellant must file:

(1) a claim of cross appeal in the form required by MCR 7.104(C);

(2) any required fee;

(3) a copy of the judgment, order, or decision from which the cross appeal is taken; and

(4) proof that a copy of the claim of cross appeal was served on all parties.

(D) Additional Requirements. The cross appellant must perform the steps required by MCR 7.104(D) and (E) unless compliance with this subrule would duplicate the appellant's filing of the same document. The cross appellant is not required to order a transcript or file a court reporter's certificate, unless the initial appeal is dismissed.

(E) Dismissed Appeal. If the initial appeal is dismissed, the cross appeal may continue. If there is a transcript to be produced and the certificate of the court reporter or recorder has not been filed, the cross appellant must file the certificate within 14 days after the order dismissing the appeal. If there is nothing to be transcribed, the cross appellant must file a statement so indicating within 14 days after the order dismissing the appeal.

(F) Delayed Cross Appeal. A party seeking leave to take a delayed cross appeal must proceed under MCR 7.105(F).

Committee Comment

MCR 7.106 corresponds to former MCR 7.101(D)(2). Except for the 14-day time requirement, the rule is based on MCR 7.207.

RULE 7.107. AUTHORITY OF TRIAL COURT OR AGENCY.

After a claim of appeal is filed or leave to appeal is granted, jurisdiction vests in the circuit court. The trial court or agency may not set aside or amend the judgment, order, or decision appealed except by

circuit court order or as otherwise provided by law. In all other respects, the authority of the trial court or agency is governed by MCR 7.208(C) through (I).

Committee Comment

MCR 7.107 is a new rule that is based in part on MCR 7.208. It explicitly provides that once a claim of appeal is filed or leave to appeal is granted, jurisdiction over the case vests with the circuit court. The trial court retains authority over matters listed in MCR 7.208(C) through (I).

Under former MCR 7.101(G) and (J), a trial court had the authority to dismiss a circuit court appeal when the appellant failed to timely perfect the appeal or file an appellate brief. Former MCR 7.101(N) recognized that both the trial court and the circuit court had control of the appeal and authorized the circuit court's interlocutory review of the trial court's appellate process. MCR 7.107 changes this practice and makes it clear that the appellate process is controlled by the circuit court.

RULE 7.108. STAY OF PROCEEDINGS; BOND; REVIEW.

(A) General Provisions.

(1) A motion for bond or a stay pending appeal may not be filed in the circuit court unless such a motion was decided by the trial court. The motion must include a copy of the trial court's opinion and order and a copy of the transcript of the hearing, unless its production has been waived.

(2) Except as otherwise provided by rule or law, the circuit court may amend the amount of bond, order an additional or different bond and set the amount, or require different or additional sureties. The circuit court may also remand a bond matter to the trial court. The circuit court may grant a stay of proceedings in the trial court or stay the effect or enforcement of any judgment or order of a trial court on terms the circuit court deems just.

(B) Civil Actions.

(1) *Automatic Stay.* Unless otherwise provided by rule, statute, or court order, an execution may not issue and proceedings may not be taken to enforce an order or judgment until expiration of the time for taking an appeal of right.

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

(a) the appellant files a bond in an amount not less than 1-1/4 times the amount of the judgment or order being enforced, including any costs, interest, attorney fees, and sanctions assessed to date of filing the bond. When the bond is filed, the judgment or order shall automatically be stayed even though objections to the bond or surety may be filed, or

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

(3) *Bond Form and Content.* The bond must:

(a) recite the names and designations of the parties and the judge in the trial court; identify the parties for whom and against whom judgment

was entered; and state the amount of the judgment, including any costs, interest, attorney fees, and sanctions assessed;

(b) contain the promise and conditions that the appellant will:

(i) diligently file and prosecute the appeal to decision taken from the judgment or order stayed, and will perform and satisfy the judgment or order stayed if it is not set aside or reversed;

(ii) perform or satisfy the judgment or order stayed if the appeal is dismissed;

(iii) pay and satisfy any judgment or order entered and any costs assessed against the principal on the bond in the circuit court, Court of Appeals, or Supreme Court; and

(iv) do any other act which is expressly required in the statute authorizing appeal or ordered by the court;

(c) be executed by the appellant along with one or more sufficient sureties as required by MCR 3.604; and

(d) include the conditions provided in MCR 4.201(N)(4) if the appeal is from a judgment for the possession of land.

(4) *Notice of Bond; Objections; Stay Orders.*

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

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

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

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

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

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

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

(7) If an execution has issued, it is suspended by giving notice of filing of the bond to the officer holding the execution.

(C) Criminal Cases.

(1) *Immediate Effect.* A criminal judgment may be executed immediately even though the time for taking an appeal has not elapsed. The granting of bond and its amount are within the discretion of the trial court, subject to the applicable laws and rules on bonds pending appeals in criminal cases.

(2) *Bond Form and Content.* If a bond is granted, the defendant must promise in writing:

(a) to prosecute the appeal to decision;

(b) if the sentence is one of incarceration, to surrender immediately to the county sheriff or as otherwise directed, if the judgment of sentence is affirmed on appeal or if the appeal is dismissed;

(c) if the sentence is other than one of incarceration, to perform and comply with the judgment of sentence if it is affirmed on appeal or if the appeal is dismissed;

(d) to appear in the trial court if the case is remanded for retrial or further proceedings or if a conviction is reversed and retrial is allowed;

(e) to remain in Michigan unless the court gives written approval to leave;

(f) to notify the trial court clerk in writing of a change of address; and

(g) to comply with any other conditions imposed by law or the court.

(3) *Notice of Bond; Objections.* A criminal defendant filing a bond after conviction shall give notice to the prosecuting attorney of the time and place the bond will be filed. The bond is subject to the objection procedure provided in MCR 3.604.

(D) Civil Infractions. An appeal bond and stay in a civil infraction proceeding is governed by MCR 4.101(G)(1).

(E) Probate Actions.

(1) The probate court has continuing jurisdiction to decide other matters pertaining to the proceeding from which an appeal was filed.

(2) A stay in an appeal from the probate court is governed by MCL 600.867 and MCR 5.802(C).

Committee Comment

MCR 7.108 revises former MCR 7.101(H). MCR 7.108, like its predecessor, is divided into a series of subrules specific to civil actions, criminal cases, civil infractions, and probate actions. The bond for costs under former MCR 7.101(C)(2)(b) has been eliminated, unless the underlying statute or ordinance specifically provides otherwise.

MCR 7.108(A)(1) is new and is based on MCR 7.209(A)(2) and (3).

In civil actions, MCR 7.108(B) retains many of the features of former MCR 7.101(H)(1). Subrule (B)(2)(a) clarifies that the amount of the bond is calculated by adding the amount of the judgment or order, including costs, interest, attorney fees, and sanctions.

MCR 7.108(B)(3)(b)(iii) also expands the conditions of the bond found in former MCR 7.101(H)(1)(c)(ii)[C] to include the payment of any judgment or order and any costs assessed against the principal on the bond. This subrule is based on MCR 7.209(F)(1)(b).

MCR 7.108(B)(4) is new. It requires service of a copy of the bond on the parties and provides a procedure for objecting to the amount of the bond or the surety. Additionally, it allows all hearings on the bond to be conducted by telephone conference as provided in MCR 2.402.

Two other provisions, not found in former MCR 7.101(H), have been included in MCR 7.108(B). First, for good cause shown and if the amount is adequate to protect the interests of the parties, MCR 7.108(B)(5)

permits the court to set the bond in a greater or lesser amount. MCR 7.108(B)(5). Second, MCR 7.108(B)(6) allows bonds to be secured under MCL 600.2631.

MCR 7.108(C)(1) governs criminal cases and restates former MCR 7.101(H)(4). Subrule (C)(2), listing the required conditions of the bond, is new. It is based on MCR 7.209(F)(2), but additionally requires the defendant to comply with any other conditions imposed by law or the court.

MCR 7.108(C)(3) is a new provision and is based on MCR 7.209(G)(2).

MCR 7.108(D) governs appeal bonds and stays in civil infraction proceedings. It is identical to former MCR 7.101(H)(3).

The provisions regarding probate actions are unchanged from former MCR 7.101(H)(2).

RULE 7.109. RECORD ON APPEAL.

(A) Content of Record. Appeals to the circuit court are heard on the original record.

(1) *Appeal From Trial Court.* The record is as defined in MCR 7.210(A)(1).

(2) *Appeal From Agency.* The record is as defined in MCR 7.210(A)(2).

(3) *Excluded Evidence.* The record on appeal must include the substance of the excluded evidence or the transcript of proceedings in the trial court or agency excluding it. Excluded exhibits must be maintained by the party offering them.

(4) *Stipulations.* The parties may stipulate in writing regarding any matters relevant to the trial court or agency record if the stipulation is made a part of the record on appeal and sent to the circuit court.

(B) Transcript.

(1) *Appellant's Duties; Orders; Stipulations.*

(a) The appellant is responsible for securing the filing of the transcript as provided in this rule. Unless otherwise provided by circuit court order or this subrule, the appellant shall order the full transcript of testimony and other proceedings in the trial court or agency. Under MCR 7.104(D)(2), a party must serve a copy of any request for transcript preparation on the opposing party and file a copy with the circuit court.

(b) In an appeal from probate court, only that portion of the transcript concerning the order appealed need be filed. The appellee may file additional portions of the transcript.

(c) On the appellant's motion, with notice to the appellee, the trial court or agency may order that no transcript or some portion less than the full transcript be included in the record on appeal. The motion must be filed within the time required for filing an appeal, and, if the motion is granted, the appellee may file any portions of the transcript omitted by the appellant.

(d) The parties may stipulate that no transcript or some portion less than the full transcript be filed.

(e) The parties may agree on a statement of facts without procuring the transcript and the statement signed by the parties may be filed with the trial court or agency and sent as the record of testimony in the action.

(2) *Transcript unavailable.* When a transcript of the proceedings in the trial court or agency cannot be obtained, the appellant shall file a settled statement of facts using the procedure in MCR 7.210(B)(2) unless a statute provides otherwise.

(3) *Duties of Court Reporter or Recorder.*

(a) Certificate. Within 7 days after a transcript is ordered by a party or the court, the court reporter or recorder shall furnish a certificate stating that the transcript has been ordered and payment for it made or secured and that it will be filed as soon as possible or has already been filed.

(b) Time for Filing.

(i) The court reporter or recorder shall file the transcript in the trial court or agency within:

[A] 14 days for an application for leave to appeal from an order granting or denying a motion to suppress evidence in a criminal case;

[B] 28 days in an appeal of a criminal conviction based on a plea of guilty, guilty but mentally ill, or nolo contendere or an appeal from the dismissal or reduction of a felony charge following a preliminary examination; or

[C] 56 days in all other cases.

(ii) The circuit court may extend or shorten these time limits in an appeal pending in the court on motion filed by the court reporter or recorder or a party.

