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STATE OF MICHIGAN

IN THE

SUPREME COURT

ON APPEAL FROM THE MICHIGAN COURT OF APPEALS
HOOD, P.J., SWARTZLE AND, REDFORD J.J.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

-vs-

DAVID HENRY SERGES,

Defendant-Appellant.

Supreme Court
No. 167154

Court of Appeals
No. 355554

Circuit Court
No. 18-42951-FC

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PLAINTIFF-APPELLEE'S SUPPLEMENTAL BRIEF ON APPEAL

PURSUANT TO THE MAY 30, 2025, ORDER OF THIS COURT

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STATEMENT OF JURISDICTION

The People do not contest this Court's jurisdiction.

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JUDGMENT APPEALED FROM AND RELIEF SOUGHT

Defendant seeks leave to appeal a properly decided and published Court of Appeals Opinion. Defendant David Serges had no reasonable expectation of privacy in the blood of murder victim Gail Anderson on the surface of his pants. The Court of Appeals appropriately relied upon the precedents of *United States v Edwards*, 415 US 800; 94 S Ct 1234; 39 L Ed 2d 771 (1974), *People v Brooks*, 405 Mich 225; 274 NW2d 430 (1979), and *People v Custer*, 465 Mich 319; 630 NW2d 870 (2001), to determine that Defendant failed to establish plain error or the ineffective assistance of counsel with respect to the possible suppression of Defendant's pants. At no point in its decision did the Court of Appeals provide the police with new license to make warrantless seizures or create a "custody exception" to the warrant requirement, as alleged by Defendant. The Court simply found that there were no clear grounds for suppressing the DNA evidence found on Defendant's pants, which were lawfully collected by guards when he was arrested.

Defendant asserts the Court of Appeals' opinion in this case would allow police to test-fire and perform tool-mark examinations on a lawfully owned handgun when the CPL holder is arrested and jailed for a driving offense and to swab the inside of a wallet for invisible drug residue when the owner of the wallet was arrested and jailed for retail fraud. Besides these examples being inapt conjecture, the Court of Appeals opinion is not so broad; it is fact specific and relies upon the precedents of this Court and the United States Supreme Court. Not only that, but these examples also miss entirely that Defendant did not have a reasonable privacy interest in someone else's blood on the surface of his pants in the way that a person may have a reasonable privacy interest in other items and testing for another person's biological matter is not trespassing on a constitutionally protected area. Additionally, the police suspected Defendant of murder and were not on a fishing expedition.

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The Court of Appeals opinion does not create a "custody exception" to the warrant requirement. It certainly does not allow the police to confiscate and search any property that is near a person upon arrest – Defendant was wearing his clothes when he was booked into jail. It has long been precedent that police can collect people's clothing upon their entrance to jail and that it is unnecessary for the police to obtain a search warrant to scrutinize the outside of an object or submit it to scientific testing once it is in the police's lawful possession. See *People v Custer*, *Hudson v Palmer*[1], and *United States v Edwards*. In this case, the Court of Appeals correctly determined that the police lawfully obtained Defendant's clothes when he was detained in jail, his pants were then lawfully subjected to scientific testing and examination, and Defendant had no reasonable or justifiable expectation of privacy regarding his pants, especially not someone else's blood on his pants, once taken from him by the jail. *People v Serges*, ___ Mich App ___, ___; ___ NW2d ___ (2024) (Docket No. 355554), slip op at 12; *Id*. (Swartzle, J., concurring dubitante), slip op at 5. After all, "clothing or other belongings may be seized upon arrival of the accused at the place of detention and later subjected to laboratory analysis" where those results are admissible at trial. *United States v Edwards*, 415 US at 804.

Although Judge Swartzle found the law in Michigan to be unsettled regarding *People v Carr*, 370 Mich 251; 121 NW2d 449 (1963) and *People v Trudeau*, 385 Mich 276; 187 NW2d 890 (1970), those cases are unnecessary to decide this case, as they are distinguishable and were not relied upon by the majority. The warrantless search of Carr's vehicle in the jail parking lot while Carr served a sentence on an unrelated case was not incident to arrest or part of an inventory search and the vehicle remained in Carr's control. *Serges*, ___ Mich App at ___; slip op at 11. Additionally, Trudeau was required to give the police his shoes when he was in the bullpen at court

[1] *Hudson v Palmer*, 458 US 517; 104 S Ct 3194; 82 L Ed 2d 393 (1984).

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for a different case, and the Court insinuated that there may not have been a constitutional deficiency if the police had taken the shoes during Trudeau's processing. *Id*.; *Trudeau*, 385 Mich at 281. In this case, the police properly seized Defendant's pants upon his entrance to jail after arrest and he had no right to privacy in the pants or the victim's blood on the outside of his pants. After *Trudeau* was decided, the United States Supreme Court ruled that "the Fourth Amendment proscription against unreasonable searches does not apply within the confines of the prison cell." *Hudson v Palmer*, 468 US 517, 526; 104 S Ct 3194; 82 L Ed 2d 393 (1984). Additionally, despite being decided post-*Katz*[2], the *Trudeau* Court does not address whether Trudeau had a reasonable expectation of privacy in the bottom of shoes that he was wearing in public. *People v Hughes*, 506 Mich 512, 529; 958 NW2d 98 (2020), relied upon by Defendant, is an inapposite comparison to this case since the United States Supreme Court "distinguished cell-phone data from other items subject to a search incident to a lawful arrest in terms of the privacy interests at stake" and this case does not involve cellular data, nor any similarly broad and intimate personal information. *Hughes*, 506 Mich at 531.

Serges does not create a "custody exception" to the warrant requirement or perversely incentivize the police. The Court of Appeals relied upon both well-settled and modern precedent to reaffirm lawful police procedures regarding search incident to arrest, inventory searches, and reasonable expectations of privacy. While Judge Swartzle found the lack of other evidence in this case disconcerting, Defendant has never made a sufficiency of the evidence claim and so that concern seems to address an argument that has not been made. The brutality of the murder, the large volume of blood, the filthy condition of the home, the time that lapsed between the murder and the discovery of the victim's body, and the holiday weekend prevented police from obtaining

[2] *Katz v United States*, 389 US 347; 88 S Ct 507; 19 L Ed 2d 576 (1967).

other fingerprint, DNA, and eyewitness evidence. There were no other suspects in this case. What is unsettling is how perilously close the Defendant came to getting away with murder. The decision of the Court of Appeals is not clearly erroneous, will not cause material injustice, and does not conflict with a Supreme Court decision or another decision of the Court of Appeals. Defendant's Application for Leave to Appeal should be denied.

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

Question One

The question of whether Defendant was "unlawfully arrested such that his pants should be excluded as the result of an unreasonable seizure" has never been raised by Defendant. Defendant has only framed the issue of the admission at trial of evidence obtained from his pants as one of the ineffective assistance of trial counsel. Thus, the issue is not properly before this Court. Where Defendant was lawfully arrested, his pants were properly in police custody, and they were properly admitted into evidence because Defendant had no reasonable expectation of privacy in the victim's DNA on a pair of pants he exposed to the public, was there was a violation of US Const, Am IV or Mich Const 1963, art 1, § 11 in this case?

Plaintiff-Appellee contends the answer is: "No."

Defendant-Appellant contends the answer is: "Yes."

The Court of Appeals did not consider this question.

Question Two

Since Defendant was lawfully arrested, did the police act constitutionally under US Const, Am IV and Mich Const 1963, art 1, § 11 when they sent Defendant's pants for DNA testing without a warrant due to Defendant's detention in jail and are the legitimacy of *People v Trudeau*, 385 Mich 276 (1971) and *People v Carr*, 370 Mich 251 (1963) as precedent questionable after the decisions of *United States v Edwards*, 415 US 800; 94 S Ct 1234; 39 L Ed2d 771 (1974) and *Katz v United States*, 389 US 347; 88 S Ct 507; 19 L Ed 2d 576 (1967)?

Plaintiff-Appellee contends the answer is: "Yes."

Defendant-Appellant contends the answer is: "No."

The Court of Appeals answered: "Yes."

Question Three

Was Defendant's trial counsel ineffective for failing to make a futile motion to suppress the evidence police obtained via Defendant's clothing collected at the jail after his arrest and was counsel's trial strategy unreasonable?

Plaintiff-Appellee contends the answer is: "No."

Defendant-Appellant contends the answer is: "Yes."

The Trial Court answered: "No."

The Court of Appeals answered: "No."

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COUNTER-STATEMENT OF FACTS

The facts, as established by the Court of Appeals, are as follows:

Defendant, an admitted heroin addict who used intravenously twice per day to avoid withdrawal, made money by working odd jobs around the neighborhood in Burton, Michigan. The victim, an elderly widow, lived alone in the neighborhood. She had hired defendant in the past to work around her house and yard. On Monday November 27, 2017, a neighbor found the victim dead in her home. The medical examiner determined that she died from multiple blunt force traumas to the head and face. Police investigated the crime scene and observed a significant amount of blood located on the exterior door, garage, interior walls, furniture, counters, cabinets, and floors. The police identified a can of Raid insect killer and a hammer as the suspected murder weapons.

The victim's neighbor told the police they should consider investigating defendant. The police searched for defendant in relation to the murder and located him at his friend's house and took him into custody to the police station. Defendant waived his *Miranda*[3] rights and agreed to be interviewed by Detective Eric Freeman of the Burton Police Department at the police station. During interrogation defendant admitted that he knew the victim and that he had done work for her, but he denied harming her. The police arrested defendant and held him in jail. Defendant did not post bond. The jail took defendant's clothing into custody pending his release.

While defendant remained jailed on unrelated misdemeanor charges, the police continued to investigate the victim's murder. All of the DNA and fingerprint evidence from inside of the victim's house provided no connection to defendant. The testing of defendant's clothes found in places he was known to stay did not contain any of the victim's DNA. The suspected murder weapons did not contain defendant's fingerprints or DNA. In mid-January 2018, the police sent defendant's clothing from the jail for DNA testing related to the murder. The police did not have a warrant and did not obtain defendant's consent. The Michigan State Police laboratory testing revealed the presence of human blood on defendant's pants, and DNA testing determined that one small spot of the blood matched the victim's DNA. The prosecutor then charged defendant for the victim's murder and the case went to trial. Defendant's trial counsel did not move to suppress the evidence related to defendant's pants because the minuscule amount of blood on defendant's pants did not logically connect defendant to the incredibly bloody crime scene. Defendant's first trial ended in a hung jury.