(c) Copies. Additional copies of the transcripts required by the appellant may be ordered from the court reporter or recorder. Photocopies of the transcript furnished by the court reporter or recorder may also be made.

(d) Form of Transcript. The transcript must be prepared in the form provided by MCR 7.210(B)(3)(d).

(e) Notice. Immediately after the transcript is filed, the court reporter or recorder shall notify the circuit court and all parties that it has been filed and file in the circuit court an affidavit of mailing of notice to the parties.

(f) Discipline. A court reporter or recorder failing to comply with the requirements of these rules is subject to disciplinary action, including punishment for contempt of court.

(g) Responsibility When More Than One Reporter or Recorder. In a case in which portions of the transcript must be prepared by more than one reporter or recorder, the person who recorded the beginning of the proceeding is responsible for ascertaining that the entire transcript has been prepared, filing it, and giving the notice required by subrule (B)(3)(e), unless the court has designated another person.

(C) Exhibits. Unless otherwise ordered by the circuit court, trial court, or agency, the offering parties shall maintain exhibits in their possession.

(D) Reproduction of Records. The trial court or agency shall procure copies of file contents as provided in MCR 7.210(D).

(E) Record on Motion. If, before the complete record on appeal is sent to the circuit court, a party files a motion that requires the circuit court

to have the record, the trial court or agency shall, on request of a party or the circuit court, send the circuit court the documents needed.

(F) Service of the Record. Within 14 days after the transcript is filed with the trial court or agency, the appellant shall serve a copy of the entire record on appeal, including the transcripts and exhibits in his or her possession, on each appellee. However, copies of documents the appellee already possesses need not be served. On request, the appellant shall make available to the appellee exhibits incapable of being copied. Proof that the record was served must be promptly filed with the circuit court and the trial court or agency. If the filing of a transcript has been excused as provided in subrule (B), the record shall be served within 14 days after the filing of the transcript substitute.

(G) Transmission of Record.

(1) Within 14 days after the complete transcript has been filed or a certified copy of the record has been requested, the trial court or agency shall promptly send the record to the circuit court, except for those things omitted by written stipulation of the parties. The trial court may order removal of exhibits, if any, from the record. Weapons, drugs, or money are not to be sent unless requested by the circuit court. The trial court or agency shall append a certificate identifying the name of the case, listing the papers with reasonable definiteness, and indicating that the required fees have been paid and any required bond filed. The record transmitted shall include:

(a) a register of actions in the case;

(b) any exhibits on file;

(a) all documents and papers from the court file;

(b) all transcripts;

(c) all opinions, findings, and orders of the trial court or agency; and

(d) the order or judgment appealed.

(2) Transcripts and all other documents which are part of the record on appeal must be attached in one or more file folders or other suitable hard-surfaced binders showing the name of the trial court or agency, the title of the case, and the file number.

(3) The trial court or agency must immediately notify the parties when the record is transmitted to the circuit court.

(H) Return of Record. After deciding the appeal, the circuit court shall promptly send the original record with a certified copy of its order and any written opinion:

(1) to the clerk of the Court of Appeals if a timely application for leave to appeal is filed in the Court of Appeals, or

(2) to the clerk of the trial court or agency from which the record was received if no timely application for leave to appeal is filed in the Court of Appeals.

(I) Notice of Return of Record. The trial court or agency clerk shall promptly notify all parties of the return of the record.

Committee Comment

MCR 7.109 is based on MCR 7.210 and contains several important changes in practice from the predecessor rule, MCR 7.101(F).

Subrule (A) defines the record on appeal and corresponds to MCR 7.210(A).

Subrule (B) outlines the duties of the appellant and court reporter or recorder. This new rule shortens the time for ordering the transcript and for filing the court reporter's or recorder's certificate. In conjunction with MCR 7.104(D)(2), the appellant must now file proof of ordering the transcript along with the claim of appeal. The reporter's or recorder's certificate must be filed within 7 days. Subrule (B)(3)(b) establishes new deadlines for filing transcripts in circuit court appeals. The prior rule, MCR 7.101(F), required production of either the transcript or the certificate within 28 days.

MCR 7.109(C) establishes a new rule directing the parties to maintain exhibits in their possession unless ordered otherwise. This reflects the fact that courts and agencies are reluctant to accept exhibits for filing.

Under MCR 7.109(F), the appellant now has the duty to serve a copy of the transcript on the appellee. Under the former rule, the appellee had to obtain its own copy.

Subrule (G) provides that the trial court or agency clerk must transmit the record to the circuit court within 14 days after the transcript is filed. Under the prior rule, MCR 7.101(F)(2), there was no deadline. Subrule (G) also standardizes the contents and form of the record to be transmitted.

MCR 7.109(H) and (I) are new subrules. Subrule (H) directs the circuit court to either send the record to the Court of Appeals if a timely application for leave to appeal is filed or to return the record to the trial court or agency if an application is not filed. Subrule (I) requires the court to notify the parties when the record has been returned.

RULE 7.110. MOTION IN CIRCUIT COURT APPEALS.

Motion practice in a circuit court appeal is governed by MCR 2.119. Motions may include special motions identified in MCR 7.211(C). Absent good cause, the court shall decide motions within 28 days after the hearing date.

Committee Comment

MCR 7.110 is new. It provides that appellate motion practice is conducted under the rule that governs general motion practice, with an added provision that the circuit court must decide appellate motions within 28 days after the hearing date. Additionally, the rule makes it clear that a party may bring special motions, such as motions to remand, to affirm, or for peremptory reversal.

RULE 7.111. BRIEFS.

(A) Time for Filing and Service.

(1) *Appellant's Brief.*

(a) Within 21 days after the trial court or agency notifies the parties that the record on appeal has been sent to the circuit court, the appellant must file a brief conforming to MCR 7.212(C) and serve it on all other parties to the appeal. The time may be extended for 14 days by stipulation

and order or by an order granting a motion for extension. The filing of a motion does not stay the time for filing a brief.

(b) If an appellant does not file a brief within the time provided by subrule (A)(1)(a), the appeal may be considered abandoned, and the circuit court may dismiss the appeal on 14 days' notice to the parties. Compliance with subrule (A)(1)(a) after notice is sent does not preclude a dismissal of the appeal unless the appellant shows a reasonable excuse for the late filing.

(2) *Appellee's Brief.* Within 21 days after the appellant's brief is served on the appellee, the appellee may file a brief. The brief must conform to MCR 7.212(D) and must be served on all other parties to the appeal. The time may be extended for 14 days by stipulation and order or by an order granting a motion for extension. The filing of the motion does not stay the time for filing a brief.

(3) *Briefs in Cross Appeals.* The filing and service of briefs by a cross appellant and a cross appellee are governed by subrules (A)(1) and (2).

(4) *Earlier Filing and Service.* For good cause shown, the circuit court may grant a motion to shorten the time for filing and serving briefs.

(5) *Late Filing.* Any party failing to timely file and serve a brief under these rules forfeits oral argument. For good cause shown, the court may grant a motion to reinstate oral argument.

(B) Length and Form of Briefs. The appellant's brief must comply with MCR 7.212(B) and (C), and the appellee's brief must comply with MCR 7.212(B) and (D).[1]

(C) Request for Oral Argument. A party filing a timely brief is entitled to oral argument by writing "ORAL ARGUMENT REQUESTED" in capital letters or boldface type on the title page of the brief.

(D) Nonconforming Briefs. If, on its own initiative or on a party's motion, the circuit court concludes that a brief does not substantially comply with the requirements in this rule, it may order the party filing the brief to correct the deficiencies within a specified time or it may strike the nonconforming brief.

Committee Comment

MCR 7.111(A)(1)(a) and 7.111(A)(2) correspond to former MCR 7.101(I)(1). These subrules now provide that the time for filing a brief may be extended for 14 days by stipulation and order or by an order granting a motion for extension.

MCR 7.111(A)(1)(b) corresponds to former MCR 7.101(J) and clarifies that the circuit court is responsible for dismissing an appeal if an appellant fails to file a timely brief.

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[1] Note that the Court adopted an amendment of MCR 7.101 and 7.105 in ADM File No. 2009-14 to clarify that the page limit for district court appeal briefs is the same as for briefs filed in the Court of Appeals. The amendment became effective after the committee submitted its proposal to the Court in this file. In addition, contrary to the reference in the committee comment, there is no language in the proposal that would establish a page limit of half the limit in Court of Appeals briefs, i.e., 25 pages.

MCR 7.111(A)(3) is a new subrule governing briefs in cross appeals. It is consistent with MCR 7.212(E).

MCR 7.111(A)(4) and (5) are new and correspond to MCR 7.212(A)(3) and (4) respectively. MCR 7.111(A)(5) also allows the court to reinstate oral argument.

MCR 7.111(B) adopts MCR 7.212(B) with two exceptions. First, the page limit for a circuit court brief is one-half of the page limit allowed for a brief in the Court of Appeals. Second, the standard for granting a motion to exceed the page limit is less stringent.

MCR 7.111(C) is taken from former MCR 7.101(K).

MCR 7.111(D) is new and corresponds to MCR 7.212(I).

RULE 7.112. MISCELLANEOUS RELIEF.

In addition to its general appellate powers, the circuit court may grant relief as provided in MCR 7.216.

Committee Comment

MCR 7.112 is a new rule. It clarifies that the circuit court has the appellate powers set forth in MCR 7.216 and incorporates former MCR 7.101(P), which governed vexatious proceedings.

RULE 7.113. DISMISSAL.

(A) Involuntary Dismissal.

(1) *Dismissal*. If the appellant fails to pursue the appeal in conformity with the court rules, the circuit court will notify the parties that the appeal shall be dismissed unless the deficiency is remedied within 14 days.

(2) *Reinstatement*. Within 14 days after the date of the dismissal order, the appellant may move for reinstatement by showing mistake, inadvertence, or excusable neglect.

(B) Voluntary Dismissal. In all cases where the parties file a signed stipulation agreeing to dismiss the appeal or the appellant files an unopposed motion to withdraw the appeal, the circuit court shall enter an order of dismissal.

(C) Notice of Dismissal. Immediately upon entry, a copy of an order dismissing an appeal must be sent to the parties and the trial court or agency.

Committee Comment

MCR 7.113 is based on MCR 7.217 and MCR 7.218. Under former MCR 7.101(G) and (J), both the trial court and circuit court had the authority to dismiss an appeal. MCR 7.113 vests exclusive authority in the circuit court to dismiss an appeal. The new rule also increases the appellant's time to cure a deficiency from 7 to 14 days. Subrule (A)(2) adds a reinstatement procedure.

RULE 7.114. TAXATION OF COSTS, FEES.

(A) Right to Costs. Except as the circuit court otherwise directs, the prevailing party in a civil case is entitled to costs.

(B) Time for Filing. Within 28 days after the dispositive order, opinion, or order denying rehearing is mailed, the prevailing party may file a certified or verified bill of costs with the clerk and serve a copy on all other parties. Each item claimed in the bill must be specified. Failure to file a bill of costs within the time prescribed waives the right to costs.