The prosecution tried defendant again in mid-September 2020 and presented evidence of the presence of the victim's blood on defendant's pants. Defendant's trial counsel again did not move to suppress that evidence and presented the same defense theory that the minuscule amount of blood on defendant's pants did not logically connect defendant to the crime. The jury convicted defendant and the trial

[3] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

court sentenced him. After sentencing, defendant moved for a new trial or an evidentiary hearing. Relevant to this opinion, defendant argued that the evidence of the victim's DNA found on his pants should have been suppressed because of an unconstitutional search and seizure. The trial court disagreed and denied defendant's motion. This appeal followed.

Defendant moved in this Court for remand for an evidentiary hearing to develop the record respecting his claims that his trial counsel provided him ineffective assistance by failing to object to a police detective's testimony regarding defendant's veracity and for failing to object to misrepresentations by the prosecutor, and that, because of the COVID-19 pandemic, the jury did not represent a fair cross section of the community. This Court denied the motion without prejudice. Defendant renewed his motion to remand for an evidentiary hearing. This Court granted the motion and remanded to the trial court for an evidentiary hearing to determine whether defendant was denied the effective assistance of counsel. This Court limited the matters for the trial court's consideration on remand to: "(1) the admissibility of the forensic analysis of defendant's clothing worn when he was detained on or about November 30, 2017; and (2) whether trial counsel provided defendant effective assistance by not moving to suppress evidence of the forensic analysis of defendant's clothing." This Court also permitted the parties to file supplemental briefs addressing the issues raised on remand.

On remand, defendant moved for a new trial on several grounds including that the police conducted an unconstitutional warrantless search that affected defendant's substantial rights, and alternatively that defense counsel provided ineffective assistance by failing to move to suppress. Defendant also asserted that trial counsel provided ineffective assistance by not objecting to the prosecution's elicitation of testimony regarding defendant's veracity. Defendant contended further that the jury did not represent a fair cross section of the community because of COVID-era jury-selection procedures.

The trial court conducted an evidentiary hearing at which defendant's trial attorney, David Clark, and Detective Freeman testified. Clark testified that he represented defendant in both trials. He affirmed that he knew about the prosecution's evidence regarding defendant's pants including testimony by forensic scientists about tests performed on the pants and the results. He admitted that he did not move to suppress such evidence. He explained that the prosecution claimed that defendant stood over the victim and struck her with a hammer and a Raid can causing blood to go all over the room, and that the prosecution intended to present defendant's pants to show that they had blood on them. Clark asserted that, had defendant done as the prosecution contended, his pants would have been covered in blood because the crime scene was particularly bloody, but evidence established that defendant never changed his pants around the time of the murder. Clark explained that defendant's pants only had a minuscule spot of the victim's blood and he had no blood on his shoes. Clark stated that defendant's pants actually worked to the prosecution's detriment. Consequently, he did not move to suppress that evidence.

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During cross-examination, Clark affirmed that defendant's first trial ended in a hung jury. That did not impact the defense strategy respecting defendant's pants. Defendant's conviction surprised Clark. On further direct examination, Clark testified that he did not think defendant guilty or capable of such a horrendous crime. He thought that the prosecution did not have evidence to convict. He stated that he believed that the pants worked in defendant's favor because, if defendant had pounded the victim, he would have been covered in blood. He believed that the pants worked to defendant's advantage.

Detective Freeman testified that defendant became a person of interest in the victim's homicide investigation, and once located, he and another officer arrested defendant on suspicion of homicide. Defendant wore the same pants seen on surveillance videos in the area. Detective Freeman interviewed defendant. Police then transported defendant to the City of Flint lockup to lodge him in jail on suspicion of homicide. Although he did not personally transport defendant to the lockup, he knew from experience that defendant's clothes would have been taken and he would have been given jail clothing. Defendant's clothes were collected from the jail by the police the next day. Detective Freeman stated that he noticed "some stuff on his pants that appeared to be blood. So he—we discussed that at the office and decided that we needed to take his, his belongings at that time." Defendant's clothes were transported to the police station and secured as evidence. Detective Freeman said that he sought a warrant but the prosecutor denied the request and wanted further investigation.

Detective Freeman testified that items collected at the crime scene were sent first to the Michigan State Police lab for testing. Defendant's pants and other items collected from him were included in the second set of items sent on January 19, 2018, to the crime lab for testing. Three sets of items in all were sent separately because they could only send seven items at a time to the lab for testing and the prosecutor had to request sending additional items. Detective Freeman testified that defendant's jeans were in police custody and secured as evidence the entire time. He stated that the prosecutor issued a warrant the second time police requested one. On cross-examination, Detective Freeman affirmed that the victim was found on November 27, 2017, and that on the 29th the police put out a media release. He affirmed that the police located defendant on the 29th. Detective Freeman affirmed that the police considered defendant a person of interest in the murder investigation, and within 48 hours of his apprehension the police requested the prosecutor's office to press charges because the murder charges were not authorized at that point. Detective Freeman testified that defendant remained in jail on outstanding warrants. Detective Freeman affirmed that a police report indicated that defendant was arrested on his outstanding warrants, but he attested that defendant was arrested for murder. He asserted that that police arrest report existed but was incorrect. He affirmed that the day after defendant's arrest he requested that the sheriff turn over all of defendant's property which got collected and secured by the police as

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evidence. Detective Freeman affirmed that defendant's pants were not sent to the crime lab until January 2018.

Detective Freeman also affirmed that he interviewed defendant at the police station and that he testified at the preliminary examination that he stepped out of the room and observed defendant brushing off his legs. Detective Freeman affirmed that he had testified that such conduct indicated deception.

On further direct examination, Detective Freeman explained that the prosecutor agreed to issue a warrant because the police had more evidence, more witnesses came forward, and a gas station's surveillance video placed defendant in the area establishing a time link to the crime. Detective Freeman affirmed that completion of the DNA testing on defendant's pants occurred on March 8, 2018, and the results were e-mailed to the police on or around that date.

The trial court asked Clark to return to the podium for some questioning by the court. The court described its recollection of the evidence at trial regarding the very bloody crime scene. The court asked Clark if he discussed the defense strategy with defendant. Clark affirmed that he had done so and that they agreed to the strategy that, had defendant murdered the victim, his pants would have had more than a dot of her blood, and they intended to use the pants against the prosecution's case. Clark affirmed and explained that defendant had worked for the victim a number of times. Clark affirmed that the trial strategy included that defendant came in contact with the victim's blood on another occasion when he worked for the victim who had medical problems including diabetes and bleeding of her feet, plus her house was not kept well. Clark acknowledged again that he consulted with defendant regarding the trial strategy to use the pants against the prosecution's case. Clark did not recall if he informed defendant that a Fourth Amendment ground to exclude the pants may have existed.

After the hearing, the parties submitted supplemental briefs to the trial court. A few months later, the court reconvened the hearing to render its decision. The court recounted the two trial outcomes and observed that the suppression of defendant's pants did not seem as straightforward as defense counsel argued. The court stated that it did not know if it would have granted a motion to suppress under the circumstances presented in the case. On reflection it felt inclined that it would not have granted such a motion. The court then noted that caselaw provided a presumption that counsel performed effectively. The court considered the standard set forth in Strickland v Washington, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). The court recalled the evidence of the brutal, bloody crime scene. The court noted that Clark testified that he did not consider filing a motion to suppress since, after discussing the defense theory with defendant, they agreed upon a trial strategy that considered the pants favorable to defendant and detrimental to the prosecution because, had defendant been at the crime scene, he would have had more than a dot of blood on himself. The court applied the Strickland standard and concluded defendant's trial counsel followed a reasonable trial strategy and had provided

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> defendant effective assistance. The court noted that defendant's first trial ended in a hung jury which indicated that the strategy was good enough to cause at least one juror to pause. For those reasons, the court denied defendant's motion. [*People v Serges*, ___ Mich App ___; ___ NW3d ___ (2024), pp 1–5].

The following facts are supplementary to the Court of Appeals' factual and procedural background:

A neighbor asks a neighbor for assistance and is ruled out as a suspect

Gail Anderson was brutally murdered in her home around Thanksgiving Day in November of 2017. Her elderly neighbor Dallas Robinson had a doctor's appointment the Monday following Thanksgiving. 9/21/20 Tr, 41. As he was getting into his vehicle, a man he did not know, and who he specifically testified was a "black gentleman," pulled up behind him and yelled, "hello, neighbor." *Id*. at 42. The man told Mr. Robinson that his wife's vehicle had broken down and he needed help. *Id*. Mr. Robinson said he had to go to a doctor's appointment and "maybe I can help you later." *Id*. When the man asked Mr. Robinson when he would return home, Mr. Robinson refused to tell him. *Id*. Mr. Robinson was troubled about the man's question and he and his wife tried calling Gail to tell her "what's going on," but she did not answer her telephone. *Id*. at 42–43. After Gail did not answer her telephone two times, Mr. Robinson went to her front door, which was ajar by approximately a foot and a half to two feet, and yelled for her. *Id*. at 43. There was no response again, so he went to the back door, which was fully open, received no response to his yells, went inside, and found her dead on the floor. *Id*.

The man that caused Mr. Robinson concern was found and investigated by police. 9/22/20 Tr, 48. Even though Mr. Robinson did not know the man, he was indeed a neighbor who lived down the road and had car trouble on the Monday after Thanksgiving. *Id*. The police determined he had nothing to do with the murder of Gail Anderson. *Id*.

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Gail Anderson's neighbors consistently identify David Serges as a person of interest to police

Detective Freeman was the officer in charge of the case, and he reported to the scene when Ms. Anderson's body was found on November 27, 2017. 2/1/23 Tr, 20. He testified that it was a "very bloody gruesome scene." 9/18/20 Tr, 163. On November 27 and 28, 2017, the police spoke with Ms. Anderson's neighbors and developed a person of interest – David Serges.[4] *Id*. at 20–21. Neighbor Sidney Owens told the police that on Thanksgiving Day, November 23rd, she saw a man standing on Ms. Anderson's porch with his hands in his pockets and he had on a hat, Carhartt jacket, work boots or tennis shoes, and dark pants. 9/18/20 Tr, 41, 46–47. Jayme Lee Cosner testified that she saw a man in a grayish blue coat and a hat talking to Ms. Anderson on her front porch on Thanksgiving Day. *Id*. at 94. Admiral gas station surveillance video also showed him in dark shoes, dark pants, a blue hat, and a blue coat on Friday, November 24, 2017, like what he was wearing when arrested.[5] 9/22/20 Tr, 44, 45, 84; Trial Exhibit 41. Neighbor Gregory Kotlark saw Defendant in the neighborhood on Saturday, November 25, 2017, and he was acting differently than usual. 9/18/20 Tr, 101–103. Neighbors also had surveillance cameras that showed Defendant in the neighborhood wearing the same pants and jacket during the timeframe Ms. Anderson was murdered. 9/22/20 Tr, 39; 2/1/23 Tr, 21, 23.

[4] At trial, Detective Freeman testified that more than 10 people drew his attention to David Serges when they initiated their investigation. 9/22/20 Tr, 86.

[5] When Defendant was arrested, he was wearing a blue "Bud Light" hat, a pair of socks, a belt, a pair of gloves, a coat, boots, two shirts, and two pairs of pants. 2/1/23 Tr, 43.

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People's Trial Exhibit 41 shows Defendant wearing dark colored pants at the Admiral gas station in the victim's neighborhood on Friday, November 24, 2017

On November 29, 2017, the police issued a press release requesting public assistance in finding Defendant and received several tips that he was staying in a house located on Bennett Avenue in Flint. 2/1/23 Tr, 21. When the police arrived, Detective Freeman's partner, Detective Schreiber, took Defendant into custody. *Id*. at 22. Detective Freeman testified that Defendant was arrested on suspicion of homicide. *Id*. at 22, 40. He was also aware Defendant had an outstanding warrant because that information is generally looked up through LEIN prior to arrest. *Id*. Although Detective Schreiber authored a police report that said Defendant was arrested on outstanding warrants, Detective Freeman, as the officer in charge, testified that the police report was incorrect. *Id*. at 41, 55.

Defendant was deceitful with police about his whereabouts during the time frame of the murder

After he was taken into custody, Defendant was interviewed and was deceitful with the police about his whereabouts during the time frame of Ms. Anderson's murder. Defendant first told Detective Freeman that he worked at a brick house with a golden retriever on Thanksgiving

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Day and the Saturday after Thanksgiving but went out looking for work on Friday and could not find any. 9/22/20 Tr, 52–53. When pressed on the location of the brick house, Defendant said it was somewhere off Covert Road. *Id*. at 53. The police could not locate any such house. *Id*. at 54. Then, Defendant told Detective Freeman that he did not go out on Friday, which Detective Freeman noted was a change in Defendant's story. *Id*. at 55. When Detective Freeman left the interview room and watched Defendant on the live feed, Defendant was grooming himself and brushing his legs, which Detective Freeman learned in interview school was a possible indicator of deception. *Id*. at 57.

Detective Freeman's lieutenant, Lieutenant Odette, interviewed Defendant next to try and pin down a timeline. *Id*. at 57–58. Defendant told the police that he did yard work on Thanksgiving Day, November 23, 2017, for Dakota Thronson and Shirley Fenner, which police were able to confirm. *Id*. at 59–60. To do the work for Ms. Fenner, Defendant had to borrow a ladder from Ms. Anderson's direct next-door neighbor. *Id*. at 60. Then, Defendant told police that he did not go out on Friday, November 24, 2017, because of a toothache. *Id*. at 61. This was not true because Defendant was on surveillance video at the Admiral gas station near the victim's neighborhood on Friday, November 24, 2017. *Id*. at 61. Defendant also said he was in the neighborhood doing handyman work for Richard Srda on Saturday and Sunday, which was not true because Mr. Srda said that he had paid Defendant $100 to do a big job on the Wednesday before Thanksgiving, but Defendant did not do the job. *Id*. at 62–63.

At first, Defendant did not know the names of anyone he did work for in the neighborhood. *Id*. at 58. Defendant told the police that he did not generally get people's names when he did work for them or use names for references. *Id*. at 64. When Detective Freeman asked Defendant if he did a lot of work for Gail Anderson, Defendant said, yes, he did a lot of work for Gail Anderson.

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Id. Defendant told Detective Freeman that Gail had problems with her feet, was stubborn, drove a nice black car, smoked, had a dog, had a green lawnmower that the neighbors borrowed sometimes, that her house was cluttered and he knew that she was embarrassed by the clutter, and that she was a great person. *Id*. He also said, "I love her to death." *Id*.

Defendant told the police that earlier in Thanksgiving week he had cleaned off the victim's eavestroughs and changed a lightbulb in the landing where all the blood was located. *Id*. at 65. Then he went into the house and smoked a cigarette with her. *Id*. He initially told the police that he did work for her two weeks prior but changed his timeframe. *Id*. at 66–67. Defendant also told Detective Freeman he checked on Gail on the Wednesday before Thanksgiving and that he would often check on her, even knocking on a neighbor's door to ask about her whereabouts when she was in the hospital. *Id*. at 67. When directly asked about whether he spoke with Gail on Thanksgiving Day, as mentioned by a witness, Defendant said, "I might have." *Id*.

Defendant asked to shower the Friday after Thanksgiving, which was unusual

Defendant stayed with a man named Gregory Barrett in November of 2017. 9/18/20 Tr, 112. Defendant lived with him for approximately a month. *Id*. at 113. Defendant's routine was to leave the house every morning around 8:00 AM and come back in the evening. *Id*. at 114. Defendant left to walk around looking for little jobs like cleaning gutters or mowing lawns. *Id*. at 115. Since it was cold and Defendant did not have a coat, Mr. Barrett gave him a blue Carhartt jacket to wear. *Id*. at 116. Defendant wore the same clothes every day. *Id*. at 117. Friday, November 24, 2017, was a notable date for Mr. Barrett because Defendant asked to take a shower, which he had never done. *Id*. at 118. Mr. Barrett allowed him to take a shower. *Id*. Defendant changed back into the same clothes after his shower and his clothes were never washed. *Id*. at 121.

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Defendant's clothes are taken as part of the usual jail inventory procedure

After the interview with police, Defendant was transferred to the City of Flint lockup[6] to be lodged on suspicion of homicide, Defendant's clothing was taken as part of standard jail inventory, and he was provided with jail clothing. 2/1/23 Tr, 26. Detective Freeman could not recall when he noticed a substance on Defendant's pants that appeared to be blood, but he noticed it and discussed it with his office.[7] *Id*. This is consistent with Detective Freeman's testimony at preliminary examination that he did not notice the blood when he was interviewing Defendant. 4/12/18 Tr, 45. It was decided that Defendant's belongings should be collected so Detective Freeman transported them back to Burton's Police Station and secured them into evidence. 2/1/23 Tr, 26–27.

When pressed about his preliminary examination testimony that he did not notice blood on Defendant's pants during the police interview, Detective Freeman said that Defendant's legs were underneath a small table. *Id*. at 56. Defense counsel was not allowed to re-cross examine Detective Freeman on this point. *Id*. at 64. As a result, and in the interest of justice, the parties agreed to submit Joint Exhibit G so the layout of the interview room and the relative positioning of Defendant and Detective Freeman during the interview could be viewed.

[6] This was most likely a county decision based on overcrowding. 2/1/23 Tr, 37.

[7] In his Supplemental Brief, Defendant includes a photograph of the pants that the People attached in their response to Defendant's Motion for New Trial (After Remand) as a refresher to Judge Kelly of their appearance. As the judge who oversaw trial, Judge Kelly had the opportunity to view the pants in person as they were entered into evidence. A photograph scanned as a PDF, printed on computer paper, and scanned again as part of a brief is low resolution, dull, and cannot be presented as an accurate representation of what the judge, jury, MSP biologist, or Detective Freeman saw with their unaided eyes.

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A sample still frame of the interview in Joint Exhibit G

The filthy home and bloody scene made gathering DNA and fingerprint evidence challenging

The condition of the victim's home made the lifting of fingerprints difficult. 9/21/20 Tr, 157. The home was full of cobwebs, dirt, and dog hair, and was coated with nicotine. *Id*. The smearing of blood also hampered the ability to find prints in it. *Id*. at 158. Additionally, this crime scene was particularly bloody, which made touch DNA unlikely to be found because the blood overwhelms the skin cells that may be present in a mixed sample. *Id*. at 67.

Defendant was excluded from the only latent fingerprint of suitable quality for comparison lifted from the scene, found on a "FAS rewards card" from the victim's wallet. *Id*. at 151. The fingerprint was not compared with the victim because she did not have fingerprints on file, and none were taken as part of the autopsy. *Id*. The fingerprint also did not match anyone in the Automated Fingerprint Identification System. *Id*. at 151–152. The fingerprint could have been from a clerk at a store. 5/31/19 Tr, 30. No fingerprints could be developed on the Raid can, claw hammer, blue plastic pieces, or a cigarette box collected from the scene. 9/21/20 Tr, 149.

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MSP lab policy delays the testing of Defendant's pants

After the victim's autopsy revealed circular shapes on her skull, the Michigan State Police (hereinafter "MSP") crime scene response crew returned to the victim's home to collect more potential evidence. 9/21/20 Tr, 75. Detective Freeman did not control what was collected at the scene by the crime laboratory. 9/22/20 Tr, 46–47. Afterwards, the MSP forensic biologist worked with the investigating agency to determine which items of evidence would be processed initially because they were most probative to the case, meaning they would yield a DNA result that would be important. 9/21/20 Tr, 76, 77. The pants Defendant was wearing when he was arrested were not determined to be a priority at that time since there were so many items from the scene of the crime that had blood on them. 2/1/23 Tr, 32. For a homicide, MSP only allowed the police to send seven evidentiary samples. 9/21/20 Tr, 77. In the first round of testing, the forensic biologist tested the Raid can (which was covered in blood), the claw head hammer, the victim's wallet, a gray zip up hooded sweatshirt, blood from the ground outside the north door, blood from the kitchen counter, and blood from the east threshold. The testing of these items yielded nothing particularly helpful, so police went back to the "drawing board." *Id*. at 82.

The police were twice given special permission to send additional items to the forensic laboratory for testing, and the jeans were in the second batch of items.[8] 2/1/23 Tr, 33. The second batch consisted of nearly everything that had been collected from Defendant. *Id*. The jeans were not sent to the forensic laboratory until January 19, 2018. *Id*. at 34. The time lapse between when the jeans were collected to when they were tested occurred because the first seven items were sent,

[8] The Michigan State Police laboratory generated a new report every time it had results from testing evidence. 2/1/23 Tr, 50. Laboratory reports 1 and 2 were items collected from the scene by the crime laboratory and reports 4, 5, 6, and 7 memorialized DNA extract results from the previously collected or sent items; the reports were not generated due to newly sent items or new requests. 2/1/23 Tr, 49–50, 57, 60. Detective Freeman testified that the first items Burton Police sent to the MSP for testing were documented in Laboratory Report 3 and the second set of items Burton Police sent to the MSP for testing were documented in Laboratory Report 8, which included Defendant's pants. 2/1/23 Tr, 57, 60.