(C) Objections. Any other party may file objections to the bill of costs with the clerk within 7 days after a copy of the bill is served. The objecting party must serve a copy of the objections on the prevailing party and file proof of that service.

(D) Taxation. The clerk will promptly verify the bill and tax those costs available.

(E) Review. The action by the clerk will be reviewed by the circuit court on motion of either party filed within 7 days from the date of taxation, but on review only those affidavits or objections that were previously filed with the clerk may be considered by the court.

(F) Taxable Costs and Fees. A prevailing party may tax only the reasonable costs and fees incurred in the appeal, including:

(1) printing of briefs, or if briefs were typewritten, a charge of $1 per original page;

(2) obtaining any stay bond;

(3) the transcript and necessary copies of it;

(4) documents required for the record on appeal;

(5) fees paid to the clerk or to the trial court clerk incident to the appeal;

(6) taxable costs and fees allowed by law in appeals under MCL 600.2441;

(7) the additional costs incurred when a party to an appeal under the Administrative Procedures Act unreasonably refused to stipulate to shortening the record as provided in MCL 24.304(2); and

(8) other expenses taxable under applicable court rules or statutes.

Committee Comment

MCR 7.114 corresponds to former MCR 7.101(O). It is based on MCR 7.219, MCR 2.625, and MCL 600.2441.

RULE 7.115. DECISION AND EFFECT OF JUDGMENT, RECONSIDERATION.

(A) Oral Argument. If requested in accord with MCR 7.111(C), the court shall schedule oral argument unless it concludes that the briefs and record adequately present the facts and legal arguments, and the court's deliberation would not be significantly aided by oral argument.

(B)Decision. The circuit court shall decide the appeal by oral or written opinion and issue an order. The court's order is its judgment.

(C) Effect of Judgment. Unless otherwise ordered by the circuit court or the Court of Appeals, a judgment is effective after expiration of the period for filing a timely application for leave to appeal or, if such an application is filed, after the Court of Appeals decides the case. Enforcement is to be obtained in the trial court or agency after the record is returned as provided in MCR 7.109(H).

(D) Reconsideration. A motion for reconsideration is governed by MCR 2.119(F).

Committee Comment

MCR 7.115(A) is new and allows the circuit court to dispense with oral argument if certain conditions are met.

MCR 7.115(B) is new and is consistent with MCR 7.215(E)(1). It specifies that all appeals must be decided by oral or written opinion and issuance of an order. Administrative Order 2003-7 sets the time guidelines for deciding circuit court appeals.

Subrule (C) is new and consistent with MCR 7.215(F).

Subrule (D) is also new. It clarifies that a circuit court has the authority to decide a motion for reconsideration.

RULE 7.116. APPEALS UNDER THE MICHIGAN EMPLOYMENT SECURITY ACT.

(A) Scope. This rule governs appeals to the circuit court under the Michigan Employment Security Act, MCL 421.1 *et seq*. Unless this rule provides otherwise, MCR 7.101 through 7.115 apply.

(B) Time Requirements. An appeal of right from an order or decision of the Michigan Employment Security Board of Review must be taken within 30 days after the mailing of the board's decision.

(C) Manner of Filing. Except as provided in subrule (B), the claim of appeal shall conform with MCR 7.104 and must include statements of jurisdiction and venue. In addition, proof that the claim of appeal was served on the board of review and all interested parties must be filed in the circuit court. The Michigan Employment Security Commission is a party to any appeal under MCL 421.38(3), but the board of review is not a party to the appeal.

(D) Venue. Venue is determined under MCL 421.38(1).

(E) Appearance of Appellee. Within 14 days after service of the claim of appeal, the appellee must file an appearance in the circuit court.

(F) Record on Appeal. Within 42 days after the claim of appeal is served on the board of review, or within further time as the circuit court allows, the board of review must transmit to the clerk of the circuit court a certified copy of the record of proceedings before the referee and the board of review. The certified record must comply with MCL 421.36(3). The board of review must notify the parties that the record was transmitted.

(G) Standard of Review and Decision on Appeal. Under MCL 421.38, the circuit court may reverse an order or decision of the board of review only if it finds that the order or decision is contrary to law or is not supported by competent, material, and substantial evidence on the whole record. In all other respects, MCR 7.115 applies.

Committee Comment

MCR 7.116 is based on former MCR 7.104(B) and MCL 421.1 *et seq.*, particularly MCL 421.38.

MCR 7.116(C) adds the requirement that the claim of appeal include statements of jurisdiction and venue. Subrule (G) is included to identify the standard of review under MCL 421.38.

MCR 7.116 deletes former MCR 7.104(B)(5), which referenced class appeals.

RULE 7.117. APPEALS FROM THE MICHIGAN CIVIL SERVICE COMMISSION.

(A) Scope. This rule governs appeals to the circuit court from the Michigan Civil Service Commission. Unless this rule provides otherwise, MCR 7.101 through 7.115 apply.

(B) Procedure. An appeal from a decision of the Michigan Civil Service Commission must comply with MCR 7.119.

(C) Commission as Party. An appeal challenging any decision, rule, or regulation of the Michigan Civil Service Commission must name the Commission as a party and must serve the Commission at the Office of the State Personnel Director in Lansing, Michigan.

Committee Comment

MCR 7.117 is based on former MCR 7.104(C) and Michigan Civil Service Commission Rule 8-7.9.

RULE 7.118. APPEALS FROM THE MICHIGAN PAROLE BOARD.

(A) Scope. This rule governs appeals to the circuit court from the Michigan Parole Board. Unless this rule provides otherwise, MCR 7.101 through 7.115 apply.

(B) No Appeal of Right. There is no appeal of right from a decision of the parole board.

(C) Access to Reports and Guidelines. Upon request, the prosecutor, the victim, and the prisoner shall receive the parole eligibility report, any prior parole eligibility reports that are mentioned in the parole board's decision, and any parole guidelines that support the action taken.

(D) Application for Leave to Appeal.

(1) *Parties.*

(a) Only the prosecutor or a victim may file an application for leave to appeal.

(b) The prisoner shall be the appellee.

(c) The parole board may move to intervene as an appellee.

(2) *Time Requirements.* An application for leave to appeal must be filed within 28 days after the parole board mails a notice of action granting parole and a copy of any written opinion to the prosecutor and the victim, if the victim requested notification under MCL 780.771.

(3) *Manner of Filing.* An application for leave must comply with MCR 7.105, must include statements of jurisdiction and venue, and must be served on the parole board and the prisoner. If the victim seeks leave, the prosecutor must be served. If the prosecutor seeks leave, the victim must be served if the victim requested notification under MCL 780.771.

(a) Service on the parole board, the victim, or the prosecutor must be accomplished by certified mail, return receipt requested, in compliance with MCR 2.105(A)(2).

(b) Service on a prisoner incarcerated in a state correctional facility must be accomplished by serving the application for leave on the warden or administrator, along with the form approved by the State Court Administrative Office for personal service on a prisoner. Otherwise,

service must be accomplished by certified mail, return receipt requested, as described in MCR 2.103(C) and MCR 2.104(A)(2) or in compliance with MCR 2.105(A)(2). In addition to the pleadings, service on the prisoner must also include a notice in a form approved by the State Court Administrative Office advising the prisoner that:

(i) the prisoner may respond to the application for leave to appeal through retained counsel or in propria persona, although no response is required, and

(ii) if an order of parole is issued under MCL 791.236 before the completion of appellate proceedings, a stay may be granted in the manner provided by MCR 7.108, except that no bond is required.

(c) Proof of service must be promptly filed with the clerk of the circuit court and must include a copy of the return receipt and, in the case of the prisoner, a copy of the certificate of service executed by the appropriate prison official.

(4) *Venue.* An application for leave to appeal a decision of the parole board may only be filed in the circuit court of the sentencing county under MCL 791.234(9).

(E) Late Application. A late application for leave to appeal may be filed under MCR 7.105(F).

(F) Stay of Order of Parole.

(1) An order of parole issued under MCL 791.236 shall not be executed until 28 days after the mailing of the notice of action.

(2) If an order is issued under MCL 791.235 before completion of appellate proceedings, a stay may be granted in the manner provided by MCR 7.108, except that no bond is required.

(G) Decision to Grant Leave to Appeal.

(1) The circuit court shall make its determination within 28 days after the application for leave to appeal is filed.

(2) If the court does not make its determination within 28 days, the court shall enter an order to produce the prisoner before the court for a show cause hearing to determine whether the prisoner shall be released on parole pending disposition of the appeal.

(H) Procedure After Leave to Appeal Granted. If leave to appeal is granted, MCR 7.105(D)(4) applies along with the following:

(1) *Record on Appeal.*

(a) The record on appeal shall consist of the prisoner's central office file at the Department of Corrections and any other documents considered by the parole board in reaching its decision.

(b) Within 14 days after being served with an order granting leave to appeal, the parole board shall send copies of the record to the circuit court and the other parties. In all other respects, the record on appeal shall be processed in compliance with MCR 7.109.

(c) The expense of preparing and serving the record on appeal may be taxed as costs to a non-prevailing appellant, except that expenses may not be taxed to an indigent party.

(2) *Briefs.* Briefs must comply with MCR 7.111, except:

(a) the appellant's brief is due 28 days after the record is served on the parties, and

(b) the appellee's brief, if filed, is due 21 days after the appellant's brief is served on the appellee.

(3) *Burden of Proof.* The appellant has the burden of establishing that the decision of the parole board was

(a) in violation of the Michigan Constitution, a statute, an administrative rule, or a written agency regulation that is exempted from promulgation pursuant to MCL 24.207, or

(b) a clear abuse of discretion.

(4) *Remand to the Parole Board.* On motion by a party or on the court's own motion, the court may remand the matter to the parole board for an explanation of its decision.

(a) The parole board shall hear and decide the matter within 28 days of the date of the order, unless the board determines that an adjournment is necessary to obtain evidence or there is other good cause for an adjournment.

(b) The time for filing briefs on appeal under subrule (G)(2) is tolled while the matter is pending on remand.

(I) Subsequent Appeal to the Court of Appeals. An appeal of a circuit court decision is by emergency application for leave to appeal to the Court of Appeals under MCR 7.205(E), and the Court of Appeals shall expedite the matter.

(J) Parole Board Responsibility After Reversal or Remand.

(1) If a decision of the parole board is reversed or remanded, the board shall review the matter and take action consistent with the circuit court's decision within 28 days.

(2) If the circuit court order requires the board to undertake further review of the file or to reevaluate its prior decision, the board shall provide the parties with an opportunity to be heard.

(3) An appeal to the Court of Appeals does not affect the board's jurisdiction to act under this subsection.

Committee Comment

MCR 7.118 is based on former MCR 7.104(D) and MCL 791.234.