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examined by the laboratory, and determined to not be especially useful and then the prosecutor had to write a letter to the laboratory requesting special permission to get additional items tested. *Id*. at 34–35. Detective Freeman had a discussion with the entire detective bureau, including his superiors, about sending the pants sooner, but it was decided that other items would be sent first. *Id*. at 36.

City of Burton issues separate charges

In July of 2016, Defendant was charged by the City of Burton with Breaking and Entering pursuant to City of Burton Ordinance Code §149.02. See Joint Exhibit A (Register of Actions for 67th District Court Case Number 16F01452). He was scheduled to be arraigned on the charge on September 19, 2016. *Id*. Defendant did not appear, and a warrant was issued on September 21, 2016. *Id*. On November 30, 2017, the warrant was cancelled. *Id*. Defendant pled guilty to the lesser charge of Unlawful Entry on January 18, 2018. *Id*. He was sentenced to 45 days in jail and received credit for time served. *Id*.

On January 17, 2018, the City of Burton charged Defendant with Theft by False Token/Coin or False Pretenses pursuant to City of Burton Ordinance Code §141.10, which was committed on November 22, 2017 (the day before Thanksgiving). Joint Exhibit B (Register of Actions for Case Number 18F00053). Defendant was arraigned on the charge on January 18, 2018. *Id*. On March 15, 2018, at the first pretrial hearing, Defendant pleaded no contest and was sentenced to 90 days in jail with credit for time served. *Id*.

The Genesee County Prosecutor's Office, acting independently from the City of Burton Attorney, initially denied the warrant for Defendant's arrest for homicide pending further investigation. 2/1/23 Tr, 27, 38. After a meeting with the elected Prosecutor, a warrant request for homicide was granted. *Id*. at 35, 42. Detective Freeman believed the request for a homicide warrant

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was granted the second time because there was more evidence – more witnesses, more camera footage, and a better timeline. *Id*. at 62.

Defendant's pants test positive for the victim's blood

The MSP expert in body fluid identification visually examined Defendant's pants using a light and a magnifying glass to locate staining she wanted to test. 9/21/20 Tr, 92. 94. The silver writing on the pants were her notations to indicate the areas that were tested and the results. *Id*. at 94. Filter paper was used to test for the presence of blood. *Id*. On the left front leg of the pants, there were many spots that indicated the possible presence of blood or indicated the presence of human blood. *Id*. at 95. On the right front leg of the pants, there was one spot that indicated the presence of human blood and one that indicated the possible presence of blood. *Id*. at 97. On the right back side of the pants, there were two spots that indicated the possible presence of blood. *Id*. at 98. The expert chose what places to test based on what samples were most likely to result in a DNA profile but also noted that she had to keep finances in mind to conserve the number of tests done for human blood. *Id*. at 99. She sent on two separate swab samples from the pants for further DNA testing. *Id*. at 101. Of those two samples, the sample from the right leg of the pants contained a DNA mixture with Gail Anderson as the major contributor and the minor contributor insufficient for comparison. 9/22/20 Tr, 15.

Trial counsel defends his strategy

At an evidentiary hearing ordered by the Michigan Court of Appeals after oral arguments, Attorney David Clark testified that he was Defendant's trial attorney for both trials. 2/1/23 Tr, 8–9. He was aware that the Prosecutor's evidence consisted of Defendant's pants, including testimony from forensic scientists about tests performed on the pants and results of those tests. *Id*. at 9. He did not consider filing a motion to suppress the evidence because the small amount of

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blood on the pants made the People's case weaker due to their theory that Defendant stood over the victim and pounded her with a hammer and then a Raid can, causing blood to go all over the room. *Id*. If this was true, Defendant would have been covered in blood. *Id*. at 9–10. Because Defendant had not changed his pants since the date of the murder, the blood must have been from some other point in time. *Id*. at 10. He also relied on the testimony of the Michigan State Police that there was no indication another person was in the room with the victim. *Id*. at 10.

He did not file a motion to suppress because he believed Defendant's clothes were seized upon arrest. *Id*. at 13. His trial strategy was to discredit the Prosecution's theory by comparing the small amount of blood on Defendant's pants to the large amount of blood at the scene and to highlight alternative ways the victim could have died that had nothing to do with Defendant. *Id*. at 14. Attorney Clark did adjust his trial strategy after the first trial resulted in a hung jury, but not in regard to the blood. *Id*. at 15. He thought this was a winnable case, he did not believe Defendant killed the victim, and he was surprised Defendant was convicted. *Id*. at 15.

When asked whether he told appellate counsel that he just did not think of filing a motion, trial counsel responded that the case was 5 years ago, so he did not remember, but from very early on in the case, he realized the pants worked for Defendant more than for the prosecution. *Id*. at 17. "The prosecutor's argument…about him pounding her…did not fit with no blood on the pants, except that little bit…I think I even got the lab people to say it wasn't so much as a drop as it could have been him rubbing his hand off on them." *Id*. He continued, "[t]heir argument from the get go was that he pounded her to pieces and there was blood all over. Couldn't have – it had to be on the pants…so it worked to our advantage not to do it that way." *Id*. at 17–18.

When questioned by the judge, Attorney Clark confirmed that how he approached the issue of Defendant's pants was one of trial strategy. *Id*. at 65. Attorney Clark and Defendant talked

about, and agreed upon, the strategy of embracing the pants – arguing that if Defendant committed the murder, there would be more than a dot of blood on his pants. *Id*. at 66. There was also testimony that Defendant had a prior handyman relationship with the victim and so the trial strategy was to suggest the blood had transferred from a time when Defendant was raking leaves or cleaning the house since the victim was known to have open wounds due to her diabetes. *Id*. at 67–68. His trial strategy, in consultation with his client, was to use the pants as a shield instead of a sword. *Id*. at 69. Attorney Clark admitted that he did not inform Defendant that there may be a Fourth Amendment basis to exclude the pants. *Id*. at 70.

The trial court ruled that Attorney Clark was not ineffective

After the evidentiary hearing and written briefs, the trial judge ruled that trial counsel was effective. 7/26/23 Tr, 9. When considering the judge's recollection of the trial, the testimony, and the briefs, the trial court determined Attorney Clark made no errors that met the threshold for ineffective assistance of counsel. *Id*. The trial judge did not know if she would have granted a motion to suppress the pants had one been filed and did not find it shocking that Defendant's trial counsel had not filed a motion to suppress. *Id*. at 5–6. The trial judge recalled the awful, bloody photos of the crime scene – blood all over the floor, cupboards, living room, and splattered everywhere. *Id*. at 8. Attorney Clark's trial strategy to argue that there would have been more than a "dot" of blood on Defendant's pants if he had committed the murder was sound and indeed led to a hung jury after the first trial, which indicated the argument gave at least one juror pause. *Id*. There was not a reasonable probability that, but for counsel's alleged error, the result of the proceedings would have been different. *Id*. at 9.

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The Court of Appeals affirms Defendant's conviction

Defendant's two Motions for New Trial were denied by the trial court. The Court of Appeals Opinion affirmed Defendant's conviction in a published opinion with Judge Swartzle concurring *dubitante*. Defendant filed an Application for Leave to Appeal with this Court raising seven issues, with the most pertinent to this Court being whether the use of the DNA evidence obtained from Defendant's pants was plain error or, alternatively, if trial counsel was ineffective for failing to move to suppress. Defendant's Application for Leave to Appeal should be denied.

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ARGUMENT

I. The question of whether Defendant was "unlawfully arrested such that his pants should be excluded as the result of an unreasonable seizure" has never been raised by Defendant. Defendant has only framed the issue of the admission at trial of evidence obtained from his pants as one of the ineffective assistance of trial counsel. Thus, the issue is not properly before this Court. Even so, Defendant was lawfully arrested, his pants were properly in police custody, and they were properly admitted into evidence because Defendant had no reasonable expectation of privacy in the victim's DNA on a pair of pants he exposed to the public. As such, there was no violation of US Const, Am IV or Mich Const 1963, art 1, § 11.

A. *Issue Preservation*

This Court "has long recognized the importance of preserving issues for appellate review." *People v Carines*, 460 Mich 750, 762; 597 NW2d 130 (1999). As a result, this Court disfavors consideration of unpreserved claims of error, even unpreserved claims of constitutional error. *People v Vaughn*, 491 Mich 642, 653–654; 821 NW2d 288 (2012) (citation and quotation marks omitted). Defendant's trial counsel did not challenge Defendant's arrest or the admission of the evidence the police obtained from his pants, although appellate counsel did raise the issue of whether trial counsel should have filed a motion to suppress the DNA evidence obtained from the pants in a motion for new trial.[9] The issue is unpreserved.

B. *Standard of Review*

Unpreserved issues, including unpreserved constitutional issues, are reviewed for plain error affecting defendant's substantial rights. *Carines*, 460 Mich at 764. To demonstrate such an error, the defendant must show that (1) an error occurred, (2) the error was clear or obvious, and (3) "the plain error affected [the defendant's] substantial rights," which "generally requires a

[9] "[P]ermitting a party to raise an evidentiary issue for the first time in a postjudgment motion for new trial, whether in this Court or in the trial court, controverts the purpose of the preservation requirement because the opportunity for the trial court to correct the error and its prejudice has passed. We hold that making such a posttrial motion does not preserve the issue sought to be raised in the same manner a timely motion or objection during trial would have, so review of the unpreserved issue is for plain error affecting substantial rights." *People v Butsinas*, ___ Mich App ___; ___ NW3d ___ (2025).

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showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings." *Id.* at 763. Finally, once a defendant satisfies these three requirements, an appellate court must exercise its discretion in deciding whether to reverse. *Id.* 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.* at 763–64.

To the extent defendant also challenges the trial court's decision denying his motions for new trial, such a decision is reviewed for an abuse of discretion. *People v Blackston*, 481 Mich 451, 460; 751 NW2d 408 (2008). A trial court may be said to have abused its discretion only when its decision falls outside the range of principled outcomes. *Id.* A trial court's findings of fact are reviewed for clear error, while constitutional issues are reviewed de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). A trial court's factual findings are clearly erroneous "if the reviewing court is left with a definite and firm conviction that the trial court made a mistake." *People v Reese*, 491 Mich 127, 139; 815 NW2d 85 (2012) (quotation marks and citation omitted).

C. *Discussion*

As an initial matter, this question was not raised by Defendant at any time, and it has not been considered by the lower courts. Defendant submitted two Motions for New Trial and a Supplemental Brief on Remand (After Evidentiary Hearing) in the trial court, a Brief on Appeal and a Brief After Remand in the Court of Appeals, and an Application for Leave to Appeal to this Court. At no time did the Defendant challenge whether the arrest was lawful or argue that he was unlawfully arrested in such a manner that his pants should have been excluded as the result of unreasonable seizure. Although the circumstances surrounding Defendant's arrest have been entwined into Defendant's arguments, this issue appears to be one raised solely by this Court.

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Since no one challenged the legality of the arrest, neither the testimony at trial nor the remand hearing truly focused on this issue. The evidentiary hearing conducted upon remand briefly addressed the circumstances of Defendant's arrest, interview with police, and detention, but it did not center on what Detective Freeman thought gave him probable cause to arrest on suspicion of homicide. The testimony was most focused on Defendant's pants and whether trial counsel was ineffective for failing to move to suppress them. No one was specifically reviewing the appropriateness of Detective Freeman's conclusion on whether he had a basis to arrest Defendant for murder. Thus, questions regarding probable cause or the legality of the arrest were not the focus at the evidentiary hearing and factual findings were not made by the trial court on this point.

The People contend that Issue One violates the principle of party presentation and this Court's rules of issue preservation. "In our adversary system, in both civil and criminal cases, in the first instance and on appeal, we follow the principle of party presentation. That is, we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present." *Greenlaw v United States*, 554 US 237, 243; 128 S Ct 2559; 171 L Ed 2d 399 (2008); see *Mich Gun Owners, Inc v Ann Arbor Pub Sch*, 502 Mich 695, 709–710, 918 NW2d 756 (2018) (applying *Greenlaw* and declining to reach an issue).

As to the question raised by this Court of whether Defendant "was unlawfully arrested such that his pants should be excluded as the result of an unreasonable seizure," the answer is no. A city police officer has authority to execute a bench warrant for arrest issued by a court of record. MCL 117.34a. There is no indication in the record that the bench warrant for Defendant's failure to appear was invalid. The existence of this warrant provided full authority for law enforcement to arrest Defendant.

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Independent of the warrant, the police were interested in Defendant as part of an ongoing homicide investigation. The majority of the Court of Appeals accepted Detective Freeman's testimony that Defendant was arrested for suspicion of murder. It noted,

> Detective Freeman testified unequivocally that defendant was arrested for the murder. Defendant's detention and jailing arose in relation to the murder investigation and not any investigation of his pending misdemeanors. The two aspects of defendant's placement in jail appear to have intersected coincidentally. In any event, the record supports that defendant's pants were taken incident to his lawful arrest which gave the police authority to search them. [*Serges*, ___ Mich App at ___; slip op at 6].

In contrast, the concurrence believed that the trial court's factual findings declined to give weight to Detective Freeman's testimony that Defendant was arrested for the murder, remarking,

> Specifically, the trial court explained in its ruling after the *Ginther* hearing, "[T]he pants are ones that he was wearing *when he was taken into custody on an unrelated matter*. He had an outstanding warrant on another case. And, when he was taken into custody, those pants he was wearing, and they were held by the jail." (Emphasis original.) [*Serges*, ___ Mich App at ___ (SWARTZLE, J., concurring dubitante); slip op at 2].

Thus, Judge Swartzle understood "as an established fact that defendant was not initially arrested and held on suspicion of murder, but rather he was arrested and subsequently held on unrelated misdemeanor charges." *Id*.

Indeed, the record establishes that Defendant was arrested on both an outstanding warrant for failure to appear and for the suspicion of homicide. While Detective Freeman believed he was arresting Defendant on suspicion of homicide based on probable cause, the trial court depended on the court records to determine that Defendant's arrest was justly based on the outstanding failure to appear warrant. This is a factual finding of the trial court, which is reviewed for clear error. See *LeBlanc*, 465 Mich at 579. Since the trial court relied on objective court records to make the determination that Defendant was arrested for the failure to appear, held on that warrant, and kept

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in jail on that warrant and another unrelated misdemeanor that occurred around the same time as the murder, these factual findings cannot be clearly erroneous.

Detective Freeman evidently believed that he had probable cause to arrest Defendant on suspicion of homicide after interviewing neighbors, reviewing surveillance video, and viewing the murder scene, but again, his exact reasoning is not elucidated in the lower court record because this issue was not raised by Defendant.[10] Even assuming *arguendo* that Detective Freeman did not have probable cause to arrest Defendant for homicide, there was a valid warrant for Defendant's arrest. So, even if the detective's subjective intent to arrest for probable cause on a homicide is found by this Court to be constitutionally invalid, the objective alternative basis for the arrest, a valid warrant for a different crime which permits the arrest, settles the question of the lawfulness of the detective's conduct in bringing the Defendant to jail where his belongings were properly collected as part of the jail inventory procedure and incident to arrest.

The fact that the Genesee County Prosecutor's Office initially declined to charge for homicide pending further investigation is irrelevant to whether there was probable cause to arrest Defendant. While a prosecutor can theoretically charge based on probable cause alone, a prosecutor carries an obligation to ensure that a defendant's guilt is decided upon the basis of sufficient evidence. See MRPC 3.8 and Comment. When the initial request was made by Detective Freeman, there was outstanding forensic testing that needed to be performed and, although Defendant was deceitful in his interview, he did not confess. Thus, it was prudent of the Genesee

[10] "Probable cause...is not a high bar: It requires only the kind of fair probability on which reasonable and prudent people, not legal technicians, act." *Kaley v United States*, 571 US 320, 338; 134 S Ct 1090; 188 L Ed 2d 46 (2014), quoting *Florida v Harris*, 568 US 237, 244; 133 S Ct 1050; 185 L Ed 2d 61 (2013) (quotation marks, citation, and brackets omitted). "Probable cause to arrest exists where the facts and circumstances within an officer's knowledge and of which he has reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed." *People v Champion*, 452 Mich 92, 115; 549 NW2d 849 (1996). The People contend that there was probable cause for Detective Freeman to arrest Defendant for suspicion of homicide.

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County Prosecutor's Office to deny the warrant pending further investigation, especially since Defendant was being held on the failure to appear. Additionally, the Genesee County Prosecutor's Office had no authority over the City of Burton Prosecutor who also charged Defendant with Theft by False Token/Coin or False Pretenses on January 17, 2018, prior to the MSP lab finally granting the police permission to send additional items for testing, including Defendant's pants.

Lastly, if Defendant had only been arrested on suspicion of homicide and the Genesee County Prosecutor's Office initially declined to charge Defendant pending further investigation, he would have been released within 48 hours of being taken into custody. At that time, he would either have received his pants back or had a claim that they should be returned to him. He did not get his pants back because he remained in custody based on lawfully brought charges. When Defendant was transferred to the City of Flint lockup, his clothing was taken and he was provided with jail clothing, as was standard, routine protocol. 2/1/23 Tr, 26. In *United States v Edwards*, 415 US 800; 94 S Ct 1234; 39 L Ed 2d 771 (1974), the Supreme Court upheld a warrantless search and seizure of a defendant's clothing while he was being held in a local jail after arrest. The majority opinion stated that such a seizure is permissible "where the clothing or effects are immediately seized upon arrival at the jail, held under the defendant's name in the 'property room' of the jail and at a later time searched and taken for use at subsequent criminal trial." 415 US at 807 (footnote omitted). There was nothing unlawful about Defendant's arrest, the jail's subsequent collection of his pants pursuant to Under US Const, Am IV and Mich Const 1963, art 1, § 11, or the inclusion of the pants as evidence at trial, especially since Defendant had no reasonable expectation of privacy in the DNA of the victim on his pants.

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II. Since Defendant was lawfully arrested, the police acted constitutionally under US Const, Am IV and Mich Const 1963, art 1, § 11 when they sent Defendant's pants for DNA testing without a warrant due to Defendant's detention in jail. The legitimacy of *People v Trudeau*, 385 Mich 276 (1971) and *People v Carr*, 370 Mich 251 (1963) as precedent is questionable after the decisions of *United States v Edwards*, 415 US 800; 94 S Ct 1234; 39 L Ed2d 771 (1974) and *Katz v United States*, 389 US 347; 88 S Ct 507; 19 L Ed 2d 576 (1967).

A. *Issue Preservation and Standard of Review*

"To preserve an evidentiary issue for review, a party opposing the admission of evidence must object at trial and specify the same ground for objection that it asserts on appeal." *People v Thorpe*, 504 Mich 230, 252; 934 NW2d 693 (2019). Defendant did not move to suppress or otherwise object to the admission of the evidence related to the victim's blood found on his pants in the trial court. Thus, the issue is unpreserved. *Id*. As noted above, unpreserved issues are reviewed for plain error affecting defendant's substantial rights. *Carines*, 460 Mich at 764.

Defendant raised this issue in two Motions for New Trial in the Circuit Court, which were denied. Such decisions are reviewed for an abuse of discretion. *Blackston*, 481 Mich at 460. A trial court may be said to have abused its discretion only when its decision falls outside the principled range of outcomes. *Id*. A trial court's findings of fact are reviewed for clear error, while constitutional issues are reviewed de novo. *LeBlanc*, 465 Mich at 579. A trial court's factual findings are clearly erroneous "if the reviewing court is left with a definite and firm conviction that the trial court made a mistake." *Reese*, 491 Mich at 139.

B. *Discission*

Defendant's constitutional Fourth Amendment rights to be secure from unreasonable searches and seizures were not violated when the police collected the pants he was wearing upon arrest and tested them for the victim's DNA without a warrant. The right to be protected against

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unreasonable searches and seizures is guaranteed by both the United States[11] and Michigan[12] Constitutions. US Const, Am IV; Const 1963, art 1, § 11. These constitutional provisions do not forbid all searches and seizures, only those that are unreasonable. [13] *People v Slaughter*, 489 Mich 302, 311; 803 NW2d 171 (2011). In the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment but is also a "reasonable" search under that Amendment. *United States v Robinson*, 414 US 218, 235; 94 S Ct 467, 476; 38 L Ed 2d 427 (1973). A search occurs under the Fourth Amendment when the government violates a subjective expectation of privacy that society recognizes as reasonable. *Kyllo v United States*, 533 US 27, 31–33; 121 S Ct 2038; 150 L Ed 2d 94 (2001). In comparison, a seizure of property occurs when there is some meaningful interference with an individual's possessory interests in that property. *United States v Jacobsen*, 466 US 109, 113, 104 S Ct 1652, 80 L Ed 2d 85 (1984). Searches and seizures conducted without a warrant are unreasonable per se, subject to several specifically established and well-delineated exceptions. *People v Borchard-Ruhland*, 460 Mich 278, 293–294; 597 NW2d 1 (1999). The usual remedy if the police have seized evidence in violation of an accused's constitutional protections is to exclude that evidence from any prosecution of the accused. See *People v Goldston*, 470 Mich 523, 528; 682 NW2d 479 (2004).