Subrule (B) is new and reiterates existing law. See MCL 791.234(9). Subrule (D)(3) adds the requirements that the application for leave to appeal include statements of jurisdiction and venue. Subrule (D)(3)(b) updates the service requirements in former MCR 7.104(D)(2)(c).

RULE 7.119. APPEALS FROM AGENCIES GOVERNED BY THE ADMINISTRATIVE PROCEDURES ACT.

(A) Scope. This rule governs an appeal to the circuit court from an agency decision where MCL 24.201 *et seq*. applies. Unless this rule provides otherwise, MCR 7.101 through MCR 7.115 apply.

(B) Appeal of Right.

(1) *Time Requirements.* Judicial review of a final decision or order shall be by filing a claim of appeal in the circuit court within 60 days after the date of mailing of the notice of the agency's final decision or order. If a rehearing before the agency is timely requested, then the claim of appeal must be filed within 60 days after delivery or mailing of the notice

of the agency's decision or order on rehearing, as provided in the statute or constitutional provision authorizing appellate review.

(2) *Manner of Filing.*

(a) Claim of Appeal - Form. The claim of appeal shall conform with the requirements of MCR 7.104(C)(1), except that:

(i) the party aggrieved by the agency decision is the appellant and is listed first in the caption; and

(ii) the party seeking to sustain the agency's decision is the appellee; or

(iii) if there is no appellee, then the caption may read "In re [*name of appellant or other identification of the subject of the appeal*]," followed by the designation of the appellant. Except where otherwise provided by law, the agency or another party to the case may become an appellee by filing an appearance within 21 days after service of the claim of appeal.

(b) Claim of Appeal — Content. The claim of appeal must:

(i) state "[*Name of appellant*] claims an appeal from the decision entered on [*date*] by [*name of the agency*]," and

(ii) include concise statements of the following:

[A] the statute, rule, or other authority enabling the agency to conduct the proceedings;

[B] the statute or constitutional provision authorizing appellate review of the agency's decision or order in the circuit court; and

[C] the facts on which venue is based under MCL 24.303(1).

(c) Signature. The claim of appeal must be signed as stated in MCR 7.104(C)(3).

(d) Other Documents. In addition to the claim of appeal, the appellant shall also comply with MCR 7.104(D).

(e) Filing Requirements in the Agency. The appellant must comply with MCR 7.104(E).

(f) Service. In addition to the service requirements found in MCR 7.104(D)(7), the appellant must also serve the Attorney General.

(3) *Appearance.* The appellee shall file an appearance within 14 days that complies with MCR 7.104(F).

(C) Application for Interlocutory Appeal. A preliminary procedural or intermediate agency action or ruling is not immediately reviewable, except that a court may grant interlocutory appeal of a preliminary, procedural, or intermediate decision by an agency only on a showing that review of the final decision would not be an adequate remedy.

(1) *Time Requirements*. An application for interlocutory appeal must be filed with the court within 14 days of the decision.

(2) *Manner of Filing.* In addition to the requirements of MCR 7.105(B), the application must:

(a) include a jurisdictional statement citing:

(i) the statute, rule, or other authority enabling the agency to conduct proceedings, and

(ii) the statute or constitutional provision authorizing appellate review of the agency's decision or order in the circuit court;

(b) include a statement of venue with supporting facts;

(c) set forth why review of the agency's final decision will not be an adequate remedy; and

(d) state the relief sought.

(3) *Answer.* An appellee may file an answer to an application for interlocutory appeal under MCR 7.105(C). The circuit court may require the filing of an answer.

(4) *If Application is Granted.* If the application is granted, the appeal proceeds in the same manner as an appeal of right.

(D) Late Appeal. The appellant may file an application for late appeal if permitted by statute.

(1) *Time Requirements.* Unless inconsistent with the statute authorizing the appeal, the application must be filed within six months after entry of the agency decision or order.

(2) *Manner of Filing.* In addition to the requirements of MCR 7.105(B), the application must include:

(a) a statement citing the statute authorizing a late appeal;

(b) a statement of facts explaining the delay; and

(c) include statements of jurisdiction and venue complying with subrules (C)(2)(b) and (c).

(3) *Answer.* An appellee may file an answer to the application for late appeal under MCR 7.105(C). The circuit court may require the filing of an answer.

(4) *If Application is Granted.* If the application is granted, the appeal proceeds in the same manner as an appeal of right.

(E) Stay of Enforcement. The filing of an appeal does not stay enforcement of the agency's decision or order.

(1) A party may file a motion seeking a stay in the circuit court.

(2) For purposes of this subrule, the agency is entitled to notice even if it has not filed an appearance in the appeal.

(3) The court may order a stay on appropriate terms and conditions if it finds that:

(a) the moving party will suffer irreparable injury if a stay is not granted;

(b) the moving party made a strong showing that it is likely to prevail on the merits;

(c) the public interest will not be harmed if a stay is granted; and

(d) the harm to the moving party in the absence of a stay outweighs the harm to the other parties to the proceedings if a stay is granted.

(4) If the motion for stay is granted, the circuit court may set appropriate terms and conditions for the posting of a bond:

(a) in the amount required by any applicable statute authorizing the appeal, or

(b) in an amount and with sureties that the circuit court deems adequate to protect the public and the parties when there are no statutory instructions.

(5) *Temporary Stay.*

(a) The circuit court may grant a temporary stay of enforcement without written notice only if:

(i) it clearly appears from facts alleged in the motion that immediate and irreparable injury will result if a stay is not entered before a hearing, and

(ii) the moving party certifies to the court in writing that it made reasonable efforts to contact the other parties and agency, but was unsuccessful.

(b) A temporary stay may be granted by the court until a hearing can be held. A hearing on a motion to dissolve a temporary stay will be heard on 24 hours' notice, or less on order of the court for good cause shown, and takes precedence over all matters except previously filed matters of the same character.

(F) Stipulations. The parties may stipulate regarding any issue on appeal or any part of the record on appeal if the stipulation is embodied in an order entered by the court.

(G) Additional Evidence. A motion to present proofs of alleged irregularity in procedure before the agency, or to allow the taking of additional evidence before the agency, is timely only if it is filed with or included with the claim of appeal or application. The appellant shall promptly notice the motion for decision. If the court orders the taking of additional evidence, the time for filing briefs is stayed until the taking of the evidence is completed.

(H) Decision. The court may affirm, reverse, remand, or modify the decision of the agency and may grant further relief as appropriate based on the record, findings, and conclusions.

(1) If the agency's decision or order is not supported by competent, material, and substantial evidence on the whole record, the court shall specifically identify the finding or findings that lack support.

(2) If the agency's decision or order violates the constitution or a statute, is affected by a material error of law, or is affected by an unlawful procedure resulting in material prejudice to a party, the court shall specifically identify the agency's conclusions of law that are being reversed.

Committee Comment

MCR 7.119 is based on the Administrative Procedures Act (APA), MCL 24.201 *et seq.*, particularly MCL 24.301, MCL 24.302, and MCL 24.306. MCR 7.119 substantially changes the procedures in former MCR 7.105.

Not every agency as defined in MCR 7.102(1) is subject to the APA. An agency is subject to the APA if:

1. the agency meets the definition of an agency in MCL 24.203(2);

2. a statute or constitutional provision subjects the agency to the APA; or

3. an agency with rulemaking power adopts a rule subjecting itself to the APA.

The rule's most fundamental change is that judicial review under the APA is now initiated by a claim of appeal or an application for leave to appeal rather than a petition for review. The new rule promotes uniformity in all circuit court appeals. It is consistent with MCL 24.302. As a

result, the designation of the parties as "petitioner" and "respondent" under former MCR 7.105 has been changed to "appellant" and "appellee."

Subrule (B) includes the 60-day time requirement from MCL 24.304(1) and identifies the form, content, and other requirements of a claim of appeal.

The general briefing rules in MCR 7.111 apply to appeals governed by the APA. MCR 7.111(A) decreases the time to file briefs under former MCR 7.105(K)(1) from 28 to 21 days. Stipulations for extension of time must now be accompanied by an order, and the time for an extension has been decreased from 28 days to 14 days. Reply briefs have been eliminated.

RULE 7.120. LICENSING APPEALS UNDER THE MICHIGAN VEHICLE CODE.

(A) Scope. This rule governs appeals to the circuit court under the Michigan Vehicle Code, MCL 257.1 *et seq*., from a final determination by the Secretary of State pertaining to an operator's license, a chauffeur's license, a vehicle group designation, or an indorsement. Unless this rule provides otherwise, MCR 7.101 through 7.115 apply.

(B) Appeal of Right.

(1) *Time Requirements*. The time for filing an appeal of right is governed by MCL 257.323(1).

(2) *Manner of Filing*.

(a) Claim of Appeal — Form. The claim of appeal shall conform to the requirements of MCR 7.104(C)(1), except that the party aggrieved by the Secretary of State's determination is the appellant.

(b) Claim of Appeal — Content. The claim of appeal must:

(i) state the appellant's full name, current address, birth date, and driver's license number;

(ii) state "[*name of appellant*] claims an appeal from the decision on [*date*] by the Secretary of State;" and

(iii) include concise statements of the following:

[A] the nature of any determination by the Secretary of State;

[B] the statute authorizing the Secretary of State's determination;

[C] the subsection of MCL 257.323 under which the appeal is taken; and

[D] the facts on which venue is based.

(c) Signature. The claim of appeal must be signed as stated in MCR 7.104(C)(3).

(d) Other Documents. The appellant must attach as exhibits accompanying the claim of appeal:

(i) a copy of the Secretary of State's determination, and

(ii) any affidavits supporting the claim of appeal.

(e) Service. The appellant shall serve the claim of appeal on all parties.

(3) *Appearance*. The appellee shall file an appearance within 14 days that complies with MCR 7.104(F).

(C) Application for Late Appeal.

(1) *Time Requirements*. An application for late appeal must be filed within the time set forth in MCL 257.323(1).

(2) *Manner of Filing*. In addition to the requirements of MCR 7.105(B), the application must comply with MCR 7.120(B)(2)(b) and must include a statement showing good cause for the delay.

(3) *Answer*. An appellee may file an answer to the application for late appeal under MCR 7.105(C). The circuit court may require the filing of an answer.

(4) *If Application is Granted*. If the application is granted, the appeal proceeds in the same manner as an appeal of right.

(D) Stay of Enforcement. The filing of a claim of appeal or an application for late appeal does not stay enforcement of the Secretary of State's decision or order. The appellant may file for a stay of enforcement under MCL 257.323a. The appellant shall serve a copy of the order granting or denying the stay on the Secretary of State. The Secretary of State may file a motion challenging the stay.

(E) Stipulations. The parties may stipulate regarding any issue on appeal or any part of the record on appeal if the stipulation is embodied in an order entered by the court.

(F) Proceedings Under MCL 257.323(3).

(1) *Briefs*.The court may require briefs and may enter an order setting a briefing schedule. Unless otherwise ordered, briefs must comply with MCR 7.111.