[11] The Fourth Amendment of the United States Constitution provides, "[t]he 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 [w]arrants shall issue, but upon probable cause, supported by [o]ath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." US Const, Am IV. The Fourth Amendment is enforceable against the states through the Due Process Clause of the Fourteenth Amendment. *Mapp v Ohio*, 367 US 643, 655 (1961).

[12] The Michigan Constitution provides, "The person, houses, papers, possessions, electronic data, and electronic communications of every person shall be secure from unreasonable searches and seizures. No warrant to search any place or to seize any person or things shall issue without describing them, nor without probable cause, supported by oath or affirmation." Const 1963, art 1, § 11.

[13] The standard of reasonableness for searches and seizures is no higher under Michigan's Constitution than the United States Constitution. *People v Catania*, 427 Mich 447, 466; 398 NW2d 343 (1986) (explaining that there is no basis for holding that the Michigan Constitution, art 1, § 11, permits greater protection than the United States Constitution).

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1. Defendant's Fourth Amendment rights were not violated when the police lawfully seized his clothing incident to arrest and pursuant to jail inventory procedure.

Defendant's clothes were properly in police custody incident to his lawful arrest and pursuant to the jail's booking procedures. "[A] search warrant is not always required before searching or seizing a citizen's personal effects." *People v Hughes*, 506 Mich at 524–525 (citation omitted). One of the exceptions to the warrant requirement is searches incident to arrest. *Johnson v VanderKooi*, 509 Mich 524; 983 NW2d 779 (2022). "There are two historical rationales for the 'search incident to arrest' exception to the warrant requirement of the Fourth Amendment: (1) the need to disarm the suspect in order to take him into custody, and (2) the need to preserve evidence for later use at trial." *Knowles v Iowa*, 525 US 113, 116; 119 S Ct 484; 142 L Ed 2d 492 (1998). The search may occur immediately before the arrest, at the place of arrest, or at the place of detention, and may occur before the defendant is advised of his or her right to post bail. *People v Champion*, 452 Mich 92, 115–116; 549 NW2d 849 (1996). Both a person and the property in his or her immediate possession may be searched at the police station after an arrest has occurred at another place and, if evidence of crime is discovered, it may be seized and admitted in evidence. *Edwards*, 415 US at 804.

At the stationhouse, it is entirely proper for police to remove and list or inventory property found on the person or in the possession of an arrested person who is to be jailed. *Illinois v Lafayette*, 462 US 640, 646; 103 S Ct 2605; 77 L Ed 2d 65 (1983). The practical necessities of routine jail administration may even justify taking a prisoner's clothes before confining him. *Id*. at 645. "This was made clear in *United States v Edwards*, *supra*, 415 US at 804: 'With or without probable cause, the authorities were entitled [at the stationhouse] not only to search [the arrestee's] clothing but also to take it from him and keep it in official custody.'" *Id*.

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As the Court of Appeals correctly found, the record supports that Defendant's pants were taken incident to his lawful arrest and booking into jail. *Serges*, ___ Mich App at ___; slip op at 8 (relying upon *People v Eaton*, 241 Mich App 459, 463; 617 NW2d 363 (2000) and *People v Nguyen*, 305 Mich App 740, 756; 854 NW2d 223 (2014)). Defendant tries to circumvent this fact by arguing that the unreasonable seizure here did not occur when jail staff collected Defendant's items during booking at the City of Flint lockup, but instead occurred when police went to the jail property room the next day and transferred Defendant's clothes to the Burton Police Department, an argument which the Court of Appeals found unpersuasive. *Id*. at slip op 12.[14] The police had custody of Defendant's pants and, thus, the police could take, examine, and preserve the pants as evidence, as they were normally permitted to seize evidence of a crime when it is lawfully encountered.[15] *Id*. at slip op 13. Additionally, Defendant's claim that his possessory interests were meaningfully interfered with because his property was no longer available to him upon release is purely hypothetical because he was never released.

Pursuant to *Edwards*, it was reasonable for the police to examine and hold as evidence Defendant's clothing that they already had in their possession after a jail inventory because of a lawful arrest, whether it was at the jail or the police station. As in *Edwards*, that the seizure of clothing had taken place "after the administrative process and the mechanics of the arrest had come

[14] Judge Swartzle also concluded, "Police unquestionably had lawful possession of defendant's possessions, including his pants, while he was in jail on unrelated charges. And, as part of their investigation, police could certainly consider any evidence in plain view or inventoried in the normal course that might incriminate him in the murder, such as blood on his pants." Serges, ___ Mich App ___ (SWARTZLE, J., concurring dubitante); slip op at 2.

[15] Other jurisdictions have also found this argument unpersuasive. See *Sheffield v United States*, 111 A3d 611, fn 4; (DC App 2015) (concluding that because the assumed seizure of was lawful, there was no merit to the defendant's assertion that transfer of his clothes from Prince George's County Police Department to the Metropolitan Police Department violated his Fourth Amendment rights because "to hold otherwise would nonsensically submit lawfully obtained evidence to redundant Fourth Amendment assessments at each point of transfer between governmental units").

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to a halt" was not constitutionally significant. *Edwards*, 415 US at 802, 804–805. Thus, the evidence was not obtained as a result of an unconstitutional seizure and was admissible at trial.

2. Testing Defendant's pants for DNA was not an unconstitutional search.

The police testing of Defendant's pants for the DNA of his murder victim was not an unconstitutional search under either the common-law trespassory test or the reasonable expectation of privacy test. To be able to assert a claim that an illegal search or seizure has occurred, the police activity must intrude on a constitutionally protected property interest of the accused or have violated an accused's reasonable expectation of privacy. See *United States v Jones*, 565 US 400, 404–406; 132 S Ct 945; 181 L Ed 2d 911 (2012). The United States Supreme Court has clarified that the trespass doctrine exists alongside the *Katz* test. See *Florida v Jardines*, 569 US 1, 11; 133 S Ct 1409; 185 L Ed 2d 495 (2013). This Court has articulated that the trespass doctrine required it to consider whether there was a physical trespass on a constitutionally protected area and whether there was an attempt to obtain information. *Johnson v VanderKooi*, 509 Mich 524, 537; 983 NW2d 779 (2022). Defendant claims that the police's testing of his pants for the DNA of the victim was a physical intrusion on a constitutionally protected area. This is simply untrue. There is no case law to support the contention that the biological material of another person on the exterior of a personal effect worn outside, is a "constitutionally protected area." The case of *VanderKooi*, relied upon by Defendant to make this claim, is distinguishable from this case. The *VanderKooi* Court held that the fingerprinting of the plaintiffs after a *Terry* stop constituted a physical trespass onto a person's body, which is a constitutionally protected area, and so was a search. *VanderKooi*, 509 Mich at 537–538. Defendant in this case was not stopped pursuant to *Terry* and fingerprints are part of a person's body in a way that biological material on the exterior of pants worn in public are not.

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Separately, Defendant had no reasonable expectation of privacy in the DNA of another person on the exterior or his pants. This was established in *Katz*. The Fourth Amendment provides no protection for what a person knowingly exposes to the public. *Katz v United States*, 389 US at 351. This is true whether the thing exposed is examined by artificial means since "[n]othing in the Fourth Amendment prohibits the police from augmenting the sensory faculties bestowed upon them at birth with such enhancement as science and technology affords them." *United States v Knotts*, 460 US 276, 282; 103 S Ct 1081, 75 L Ed 2d 55 (1983). The touchstone of Fourth Amendment protections is reasonableness, which is measured by examining the totality of the circumstances. *People v Wiliams*, 472 Mich 308, 314; 696 NW2d 636 (2005). But "it is difficult to perceive what is unreasonable about the police's examining and holding as evidence those personal effects of the accused that they already have in their lawful custody as the result of a lawful arrest." *Edwards*, 415 US at 806; see also *People v Brooks*, 405 Mich 225, 247–248; 274 NW2d 430 (1979) (following *Edwards*); *Sheffield v United States*, 111 A3d 611, 622 (DC App, 2015) [16] (concluding that it was "absurd" the defendant would have any legitimate expectation of privacy in the decedent's blood on his pants that would warrant suppression of the victim's DNA at trial).

Defendant knowingly exposed both his pants and the blood spots on them to the public when he wore them outside. Given the totality of the circumstances, Defendant had no reasonable expectation of privacy in the biological material of another person on his pants. Society is not prepared to recognize such a circumstance as reasonable. Thus, there was no Fourth Amendment protection.

[16] "Caselaw from sister states and federal courts is not binding precedent but may be relied on for its persuasive value." *People v Parks*, 510 Mich 225, fn 10; 987 NW2d 161 (2022) (CLEMENT, J., dissenting), quoting *Haydaw v Farm Bureau Ins Co*, 332 Mich App 719, 726 n 5; 957 NW2d 858 (2020).

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Also, pursuant to *Edwards*, the police were allowed to subject Defendant's pants to laboratory analysis and those results were admissible at trial. "Nor is there any doubt that clothing or other belongings may be seized upon arrival of the accused at the place of detention and later subjected to laboratory analysis or that the test results are admissible at trial." *Edwards*, 415 US at 803–804. A chemical test that merely discloses what a particular substance is does not compromise any legitimate interest in privacy. See *United States v Jacobsen*, 466 US 109, 123; 104 S Ct 1652; 80 L Ed 2d 85 (1984).

Defendant relies upon *Skinner v Ry Lab Executives' Ass'n*, 489 US 602; 109 S Ct 1402; 103 L Ed 2d 639 (1989), to claim that, "Conducting chemical tests on blood samples, subjecting a person to a breath test, and the collection and testing of urine are all Fourth Amendment searches." Defendant's Supplemental Brief, p 26, fn 9. *Skinner* is distinguishable, however, since that Court was concerned with intrusions *into the body* for blood and breath tests and the possible privacy implications of collecting and analyzing urine samples of employees required to submit to drug screens. In this case, there was no intrusion into Defendant's body, and, as discussed below, there are very few privacy concerns with the type of DNA testing performed by the police here. Additionally, *Skinner* was analyzed in the context of the facts, where railway labor organizations filed suit to enjoin regulations promulgated by Federal Railroad Administration governing drug and alcohol testing of railroad employees, and not in the context of a criminal case or the police taking a person into custody.

Defendant claims that forensically testing a person's clothes implicates privacy interests because it could provide law enforcement with the DNA profiles of a person's family or friends, reveal health or hygiene information, or disclose whether a person has been swimming, in a construction zone, around certain chemicals, etc. Defendant's Supplemental Brief, pp 26–27. This

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argument has been rejected across the country. In *Maryland v King*, 569 US 435; 133 S Ct 1958; 186 L Ed 2d 1 (2013), the United States Supreme Court noted that the DNA profiles generated by STR testing, which has become standard nationwide through the creation of the CODIS database, is very limited. *King*, 569 US at 443. The profiles in this database are "based on [thirteen] loci at which the STR alleles are noted and compared." *Id.* at 445. These loci come from the nonprotein coding regions of DNA that do "not show more far-reaching and complex characteristics like genetic traits" and that are useful only for identification purposes. *Id.* at 442–443. In the case of *Raynor v State*, 440 Md 71, 99 A3d 753 (2014), Mr. Raynor agreed to speak with police at the station, where he declined to submit to a DNA swab of his mouth. *Raynor*, 440 Md at 76. After the interview, police took swabs of the armrests of the chair on which Mr. Raynor was rubbing his arms and submitted the swabs to the state laboratory for DNA analysis. *Id*. at 77. As part of Mr. Raynor's argument that the testing of his genetic material was a search, he also argued that he had a great expectation of privacy in his DNA because it contained "a massive amount of deeply personal information," including "medical history, family history, disorders, behavioral characteristics, and...propensity to...commit certain behaviors in the future." *Id*. at 85. The Court rejected Mr. Raynor's contentions and said, "That Petitioner's DNA could have disclosed more intimate information is of no moment in the present case because there is no allegation that the police tested his DNA sample for that purpose." *Id*. at 96. That is also true in this case. Here, the police created DNA profiles via extraction, quantitation, amplification, and insertion into an instrument that generates a DNA profile.[17] There is no evidence these profiles could reveal the genetic traits of Defendant or his family and friends or where he had been. Even if they could provide such information, they were not in fact tested for that end.

[17] 9/21/20 Tr, 177.

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Kyllo v United States, cited by Defendant, is also distinguishable from this case because it held the Government could not use a device that is not in general public use to explore details of *the home* that would previously have been unknowable minus physical intrusion without a warrant since the Fourth Amendment draws a firm line at the entrance of a house. *Kyllo v United States*, 533 US 27, 40; 121 S Ct 2038, 150 L Ed 2d 94 (2001) (emphasis added). Consequently, a person has no reasonable expectation of privacy against sense-enhancing devices. *People v Hulsey*, 176 Mich App 566, 569; 440 NW2d 59 (1989). Thus, a police officer's use of artificial illumination, such as a flashlight, or an ultraviolet scan of a suspect's hands, is not an illegal search. *Id*. Defendant's reliance on *People v Custer* is likewise misplaced since that Court said,

> We merely hold that, once an object has been lawfully seized, the police may shift the object and look at its exterior…we conclude that there was no "search" in this case when the police turned the photographs over to examine their other side because, in order for there to be a "search," one must have a reasonable expectation of privacy in the object being "searched." In this case, the police had already lawfully seized the photographs, and, therefore, defendant's reasonable expectation of privacy in the photographs already had been significantly diminished, at least sufficiently to justify the officer's cursory examination of the other side of the photographs. [*People v Custer*, 465 Mich 319, 343; 630 NW2d 870 (2001)].

The police in this case did not engage in a "search incident to seizure" and, just as there was no "search" in *Custer*, there was no Fourth Amendment "search" here since Defendant had no reasonable expectation of privacy in his clothing, or the victim's biological matter on the surface of the clothing, once it had been lawfully collected incident to his arrest and as part of jail booking procedure. Although Defendant cites to *Riley v California* for the proposition that the United States Supreme Court rejected "that a person loses all expectation of privacy in his effects upon arrest", *Riley* specifically applies to cellular telephones and their data. *Riley v California*, 573 US 373, 403; 134 S Ct 2473, 189 L Ed 2d 430 (2014) (stating, "Our answer to the question of what police must do before searching a *cell phone* seized incident to an arrest is accordingly

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simple—get a warrant." [emphasis added]). *Riley* also noted that a person has diminished privacy and Fourth Amendment rights upon arrest and a search after arrest *may* require a warrant when a privacy-related concern is weighty enough, such as a top to bottom search of a person's home or a cellular phone. *Riley*, 573 US at 392. Unlike a person's cellular telephone or home, which hold "the privacies of life," Defendant had a diminished expectation of privacy in his pants and a spot of someone else's blood on his pants. The police were allowed to use sense-enhancing devices (a light and magnifying glass) and laboratory analysis on the pants without a warrant. As Judge Swartzle noted, the identification of the blood required extensive analysis, but not an *invasive search*. *Serges*, ___ Mich App at ___ (SWARTZLE, J., concurring dubitante); slip op at 5.

Defendant's reliance on *People v Hughes* is also misplaced. Like *Riley*, *Hughes* concerns a police search of the contents of a cellular phone, which the courts have deemed particularly sensitive due to the highly personal information that is stored in a cellular telephone. See *Riley*, 573 US at 395; *People v Hughes*, 506 Mich 512, 527; 958 NW2d 98 (2020). Pants, on the other hand, do not contain the highly personal information of a cellular telephone.[18] The Court of Appeals did not ignore the relevant language of *Hughes*, as alleged by Defendant, when it concluded that Defendant had no reasonable or justifiable expectation of privacy in his lawfully taken pants incident to arrest.[19] See Defendant's Supplemental Brief, p 28. As *Hughes* observed, "the 'search incident to a lawful arrest' exception to the warrant requirement ...generally allows

[18] "In 1926, [Judge] Hand observed ... that it is 'a totally different thing to search a man's pockets and use against him what they contain, [than to] ransack[ ] his house for everything which may incriminate him.' If his pockets contain a cell phone, however, that is no longer true. Indeed, a cell-phone search would typically expose to the government far more than the most exhaustive search of a house: A phone not only contains in digital form many sensitive records previously found in the home; it also contains a broad array of private information never found in a home in any form…." *Hughes*, 506 Mich at fn 12 (citation omitted in original).

[19] Along with being distinguishable because of its focus on cellular telephones, *Hughes* also specifically noted that, "Relying on *Edwards*, some courts have held that an arrestee lacks any reasonable expectation of privacy in items seized during a lawful arrest and therefore a later examination of those items, even for evidence of a crime other than the crime of arrest, is not a search under the Fourth Amendment. See, e.g., *Wallace v State*, 373 Md 69, 90–94; 816 A2d 883 (2003)." *Hughes*, 506 Mich at 531.

police to search and seize items…located on a person during a lawful arrest." *Hughes*, 506 Mich at 512. When the *Hughes* Court said, "The prosecutor's reliance on cases holding that a suspect loses all expectation of privacy in items seized from his person during a lawful arrest is inapt," such as *Edwards*, it was specifically because "*Riley* distinguished cell-phone data from other items subject to a search incident to a lawful arrest in terms of the privacy interests at stake." *Id*. at 530–531.

The validity of *People v Trudeau*, 385 Mich 276; 18 NW2d 890 (1971), and *People v Carr*, 370 Mich 251; 121 NW2d 449 (1963), as precedent is questionable since Fourth Amendment jurisprudence has shifted substantially since they were decided, specifically due to the cases of *Katz* and *Edwards*. Since *Trudeau* and *Carr* were decided by this Court, the United States Supreme Court also ruled that "the Fourth Amendment proscription against unreasonable searches does not apply within the confines of the prison cell." *Hudson v Palmer*, 468 US 517, 526; 104 S Ct 3194; 82 L Ed 2d 393 (1984). In *People v Phillips*, the Court of Appeals concluded the rationale underlying the Court's decision in *Hudson* applies equally to pretrial detainees and inmates confined in jails. *People v Phillips*, 219 Mich App 159, 162; 555 NW2d 742 (1996). Be that as it may, Defendant did not have a reasonable expectation of privacy based on the totality of the circumstances since there was visible blood on both legs of Defendant's pants and a neighbor had approached the police about Defendant as a possible suspect prior to his arrest. Even if the holdings in *Trudeau* and *Carr* were to survive *Edwards*, *Katz*, and *Hudson*, neither *Trudeau* nor *Carr* were violated in this case because the search was conducted incident to arrest and out of institutional concerns via a jailhouse inventory.

The Court of Appeals also did not misapply *Lanza v New York*, 370 US 139; 82 S Ct 1218; 8 L Ed 2d 384 (1962), to conclude that an arrestee has no legitimate Fourth Amendment privacy

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or possessory interest in personal effects. *Serges*, ___ Mich App at ___; slip op at 12. *Lanza* was a "see also" after citation to *Hudson*. *Id*. *Hudson* was used by the Court of Appeals to note an arrestee's reduced privacy interests upon being taken into police custody along with the case law of *Rivard*, *Cook*, *Custer*, and *Edwards* to properly conclude that Defendant's pants were lawfully seized when they were taken from him at jail, the police did not meaningfully interfere with his possessory interests or violate his expectation of privacy, the police were allowed to subject the pants to laboratory testing, and no second seizure of Defendant's pants occurred when they were sent for testing. *Id*. at 12–13. The Court of Appeals did not err in this determination.

3. The DNA testing of Defendant's pants was justified by recognized exceptions to the warrant requirement and other jurisdictions have found that DNA identification is analogous to latent fingerprints with no warrant required.

Across the country, courts have ruled that police can develop a DNA profile from lawfully held evidence without a search warrant. As mentioned previously in this Brief, the United States Supreme Court in *King* concluded that, "[i]n light of the scientific and statutory safeguards, once [the defendant's] DNA was lawfully collected the STR [Short Tandem Repeat] analysis of [the defendant's] DNA pursuant to CODIS procedures did not amount to a significant invasion of privacy that would render the DNA identification impermissible under the Fourth Amendment." *King*, 569 US at 465. Additionally, many courts have found DNA identification analogous to latent fingerprints and therefore not a search, let alone an unreasonable one, and, although non-binding, the reasoning is persuasive. See *State v Burns*, 988 NW2d 352, 363 (Iowa, 2023) ("Although it is true that humans distribute DNA continually and unconsciously, the same is true of latent fingerprints (not to mention footwear impressions, tire tracks, and other impression evidence). Like our DNA, we leave fingerprints everywhere--and generally without volition."); *Commonwealth v Arzola*, 470 Mass 809, 816; 26 NE3d 185 (2015) ("DNA analysis of the

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unknown sample taken from the defendant's lawfully seized shirt revealed nothing more than the identity of the source, which is what an analysis of latent fingerprints would have revealed (albeit with less accuracy) had they been found on the clothing. Therefore, the DNA analysis was no more a search than an analysis of latent fingerprints would be."); *Raynor v State*, 440 Md 71, 96; 99 A3d 753 (2014) ("[W]e hold that DNA testing of the 13 identifying junk loci within genetic material, not obtained by means of a physical intrusion into the person's body, is no more a search for purposes of the Fourth Amendment, than is the testing of fingerprints…"). Thus, after lawfully arresting Defendant and collecting his pants pursuant to a proper jail inventory and search incident to arrest, there was no need to secure a warrant to test to develop a DNA profile. This is even more true here, where the police were seeking to develop the victim's DNA profile.