(2) *Hearing*. The court shall schedule a hearing under MCL 257.323(2). During the hearing, the court may take testimony and examine all the facts and circumstances relating to the denial, suspension, or restriction of the person's license under MCL 257.303(1)(d), MCL 257.320, MCL 257.904(10), MCL 257.904(11), MCL 257.310d, or for a first violation of MCL 257.625f.

(3) *Decision*. For denials, suspensions, or restrictions of the person's license under MCL 257.303(1)(d), MCL 257.320, MCL 257.904(10), MCL 257.904(11), MCL 257.310d, or for a first violation of MCL 257.625f, the circuit court may affirm, modify, or set aside the restriction, suspension, or denial. The circuit court, however, shall not order the Secretary of State to issue a restricted or unrestricted chauffeur's license that would permit the person to drive a commercial motor vehicle that hauls hazardous materials.

(4) *Appellant's Responsibility After Decision*. Pursuant to MCL 257.323(3), the appellant shall file a certified copy of the circuit court's order with the Secretary of State's office in Lansing within 7 days after entry of the order for denials, suspensions, or restrictions of the person's license arising under MCL 257.303(1)(d), MCL 257.320, MCL 257.904(10), MCL 257.904(11), MCL 257.310d, or for a first violation of MCL 257.625f.

(G) Proceedings Under MCL 257.323(4).

(1) *Briefs*. Unless otherwise ordered, the parties must file briefs complying with MCR 7.111.

(2) *Oral Argument*. If requested in accord with MCR 7.111(C), the court shall schedule oral argument unless it concludes that the briefs and

record adequately present the facts and legal arguments, and the court's deliberation would not be significantly aided by oral argument.

(3) *Decision*. The court shall confine its consideration to a review of the record prepared under MCL 257.322, MCL 257.625f, or MCL 257.204a for statutory legal issues and shall not grant restricted driving privileges. The court shall set aside the Secretary of State's determination only if the appellant's substantial rights have been prejudiced because the determination is:

(a) in violation of the Constitution of the United States, the Michigan constitution, or a statute;

(b) in excess of the Secretary of State's statutory authority or jurisdiction;

(c) made upon unlawful procedure that results in material prejudice to the appellant;

(d) not supported by competent, material, and substantial evidence on the whole record;

(e) arbitrary, capricious, or clearly an abuse or unwarranted exercise of discretion; or

(f) affected by other substantial and material error of law.

Committee Comment

Former subchapter 7.100 did not address licensing appeals under the motor vehicle code. This new rule establishes uniform procedures and practices for these appeals.

Consequently, even though the Code refers to a "petition," MCR 7.120 uses the terms "claim of appeal" and "application for late appeal." The parties are referred to individually as "appellant" or "appellee." Under MCR 7.120(B), a claim of appeal must include the information required in MCL 257.323 and concise statements of the nature of proceedings before the Secretary of State, jurisdiction, and venue along with citations to pertinent statutes.

MCR 7.120(C) governs applications for late appeals and comports with MCL 257.323(1).

MCR 7.120(D) addresses stays of enforcement and comports with MCL 257.323a.

Consistent with other rules in this subchapter, MCR 7.120(E) permits stipulations.

MCR 7.120(F) governs proceedings under MCL 257.323(3).

MCR 7.120(G) governs proceedings under MCL 257.323(4).

There were substantial amendments to the Michigan Vehicle Code in 1992 and 1999. Driver's license appeals are governed by the law in effect at the time the offense was committed. MCL 257.320e. This rule governs procedure in all Michigan Vehicle Code appeals unless the law in effect at the time of the offense provided otherwise.

RULE 7.121. APPEALS FROM CONCEALED WEAPON LICENSING BOARDS.

(A) Scope. This rule governs appeals to the circuit court from a final determination of a concealed weapon licensing board refusing to restore rights under MCL 28.424 or denying, failing to issue, revoking, or

suspending a license to carry a concealed pistol. Unless this rule provides otherwise, MCR 7.101 through MCR 7.115 apply.

(B) Appeal of Right.

(1) *Time Requirements.* Time requirements are governed by MCR 7.104(A).

(2) *Manner of Filing.*

(a) Claim of Appeal — Form. The claim of appeal shall conform with the requirements of MCR 7.104(C)(1), except that:

(i) the license applicant is the appellant, and

(ii) the board is the appellee.

(b) Claim of Appeal — Content. The claim of appeal must:

(i) state:

[A] "[*Name of appellant*] claims an appeal from the decision on [*date*] by [*name of the county*] Concealed Weapon Licensing Board," or

[B] "[*Name of appellant*] claims an appeal from the failure of the [*name of the county*] Concealed Weapon Licensing Board to issue a decision on the application for a license by [*date*]," and

(ii) include concise statements of the following:

[A] the nature of the proceedings before the board, including citation to the statute authorizing the board's decision;

[B] citation to the statute or Const 1963, art 6 § 28 authorizing appellate review;

[C] the facts on which venue is based.

(c) Signature. The claim of appeal must be signed as stated in MCR 7.104(C)(3).

(d) Other Documents. In addition to the documents required under MCR 7.104(D), the claim of appeal shall include a copy of the board's decision and any materials accompanying the board's decision. If the appeal is from the board's failure to issue a timely decision, the claim of appeal shall state the date on which the application was filed and shall include a statement addressing whether the application complied with MCL 28.425b(1), (5), and (9).

(e) Service. The appellant shall serve the claim of appeal on all parties.

(f) Request for Certified Record. Within the time for filing a claim of appeal, the appellant shall send a written request to the board to send a certified copy of the record to the circuit court.

(3) *Appearance*. The appellee shall file an appearance within 14 days that complies with MCR 7.104(F).

(C) Hearing De Novo from Denial of License for Grounds Specified in MCL 28.425b(7)(n).

(1) *Briefs*. The court may require briefs and may enter an order setting a briefing schedule. Unless otherwise ordered, briefs must comply with MCR 7.111.

(2) *Hearing*. The court shall hold a hearing de novo that comports with MCL 28.425d(1). Any determination that the appellant is unfit under MCL 28.425b(7)(n) shall be based on clear and convincing evidence.

(3) *Decision*. The circuit court shall enter an order either affirming the board's denial or finding the applicant qualified under MCL 28.425b(7)(n) and ordering the board to issue a license.

(D) Procedure in All Other Appeals.

(1) *Briefs*. Unless otherwise ordered, the parties must file briefs complying with MCR 7.111.

(2) *Oral Argument*. If requested in accord with MCR 7.111(C), the court shall hold oral argument within 14 days after the appellee's brief was filed or due. The court may dispense with oral argument under MCR 7.115(A).

(3) *Decision*. The court shall confine its consideration to a review of the record. If the court determines that the denial of a license was clearly erroneous, the court shall order the board to issue a license as required by the act. If the court determines that the board erroneously refused to restore rights pursuant to MCL 28.424(3), the court shall order the board to restore the applicant's rights. If the court determines that the board erroneously revoked or suspended a license, the court shall order the board to reinstate the license. If the court determines that the board failed to issue a license pursuant to MCL 28.425b(13), the court shall order the board to act on the application within 14 days. The court shall retain jurisdiction to review the board's decision.

(E) Notice of Decision. The circuit court shall serve the parties with a copy of its order resolving the appeal.

(F) Costs and Attorney Fees.

(1) *Arbitrary and Capricious Board Decision*. If the court determines that the decision of the board to deny issuance of a license to an applicant was arbitrary and capricious, the court shall order the state to pay 1/3 and the county in which the concealed weapon licensing board is located to pay 2/3 of the actual costs and actual attorney fees of the applicant in appealing the denial.

(2) *Frivolous Appeal*. If the court determines that an applicant's appeal was frivolous, the court shall order the applicant to pay the actual costs and actual attorney fees of the board in responding to the appeal.

Committee Comment

MCR 7.121 is new and is based on the Concealed Weapon Act, MCL 28.421 *et seq*.

MCR 7.121(B) sets forth the procedure for filing a claim of appeal from a final order of a concealed weapon licensing board.

Subrule (C) governs the procedure for appeals from denial of a license for grounds specified in MCL 425b(7)(n). These appeals are by a hearing de novo.

Subrule (D) governs the procedure in all other appeals.

Subrule (E) incorporates the costs and attorney fees provisions of MCL 28.424d(3).

RULE 7.122. APPEALS FROM ZONING ORDINANCE DETERMINATIONS.

(A) Scope.

(1) This rule governs appeals to the circuit court from a determination under a zoning ordinance by any officer, agency, board, commission, or zoning board of appeals, and by any legislative body of a city, village, township or county authorized to enact zoning ordinances. Unless this rule provides otherwise, MCR 7.101 through MCR 7.115 apply. This rule does not apply to legislative decisions of a city, village, township, or county, such as the adoption of or amendment to a zoning ordinance.

(2) This rule does not restrict the right of a party to bring a complaint for relief against a city, village, township or county relating to a determination under a zoning ordinance. An appeal under this section may be joined with a complaint for declaratory relief, injunctive relief, equitable relief, money damages, or other available relief.

(3) An appeal under this section is an appeal of right.

(B) Time Requirements. An appeal under this rule must be filed within the time prescribed by the statute applicable to the appeal. If no time is specified in the applicable statute, the appeal must be filed within 30 days after the certification of the minutes of the board or commission from which the appeal is taken.

(C) Manner of Filing.

(1) *Claim of Appeal — Form*. The claim of appeal shall conform to the requirements of MCR 7.104(C)(1), except that:

(a) the party aggrieved by the determination shall be designated the appellant; and

(b) the city, village, township or county under whose ordinance the determination was made shall be designated the "appellee," except that when a city, village, township, county, or an officer or entity authorized to appeal on its behalf, appeals a determination as an aggrieved party, then the appellee shall be designated as the board, commission, or other entity that made the determination.

(2) *Claim of Appeal — Content*. The claim of appeal must:

(a) state "[*Name of appellant*] claims an appeal from the decision on [*date*] by [*name of the officer or entity*]; and

(b) include concise statements of the following:

(i) the nature of the determination by the officer or entity;

(ii) the statute authorizing the officer or entity's proceedings and determination;

(iii) the statute or constitutional provision under which the appeal is taken;

(iv) the facts on which venue is based;

(v) the grounds on which relief is sought, stated in as many separate paragraphs as there are separate grounds alleged; and

(vi) the relief sought.

(3) *Signature*. The claim of appeal must be signed as stated in MCR 7.104(C)(3).

(4) *Other Documents*. The appellant must attach to the claim of appeal a copy of the order and/or minutes of the officer or entity from which the appeal is taken.

(5) *Service*. Upon filing the claim of appeal, the appellant, shall serve a copy of the claim of appeal and all attachments upon the clerk of the

city, village, township, or county. Service shall be in the manner provided in MCR 2.107, and appellant shall promptly file a proof of service with the court.

(D) Bond. An appellant shall not be required to post a bond unless so ordered by the court.

(E) Record on Appeal; Transmittal of the Record.

(1) The record includes the original or a copy certified by the city, village, township, or county clerk of the application, all documents and material submitted by any person or entity with respect to the application, the minutes of all proceedings, and any determination of the officer or entity.

(2) Within 28 days after service of the claim of appeal, the clerk of the city, village, township, or county from which the appeal is taken must file the record with the court.

(3) If the record is not available within 28 days after service of the claim of appeal, the clerk of the city, village, township or county from which the appeal is taken shall notify the court of the estimated date of transmittal of the record.

(4) If the clerk of the city, village, township or county postpones transmittal of the record or transmittal is otherwise delayed, the court may on motion or its own initiative exercise superintending control over the clerk to prevent delay.

(5) The clerk of the city, village, township or county from which the appeal is taken must notify the appellant and appellee of the transmittal of the record to the court.

(6) Motions regarding the contents of the record or to prepare a transcript of proceedings before the officer or entity must be filed within 21 days after transmission of the record to the court.

(F) Briefs. Unless otherwise ordered, the parties must file briefs complying with MCR 7.211.

(G) Decision.

(1) *Appeals under MCL 125.3606.*

(a) In an appeal from a city, village, township or county board of zoning appeals, the court shall apply the standard of review under MCL 125.3606(1).

(b) If the court finds the record inadequate to review the decision or finds that additional material evidence exists that with good reason was not presented, the court shall order further zoning board of appeals proceedings on conditions that the court considers proper. The zoning board of appeals may modify the findings and decision as a result of the new proceedings or may affirm the original decision. The supplementary record and decision shall be filed with the court.

(c) The court may affirm, reverse, or modify the decision of the board of appeals.

(2) *Other appeals.* In an appeal from a final determination under a zoning ordinance where no right of appeal to a zoning board of appeals exists, the court shall determine whether the decision was authorized by law and the findings were supported by competent, material, and substantial evidence on the whole record.

(H) Notice of Decision. The court shall serve the parties with a copy of its order resolving the appeal.

Committee Comment

This Rule is new and is based upon the Michigan Zoning Enabling Act, MCL 125.3101 *et seq*. The rule is intended to clarify the procedures for taking an appeal from a determination under a zoning ordinance.

Subrule (C)(1) sets forth the designation of the parties to the appeal.

Subrules (C)(2) and (4) identify the contents of the claim of appeal and what must be attached.

Subrule (E) specifies the contents of the record and the party responsible for transmitting the record to the circuit court.

Subrule (G) sets forth the different standards of review for appeals from city, village, township, and county zoning boards of appeal and appeals from final determinations under a zoning ordinance where no right of appeal to a zoning board of appeals exists.

RULE 7.123. APPEALS FROM AGENCIES NOT GOVERNED BY ANOTHER RULE.

(A) Scope. This rule governs an appeal to the circuit court from an agency decision that is not governed by another rule in this subchapter. Unless this rule provides otherwise, MCR 7.101 through 7.115 apply.

(B) Appeal of Right.

(1) *Time Requirements*. Time requirements are governed by MCR 7.104(A).

(2) *Manner of Filing*.

(a) Claim of Appeal — Form. The claim of appeal shall conform to the requirements of MCR 7.119(B)(2)(a).

(b) Claim of Appeal — Content. The claim of appeal must:

(i) state "[*Name of appellant*] claims an appeal from the decision on [*date*] by [*name of the agency*]," and

(ii) include concise statements of the following:

[A] the nature of the proceedings before the agency;

[B] citation to the statute, rule, or other authority enabling the agency to conduct the proceedings;

[C] citation to the statute or constitutional provision authorizing appellate review of the agency's decision or order in the circuit court; and

[D] the facts on which venue is based.

(c) Signature. The claim of appeal must be signed as stated in MCR 7.104(C)(3).

(d) Other Documents. The appellant must also comply with MCR 7.104(D).

(e) Filing Requirements in the Agency. The appellant must comply with MCR 7.104(E).

(f) Service. The appellant must comply with MCR 7.104(D)(7).

(3) *Appearance*. The appellee shall file an appearance within 14 days that complies with MCR 7.104(F).

(C) Application for Leave to Appeal or for Interlocutory Appeal.

(1) *Time Requirements.* An application must comply with MCR 7.105(A).

(2) *Manner of Filing.* An application must comply with MCR 7.105 and MCR 7.112(B)(2)(b)(ii). An application for interlocutory appeal shall also state why review of the agency's final decision will not be an adequate remedy.

(3) *Answer.* An appellee may file an answer to an application that complies with MCR 7.105(C). The circuit court may require the filing of an answer.

(4) *If Application is Granted.* If the application is granted, the appeal proceeds as an appeal of right.

(D) Late Appeal. The appellant may file an application for late appeal if permitted by statute.

(1) *Time Requirements.* Unless inconsistent with the statute authorizing late appeal, the application must be filed within six months after entry of the agency decision or order.

(2) *Manner of Filing.* In addition to the requirements of MCR 7.105(B), the application must include:

(a) a statement citing the statute authorizing a late appeal;

(b) a statement of facts explaining the delay; and

(c) statements of jurisdiction and venue complying with MCR 7.120(B)(2)(b)(ii).

(3) *Answer.* An appellee may file an answer to the application for late appeal under MCR 7.105(C). The circuit court may require the filing of an answer.

(4) *If Application is Granted.* If the application is granted, the appeal proceeds in the same manner as an appeal of right.

(E) Stay of Enforcement. The filing of an appeal or an application for leave to appeal does not stay enforcement of the agency's decision or order.

(1) A party may file a motion seeking a stay in the circuit court.

(2) For purposes of this subrule, the agency is entitled to notice even if it has not filed an appearance in the appeal.

(3) The court may order a stay on appropriate terms and conditions if it finds that:

(a) the moving party will suffer irreparable injury if a stay is not granted;

(b) the moving party made a strong showing that it is likely to prevail on the merits;

(c) the public interest will not be harmed if a stay is granted; and

(d) the harm to the moving party in the absence of a stay outweighs the harm to the other parties to the proceedings if a stay is granted.

(4) If the motion for stay is granted, the circuit court may set appropriate terms and conditions for the posting of a bond:

(a) in the amount required by any applicable statute authorizing the appeal, or

(b) in an amount and with sureties that the circuit court deems adequate to protect the public and the parties when there are no statutory instructions.

(5)*Temporary Stay.*

(a) The circuit court may grant a temporary stay of enforcement without written notice only if:

(i) it clearly appears from facts alleged in the motion that immediate and irreparable injury will result if a stay is not entered before a hearing, and

(ii) the moving party certifies to the court in writing that it made reasonable efforts to contact the other parties and agency, but was unsuccessful.

(b) A temporary stay may be granted by the court until a hearing can be held. A hearing on a motion to dissolve a temporary stay will be heard on 24 hours' notice, or less on order of the court for good cause shown, and takes precedence over all matters except previously filed matters of the same character.

(F) Stipulations. The parties may stipulate regarding any issue on appeal or any part of the record on appeal if the stipulation is embodied in an order entered by the court.

(G) Decision. The court may affirm, reverse, remand, or modify the decision of the agency and may grant further relief as appropriate based on the record, findings, and conclusions.

(1) If the agency's decision or order is not supported by competent, material, and substantial evidence on the whole record, the court shall specifically identify the finding or findings that lack support.

(2) If the agency's decision or order violates the constitution or a statute, is affected by a material error of law, or is affected by an unlawful procedure resulting in material prejudice to a party, the court shall specifically identify the agency's conclusions of law that are being reversed.

Committee Comment

MCR 7.123 broadens former MCR 7.104(A). In addition to appeals under MCL 600.631, this rule applies to all agency appeals not governed by the APA or another specific court rule. It includes appeals under Const 1963, art 6, § 28 or under statutes governing state and local boards, commissions, agencies, and councils.

MCR 7.123(B) adopts the form of a claim of appeal found in MCR 7.119(B)(2)(a). It requires concise statements of the nature of the proceedings before the agency, jurisdiction, and venue. The designation of parties as "petitioner" and "respondent" under the former rules has been changed to "appellant" and "appellee."

MCR 7.123(C) and (D) adopt the form of applications for leave found in MCR 7.105. These subrules require the same concise statements of proceedings, jurisdiction, and venue.

MCR 7.123(E), (F), and (G) add provisions regarding stay of enforcement, stipulations, and standard of review.

Staff Comment: This proposal was submitted to the Court in May 2010 by the Circuit Court Appellate Rules Revision Committee. The committee was comprised of appellate practice attorneys and judges (including circuit, district, and Court of Appeals judges). It is published for comment as submitted.

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

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be sent to the Supreme Court Clerk in writing or electronically by October 1, 2011, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2010-19. Your comments and the comments of others will be posted at www.courts.mi.gov/supremecourt/resources/administrative/index.htm.

Order Entered July 7, 2011:

PROPOSED ADOPTION OF MCR 6.202.

On order of the Court, this is to advise that the Court is considering the proposed adoption of new Rule 6.202 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at www.courts.michigan.gov/supremecourt/resources/administrative/ph.htm.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

Please note that a draft certificate, referred to in proposed subrule (B)(1), is published in conjunction with publication of this proposed rule.

RULE 6.202. DISCLOSURE OF FORENSIC TEST RESULTS; ADMISSIBILITY OF REPORT.

(A) Mandatory Disclosure. A copy of a report of the methods and findings of any examination conducted by an employee of the state police crime laboratory or of a laboratory with which the state police crime laboratory has a contract for the provision of laboratory or scientific examination services or analysis shall be served by the prosecuting attorney on the defendant's attorney, or on the defendant if the defendant is not represented by an attorney, at least 28 days before trial. Proof of service of the report on the defendant's attorney, or the defendant if the defendant is not represented by an attorney, shall be served on the court.

(B) Notice and Demand.

(1) Notice. If the prosecuting attorney intends to offer the report as evidence against the defendant at trial, the prosecuting attorney shall inform the defendant's attorney, or the defendant if the defendant is not represented by an attorney, of that fact in writing when the report is

served. The analyst who conducts the analysis on the forensic sample and signs the report shall complete a certificate on which the analyst shall state (i) that he or she is qualified by education, training, and experience to perform the analysis, (ii) the name and location of the laboratory where the analysis was performed, (iii) that performing the analysis is part of his or her regular duties, and (iv) that the tests were performed under industry-approved procedures or standards and the report accurately reflects the analyst's findings and opinions regarding the results of those tests or analysis. Except as provided in subrule (B)(2), a report so certified is admissible in evidence to the same effect as if the person who performed the analysis or examination had personally testified.

(2) Demand. Upon receipt of a copy of the laboratory report and certificate, the defendant's attorney, or the defendant if the defendant is not represented by an attorney, shall file a written objection to the use of the laboratory report and certificate against the defendant within 14 days of receipt of the notice. The written objection shall be filed with the court in which the matter is pending, and shall be served on the prosecuting attorney. If written objection is filed, the court shall determine the admissibility of the evidence by use of the appropriate rules of evidence. If the defendant's attorney, or the defendant if the defendant is not represented by an attorney, does not file a written objection with the court to the use of the laboratory report and certificate within the time allowed by this section, then the report and certificate are admissible in evidence as provided in subrule (B)(1).

Staff Comment: The intent of this proposed new rule is to create a "notice and demand" rule that would allow forensic reports to be admitted into evidence without the forensic analyst's presence if the defendant does not object. The proposed rule is based on favorable discussion by the United States Supreme Court in *Melendez-Diaz v Massachusetts*, 557 US 305 (2009). Although the Supreme Court struck down the Massachusetts procedure for admitting forensic evidence without attendance by the forensic analyst, it noted that some states have adopted "notice and demand" provisions that create a procedure by which forensic reports may be admitted into evidence if the defendant does not object to the report's entry.

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

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be sent to the Supreme Court Clerk in writing or electronically by November 1, 2011, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2010-14. Your comments and the comments of others will be posted at www.courts.mi.gov/supremecourt/resources/administrative/index.htm.

Order Entered July 19, 2011:

PROPOSED AMENDMENT OF RULE 7.3 OF THE MICHIGAN RULES OF PROFESSIONAL CONDUCT.

On order of the Court, and in light of concern expressed regarding the amendments adopted in this file by order of the Court dated May 19,

amendments adopted in this file by order of the Court dated May 19, 2011,* the order that entered on that date is rescinded, effective immediately, and the proposed language below is published for comment.

Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at www.michigan.gov/supremecourt/resources/administrative/ph.htm.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[Additions are indicated by underlining and deletions are indicated by strikeover.]

RULE 7.3. DIRECT CONTACT WITH PROSPECTIVE CLIENTS.

(a) Except as otherwise allowed under this rule, a~~A~~ lawyer shall not solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship when a significant motive for doing so is the lawyer's pecuniary gain.

(b) Prohibited methods of communication. For purposes of this rule, ~~T~~the term "solicit" includes contact that is directed to a specific recipient:

(1) in person, or

(2) by telephone or telegraph, or

(3) by letter or other writing, or

(4) by other communication, ~~directed to a specific recipient, but does not include~~

(c) Allowable forms of communication. With the exception of those circumstances absolutely prohibited in subsection (d), for purposes of this rule, the term "solicit" does not include:

(1) letters addressed or advertising circulars distributed generally to persons who are not known to need legal services of the kind provided by the lawyer in a particular matter, but who are so situated that they might in general find such services useful, ~~nor does the term solicit include "sending~~ or

(2) "[t]ruthful and nondeceptive letters to potential clients known to face particular legal problems," as elucidated in *Shapero v Kentucky Bar Ass'n*, 486 US 466 (1988). If the written solicitation concerns an action, or potential claim, that pertains to the person to whom a communication is directed, or a relative of such person, the communication shall not be transmitted less than 30 days after the injury, death, or accident occurred that has given rise to the action or potential claim.

(3) Every written communication from a lawyer described in subsections (1) and (2) shall include the words "Advertising Material" on the outside envelope, if any, and at the beginning and ending of any written communication, unless the lawyer has a family or prior professional

* 489 Mich clxxxix—REPORTER.

relationship with the recipient. If a written communication is in the form of a self-mailing brochure, pamphlet, or postcard, the words "Advertising Material" shall appear on the address panel of the brochure, pamphlet, or postcard. The requirement to include the words "Advertising Material" shall apply regardless whether the written communication is transmitted by regular United States mail, private carrier, electronically, or in any other manner.

~~(b)~~(d) A lawyer shall not solicit professional employment from a prospective client by written or recorded communication or by in-person or telephone contact even when not otherwise prohibited by paragraph (a), if:

(1) the prospective client has made known to the lawyer a desire not to be solicited by the lawyer; or

(2) the solicitation involves coercion, duress or harassment.

Staff Comment: Under the proposed amendments, MRPC 7.3 would be reformatted and would describe the general prohibition regarding a lawyer's solicitation, and also would describe the types of communication that are allowed, including a lawyer's general advertising, and a lawyer's targeted communications to potential clients who are facing legal problems (as protected by *Shapero v Kentucky Bar Ass'n*, 486 US 466 [1988]). The proposed amendments of MRPC 7.3 would require that inclusion of the designation "Advertising Material" on general advertising and targeted communications applies only to written materials, including e-mailed communications, but not to television or radio advertisements. The amendment also requires a 30-day period to pass before an attorney may contact a potential client after a death, injury, or accident.

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

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be sent to the Supreme Court Clerk in writing or electronically by November 1, 2011, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2002-24. Your comments and the comments of others will be posted at www.courts.mi.gov/supremecourt/resources/administrative/index.htm.

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CONSTITUTIONAL LAW

CRIMINAL LAW

1. The Confrontation Clause of the Sixth Amendment guarantees the accused the right to be confronted with the witnesses against him; when the prosecutor elects to introduce a diagnosis of a nontestifying psychiatrist and use that diagnosis as substantive evidence against the accused, the psychiatrist becomes a witness against the accused whom the accused has the right to confront; a psychiatric diagnosis made under circumstances that would lead an objective witness reasonably to believe that the diagnosis would be available for use at a later trial falls within the core class of testimonial statements that are subject to the Confrontation Clause. *People v Fackelman*, 489 Mich 515.

DISTRICT JUDGES

2. A person appointed by the Governor to fill a judicial vacancy is entitled to hold that office for two separate terms when the second term begins before 12 noon of the first day of January next succeeding the first general election held after the vacancy occurs (Const 1963, art 6, § 23). *Attorney General v Clarke*, 489 Mich 61.

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ACCOSTING A MINOR FOR IMMORAL PURPOSES

1. A defendant may be convicted of violating MCL 750.145a under two alternative theories; the defendant is guilty of violating the statute if he or she (1) accosted, enticed, or solicited (2) a child or an individual the defendant believed to be a child (3) with the intent to induce or force that child to commit or submit to (4) any of various proscribed immoral acts; the defendant is also guilty of violating the statute if he or she (1) encouraged (2) a child or an individual the defendant believed to be a child (3) to commit (4) a proscribed act; the second alternative requires a *mens rea* consistent with a general criminal intent. *People v Kowalski*, 489 Mich 488.

JURY INSTRUCTIONS

2. The improper omission of an element of a crime from a jury instruction does not affect the defendant's substantial rights for purposes of a plain-error analysis if the evidence related to the missing element was overwhelming and uncontested. *People v Kowalski*, 489 Mich 488.

SEX OFFENDERS REGISTRATION ACT

3. The Sex Offenders Registration Act (SORA) requires the following with regard to registration of defendants convicted of listed offenses after October 1, 1995: (1) the defendant must register before sentencing, (2) the probation officer or the family division of the circuit court must give the defendant the registration form after the defendant is convicted and must explain the defendant's duties under SORA, (3) the court must not impose sentence until it determines that the defendant's registration was properly forwarded to the state police, and (4) for a crime that the court determines on the record is

by its nature a sexual offense against an individual less than 18 years of age and therefore is a listed offense under the SORA catchall provision, the court must include that determination in the judgment of sentence (MCL 28.722[e][*xi*], MCL 28.724[5], MCL 28.726, MCL 769.1[13]). *People v Lee*, 489 Mich 289.

4. Homeless sex offenders who are subject to the Sex Offenders Registration Act must comply with its reporting and notification requirements (MCL 28.725, 28.725a). *People v Dowdy*, 489 Mich 373.
5. The Sex Offenders Registration Act defines a residence as the place at which a person habitually sleeps, keeps his or her personal effects, and has a regular place of lodging; this definition contemplates a place, not necessarily a specific street address or even a physical structure (MCL 28.722[g]). *People v Dowdy*, 489 Mich 373.
6. For purposes of the Sex Offenders Registration Act, a domicile is the place where a person has voluntarily fixed his or her abode, not for a mere special or temporary purpose but with a present intention of making it his or her home, either permanently or for an indefinite or unlimited length of time, and to which he or she intends to return after going elsewhere; every homeless sex offender can report sufficient information about where he or she lives to identify a domicile (MCL 28.725[1]). *People v Dowdy*, 489 Mich 373.

SEXUALLY DELINQUENT PERSONS

7. A defendant charged with committing a sexual offense and with being a sexually delinquent person is not necessarily entitled to have separate juries determine his or her guilt on those charges; whether separate jury trials are required under these circumstances is within the discretion of the trial court to determine in accordance with the court rules; the court may empanel separate juries when necessary to protect a defendant's rights or ensure a fair determination of guilt or innocence (MCL 767.61a; MCR 6.120[B]). *People v Breidenbach*, 489 Mich 1.

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DUTY OWED TO THIRD PARTIES—*See*

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MICHIGAN CAMPAIGN FINANCE ACT

1. A public school's administration of a payroll-deduction plan that remits money to a political action committee constitutes both an expenditure and a contribution under the Michigan Campaign Finance Act and is therefore prohibited; reimbursement or advance payment by the political action committee of the expenses associated with administering the plan does not remedy or avoid a violation of the act (MCL 169.204, 169.206, 169.255, 169.257). *Michigan Education Ass'n v Secretary of State (On Rehearing)*, 489 Mich 194.

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INSURANCE
GROUP HEALTH INSURANCE
1. A contractual provision requiring an employer to make minimum contributions to premiums in a small-employer health-benefit plan is not inconsistent with the statutory provision that requires small-employer carriers to renew health-benefit plans at the option of the employer (MCL 500.3711[1]). *Priority Health v Comm'r of the Office of Financial & Ins Services*, 489 Mich 67.
2. The statutory provision that requires small-employer carriers to renew health-benefit plans at the option of the employer does not limit the initial coverage that can be included in a policy; rather, it mandates renewal of the initial policy that was offered to the employer once that

policy is in effect (MCL 500.3711[1]). *Priority Health v Comm'r of the Office of Financial & Ins Services*, 489 Mich 67.

INTEREST ON REFUNDS—*See*

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DEFAULT JUDGMENTS

1. A trial court may grant relief from a judgment if (1) personal jurisdiction over the defendant was necessary and acquired, (2) the defendant in fact had no knowledge of the action pending, (3) the defendant entered an appearance within one year after the final judgment, (4) the defendant shows a reason justifying relief from the judgment, i.e., the defendant shows that it did not have actual notice of the action and had a meritorious defense, and (5) granting the defendant relief from the judgment will ot prejudice innocent third persons (MCR 2.612[B]). *Lawrence M Clarke, Inc v Richco Construction, Inc*, 489 Mich 355.

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LIMITATION OF ACTIONS

ARCHITECTS, PROFESSIONAL ENGINEERS, AND CONTRACTORS

1. The statute of limitations and repose applicable in actions to recover damages for injuries to persons or property brought against licensed architects, professional engineers, and contractors does not apply to actions for breach of contract; an action for breach of contract against a licensed architect, professional engineer, or contractor is governed by the general statute of limitations applicable to contract actions (MCL 600.5807[8]; MCL 600.5839[1]). *Miller-Davis Co v Ahrens Construction, Inc*, 489 Mich 355.

LISTED OFFENSES UNDER SEX OFFENDERS REGISTRATION ACT—*See*

CRIMINAL LAW 1

MANDATORY RENEWAL OF INSURANCE POLICIES—*See*

INSURANCE 2

MICHIGAN CAMPAIGN FINANCE ACT—*See*

ELECTIONS 1

MINIMUM-PREMIUM-CONTRIBUTION LEVELS FOR SMALL EMPLOYERS—*See*

INSURANCE 1

NEGLIGENCE

DUTY OWED TO THIRD PARTIES

1. A contracting party's assumption of contractual obligations does not extinguish or limit separately existing common-law or statutory tort duties owed to noncontracting third parties in the performance of the contract; when analyzing tort actions based on a contract and brought by a noncontracting third party, courts must determine whether, aside from the contract, the defendant was under any legal obligation to act for the benefit of the plaintiff. *Loweke v Ann Arbor Ceiling*, 489 Mich 157.

OFFENSE CATEGORIES—*See*

SENTENCES 2

OFFENSE VARIABLE 10—*See*
SENTENCES 3

OFFENSE VARIABLE 13—*See*
SENTENCES 2

OMISSION OF ELEMENTS FROM JURY INSTRUCTIONS—*See*
CRIMINAL LAW 2

PATTERNS OF FELONIOUS CRIMINAL ACTIVITY—*See*
SENTENCES 2

PAYROLL-DEDUCTION PLANS—*See*
ELECTIONS 1

PERSONAL JURISDICTION—*See*
JUDGMENT 1

PLAIN-ERROR ANALYSIS—*See*
CRIMINAL LAW 2

PLATS—*See*
PROPERTY 1, 2

POLITICAL ACTION COMMITTEES—*See*
ELECTIONS 1

PREDATORY CONDUCT—*See*
SENTENCES 3

PREMIUM CONTRIBUTIONS TO HEALTH INSURANCE BY SMALL EMPLOYERS—*See*
INSURANCE 1

PRIOR RECORD VARIABLES—*See*
SENTENCES 1

PROPERTY
ACTIONS TO QUIET TITLE
1. A plaintiff seeking to quiet title by adverse possession is

not required to file a claim under the Land Division Act if that plaintiff is not expressly requesting to alter a recorded plat (MCL 560.101 *et seq*; MCL 600.5801[4]). *Beach v Lima Twp*, 489 Mich 99.

LAND DIVISION ACT

2. The exclusive means by which to vacate, correct, or revise a dedication in a recorded plat is to file a lawsuit under the Land Division Act (MCL 560.101 *et seq*.). *Beach v Lima Twp*, 489 Mich 99.

PROPERTY-CLASSIFICATION DISPUTES—*See*

TAXATION 1, 2

PSYCHIATRIC DIAGNOSES—*See*

CONSTITUTIONAL LAW 1

PUBLIC BODIES—*See*

ELECTIONS 1

PUBLIC SERVICE COMMISSION'S AUTHORITY TO AWARD INTEREST—*See*

PUBLIC UTILITIES 2

PUBLIC SERVICE COMMISSION'S AUTHORITY TO IMPOSE FINES—*See*

PUBLIC UTILITIES 3

PUBLIC UTILITIES

ELECTRIC SERVICE

1. The first utility to provide electric service to a customer is entitled to serve the entire electric load on the premises of that customer; this right of first entitlement extends to the entire premises initially served and is not extinguished by the destruction of all buildings on the property, the division of the property by public roads, streets, or alleys, or new building and facilities on the premises (Mich Admin Code, R 460.3411). *Great Wolf Lodge of Traverse City, LLC v Public Service Comm*, 489 Mich 27.

2. The Public Service Commission is not statutorily required to impose interest when awarding a refund to a customer; whether to impose interest, and how much, is within the Public Service Commission's discretion

(MCL 460.6[1]). *Great Wolf Lodge of Traverse City, LLC v Public Service Comm*, 489 Mich 27.

3. The Public Service Commission is required to impose a fine on an electric service provider only when that utility willfully or knowingly fails or neglects to obey or comply with a lawful commission order (MCL 460.558). *Great Wolf Lodge of Traverse City, LLC v Public Service Comm*, 489 Mich 27.

QUIET-TITLE ACTIONS—*See*

PROPERTY 1

REASONABLENESS OF WARRANTLESS SEARCHES BY FIREFIGHTERS—*See*

SEARCHES AND SEIZURES 2

REASONS JUSTIFYING RELIEF FROM JUDGMENT—*See*

JUDGMENT 1

REFUNDS—*See*

PUBLIC UTILITIES 2

REGISTRATION PROCEDURES FOR SEX OFFENDERS—*See*

CRIMINAL LAW 1

RELIEF FROM JUDGMENT—*See*

JUDGMENT 1

RENEWAL OF INSURANCE POLICIES—*See*

INSURANCE 2

REPEAT CONTROLLED SUBSTANCE OFFENDERS—*See*

SENTENCES 1

RESIDENCE OF SEX OFFENDERS—*See*

CRIMINAL LAW 5

REVISION OF PLATS—*See*

PROPERTY 1, 2

SCOPE OF ENTRY INTO RESIDENCE—*See*

SEARCHES AND SEIZURES 2

SEARCHES AND SEIZURES

WARRANTLESS SEARCHES

1. The community-caretaking exception to the Fourth Amendment's warrant requirement applies when a firefighter responding to an emergency call involving a threat to life or property enters a private residence to abate what he or she reasonably believes to be an imminent threat of fire inside and not to perform an investigative function and the entry is reasonable (US Const, Am IV; Const 1963, art 1, § 11). *People v Slaughter*, 489 Mich 302.
2. To determine whether firefighters acted reasonably in entering an individual's home pursuant to the community-caretaking exception to the Fourth Amendment's warrant requirement, a reviewing court must first consider whether, acting in good faith, the firefighters possessed specific and articulable facts at the time of entry that led them to the reasonable belief that their actions were necessary to abate an imminent threat of fire inside the private residence, and the court must not engage in a hindsight determination that an entry was unreasonable simply because no imminent hazard actually existed; next, the court should consider the scope of the entry, which must have been limited to the justification therefor and must not have extended beyond what was reasonably necessary to determine whether the imminent threat of fire existed inside the private residence; if the threat did exist, the firefighters could remain in the building for a reasonable time to abate the hazard and to investigate its cause in order to prevent its recurrence; the fact that the firefighters could have abated the fire hazard by less intrusive means does not itself render entry into a private residence unreasonable; rather, the court must consider whether the means and scope of entry were reasonable under the circumstances, not whether they were perfect (US Const, Am IV; Const 1963, art 1, § 11). *People v Slaughter*, 489 Mich 302.

SENTENCES

CONTROLLED SUBSTANCES

1. A sentencing court calculating a defendant's recom-

mended minimum sentence range under the sentencing guidelines when the defendant's minimum and maximum sentences may be enhanced pursuant to MCL 333.7413(2) must score the prior record variables (MCL 777.21[1], [4]). *People v Peltola*, 489 Mich 174.

SENTENCING GUIDELINES

2. The offense categories designated in the sentencing guidelines apply to the scoring of offense variables; a felony that is not designated in the offense category of crimes against a person cannot be used to establish a pattern of felonious activity involving a requisite number of crimes against a person for purposes of scoring offense variable 13 (continuing pattern of criminal behavior) (MCL 777.5, 777.11 through 777.19, 777.43[1]). *People v Bonilla-Machado*, 489 Mich 412.
3. A sentencing court scoring the sentencing guidelines must assess 15 points under offense variable 10 if the offender engaged in predatory conduct to exploit a vulnerable victim; predatory conduct is preoffense conduct directed at a victim for the primary purpose of victimization; the offender's preoffense conduct need not have been directed at one particular or specific victim, and 15 points may be assessed only for those forms of preoffense conduct commonly understood as being predatory in nature, such as lying in wait or stalking; "vulnerability" is the readily apparent susceptibility of a victim to injury, physical restraint, persuasion, or temptation; the statute does not mandate that this susceptibility be inherent in the victim's characteristics, but allows for susceptibility arising externally from the victim's relationships and circumstances, including susceptibility arising from or enhanced by the defendant's predatory conduct; predatory conduct deserves to be treated as the most serious of all exploitations of vulnerability because that conduct itself created or enhanced the vulnerability in the first place, and it may have done so with regard to the community as a whole, not merely with regard to persons who were already vulnerable for one reason or another (MCL 777.40[1][a], [3][a] and [c]). *People v Huston*, 489 Mich 451.

SENTENCING GUIDELINES—*See*

SENTENCES 1, 2, 3

SEPARATE AND DISTINCT DUTY—*See*
NEGLIGENCE 1

SEPARATELY EMPANELED JURIES—*See*
CRIMINAL LAW 7

SEX OFFENDERS REGISTRATION ACT—*See*
CRIMINAL LAW 4, 5, 6

SEXUALLY DELINQUENT PERSONS—*See*
CRIMINAL LAW 7

SIXTH AMENDMENT—*See*
CONSTITUTIONAL LAW 1

SMALL-EMPLOYER GROUP HEALTH INSURANCE PLANS—*See*
INSURANCE 1, 2

SOLICITING A MINOR FOR IMMORAL PURPOSES—*See*
CRIMINAL LAW 1

STATE TAX COMMISSION—*See*
TAXATION 1, 2

STATUTES OF LIMITATIONS—*See*
LIMITATION OF ACTIONS 1

TAXATION
STATE TAX COMMISSION
1. The final sentence of MCL 211.34c(6), which provides that no appeal may be taken from a property-classification decision of the State Tax Commission, violates the guarantee of judicial review in Const 1963, art 6, § 28 and is therefore severed. *Midland Cogeneration Venture Ltd Partnership v Naftaly*, 489 Mich 83.
2. Circuit courts have subject-matter jurisdiction over appeals of property-classification decisions of the State Tax Commission (MCL 600.631). *Midland Cogeneration Venture Ltd Partnership v Naftaly*, 489 Mich 83.

TERMS OF JUDICIAL OFFICE—*See*
CONSTITUTIONAL LAW 2
TORT ACTIONS—*See*
LIMITATION OF ACTIONS 1
TRIAL BY SEPARATE JURIES—*See*
CRIMINAL LAW 7
VACANCIES IN JUDICIAL OFFICES—*See*
CONSTITUTIONAL LAW 2
VULNERABILITY OF VICTIMS—*See*
SENTENCES 3
WARRANTLESS SEARCHES—*See*
SEARCHES AND SEIZURES 1, 2
WITNESSES—*See*
CONSTITUTIONAL LAW 1
WORDS AND PHRASES—*See*
CRIMINAL LAW 5, 6