The case of *Commonwealth v Arzola* is particularly instructive in this case. In *Arzola*, the victim was robbed and stabbed in the neck and shoulder from behind by an assailant. *Arzola*, 470 Mass at 810. The victim gave a general description of the assailant to police (heavy-set "Hispanic" male, approximately 5'10'' to 6'0'' tall, wearing a gray shirt[20], dark jeans, and possibly a hat) and police stopped a man of similar description a couple blocks away from the crime scene. *Id*. at 811. After learning the person matching the general description had an outstanding warrant, the police transported him to the police station. *Id*. At the station, the police noticed that the man had a stain that could be blood on the sleeve of his shirt. *Id*. After confirming that the man had no injuries, and before placing him in a cell, the police seized the shirt as evidence of the alleged armed robbery and assault of the victim, although he was not yet under arrest for those crimes. *Id*. Because the man would have access to a sink and toilet in the cell, police were concerned that

[20] How dark the gray shirt was is not discussed in the Opinion. In this case, Detective Freeman stated that he noticed "some stuff on [Defendant's] pants that appeared to be blood. So he—we discussed that at the office and decided that we needed to take his, his belongings at that time." *Serges*, ___ Mich App at ___; slip op at 3.

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Defendant would wash away the stain. *Id*. The police sought an order requiring the man to submit to a buccal swab and the court granted it after determining there was probable cause that the man committed assault and battery. *Id*. at 812. At trial, a chemist testified that the blood on the shirt was the victim's blood. *Id*.

The defendant argued that the DNA analysis of the bloodstained shirt was a search that required a warrant. *Id*. at 814. The court noted that the shirt was known to be worn by the defendant, but the source of the bloodstain was unknown, meaning the bloodstain was treated as an unknown DNA sample. *Id*. at 815. The Supreme Judicial Court of Massachusetts determined that where the shirt was lawfully seized, the defendant had no reasonable expectation of privacy that would prevent the analysis of that shirt to determine whether blood found on it belonged to the victim or to the defendant. *Id*. at 816–817. In other words, a defendant does not have a reasonable expectation of privacy in a DNA profile from an unknown sample that was taken from lawfully seized evidence. Thus, no search warrant was required to conduct the DNA analysis of the bloodstain from the defendant's clothing, which revealed that the victim was the source of the blood. *Id*. at 820. While the facts of no two cases are the same, *Arzo*la is quite similar to the case at hand and this Court should also conclude that no search warrant was necessary for the police to test Defendant's pants for the victim's DNA.

Even if Defendant was arrested for only the outstanding warrant for failure to appear instead of the murder of Ms. Anderson, which Detective Freeman testified was not the case, this does not negate the police's ability to collect his clothing. There is nothing that limits a search incident to arrest to only evidence of the crime of arrest; such a limitation would be impractical, require law enforcement to ignore evidence of other crimes, and is not based on the law. See *Chimel v California*, 395 US 752; 89 S Ct 2034; 23 L Ed 2d 685 (1969); *United States v Robinson*,

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414 US 218; 94 S Ct 467; 38 L Ed 2d 427 (1973); *Gustafson v Florida*, 414 US 260; 94 S Ct 488; 38 L Ed 2d 456 (1973). If that were the standard, there would be few cases in which a search would be justified since the crime under investigation was not characterized by instrumentalities or fruits. Police here were searching Defendant for evidence of crime at the place of detention after his arrest.

Finally, the Court of Appeals did not "inflate[] the search-incident-to-arrest exception beyond recognition" nor did it create a "custody exception" to the warrant requirement. Defendant's Supplemental Brief, p 34. The Court of Appeals held that, because the police were in lawful possession of Defendant's possessions, including his pants, at the time they were sent to the laboratory for testing, even though such occurred more than one month after his arrest, the police could take, examine, and preserve Defendant's clothing for use as evidence, just as they are normally permitted to seize evidence of a crime when it is lawfully encountered. *Serges* ___ Mich App at ___; slip op at 13. This interpretation is not overbroad but instead is based on an understanding of decades of caselaw, cited throughout this Brief, that it is not unreasonable for police to examine and hold as evidence the personal effects of an accused in lawful custody as a result of lawful arrest. If, *arguendo*, the police conducted an illegal search of the pants, it will not require their exclusion because Detective Freeman was relying upon *Edwards* and its progeny as binding appellate precedent. *Davis v United States*, 564 US 229, 241; 131 S Ct 2419; 180 LEd2d 285 (2011).

4. <u>The introduction of the evidence obtained through a lawful search and seizure of Defendant's clothing after arrest was not plain error affecting his substantial rights and did not result in a miscarriage of justice.</u>

Since Defendant's Fourth Amendment Constitutional rights were not violated, there was no plain error or miscarriage of justice. No clear or obvious error occurred that affected

Defendant's substantial rights. See *Carines*, 460 Mich at 763–64. Defendant did not move to suppress the DNA evidence obtained from the blood on his pants at trial. Defendant has moved for reversal of his conviction, but his Constitutional rights were not violated as the DNA lab results he claims should have been suppressed were lawfully obtained and properly entered into evidence at trial. While the blood spot that contained the victim's DNA was small, there were other spots of blood also located on the pants along with potential victim blood on a sweatshirt and boots that he was wearing. Since it was a particularly bloody crime scene, it made sense to test anything that potentially contained human blood, including the pants. There was no error, especially not one that likely led to the conviction of an innocent person or would damage the public reputation of judicial proceedings. The Court of Appeals did not inflate the search-incident-to-arrest exception beyond recognition nor does it create a brand-new "custody exception" to the warrant requirement. In fact, many courts across the country have agreed with the Court of Appeals' conclusion in this case.

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III. Defendant's trial counsel was not ineffective for failing to make a futile motion to suppress the evidence police obtained via Defendant's clothing collected at the jail after his arrest. Counsel's trial strategy was reasonable.

A. *Issue Preservation and Standard of Review*

Defendant moved for a new trial in the lower court and a *Ginther* hearing was conducted. The issue is preserved. *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973). A claim of ineffective assistance of counsel is a mixed question of law and fact. *LeBlanc*, 465 Mich at 579. A trial court's findings of fact, if any, are reviewed for clear error. *Id*. Constitutional issue arising from an ineffective assistance of counsel claim are reviewed de novo. *Id*.

B. *Discussion*

Defense counsel was not ineffective for not futilely attempting to suppress the DNA evidence found on Defendant's pants, and the trial court did not clearly err when it found defense counsel provided effective representation. To establish a claim of ineffective assistance of counsel, Defendant must demonstrate (1) that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms and (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Strickland v Washington*, 466 US 668, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984).[21] "'A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001), quoting *Strickland*, 446 US at 694. "A Defendant must also show that the result that did occur was fundamentally unfair or unreliable." *People v Lockett*, 295 Mich App 165, 187; 814 NW2d 295 (2012). Failure to advance a meritless argument or raise a meritless objection does not constitute ineffective assistance of counsel. *People v Xun Wang*, 505 Mich 239, fn 22; 952 NW2d 334 (2020), quoting *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120

[21] See also *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994) (adopting the *Strickland* test as the standard for ineffective assistance under Michigan's Constitution).

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(2010). As this Court is far removed from the passion, dust, and grit of the courtroom, "we must be especially careful not to second-guess or condemn with hindsight the decisions of defense counsel" and a reviewing court many not substitute its own judgment for that of defense counsel. *People v Pickens*, 446 Mich 298, 330; 521 NW2d 797 (1994).

Defense counsel's trial performance was also not objectively unreasonable. The seizure of the pants occurred incident to his lawful arrest as part of jail house inventory procedure and the testing occurred while police had lawful possession of the pants. One of the reasons trial counsel did not file a motion to suppress was because he believed Defendant's clothing was seized upon arrest, which it was. 2/1/23 Tr, 13. Trial counsel testified that he also did not consider filing a motion to suppress Defendant's pants or the DNA evidence results from the testing of those pants because the prosecution's theory of the case did not line up with just one spot of blood. Further, MSP saw no indication that there was another person in the same room as the victim so there were other ways the victim could have died that had nothing to do with Defendant.[22] *Id*. at 10, 13. The testimony from the evidentiary hearing shows that trial counsel made reasonable investigation into the facts and circumstances of the case and developed a sound trial strategy, in concert with his client, based on his professional judgments.

Defendant argues that the pants made him look more guilty, not less, and so trial counsel's strategy was unreasonable. The pants making Defendant look less guilty, however, was a reasonable trial strategy and worked with one jury. The scene of the murder was incredibly bloody, and the jury saw the photographs of pools of blood, blood smear, and blood spatter everywhere. 9/17/20 Tr, 65–82. Defendant was a transient who did not wash his clothing and was known to do

[22] Although it was not highlighted at the evidentiary hearing, defense counsel asserted during closing argument that victim died of an accident, as originally thought by the police prior to the medical examiner's determination otherwise. 9/22/20 Tr, 149, 161, 166, 167.

handyman work for the victim, who was a diabetic with open wounds in a badly kept house. 9/22/20 Tr, 159, 166; 2/1/23 Tr, 68. Thus, it was plausible that Defendant had the victim's blood on his pants for innocent reasons. Defendant agreed with trial counsel's strategy on how to use the pants. 2/1/23 Tr, 66, 69. This strategy was rooted in the facts of the case, the law of reasonable doubt, and counsel's decades of experience. That the strategy did not work the second time does not make it unreasonable.

The alternative scenario, where the pants/DNA evidence from the pants are suppressed and Defendant's case fails to meet probable cause or he is found not guilty, is entirely theoretical even if defense counsel had filed a motion to suppress. The trial judge said she was unsure of how she would have ruled on a motion to suppress but was inclined to think she would not have granted it. 7/26/23 Tr, 5–6, 9. Even if the trial court had granted a motion to suppress, many people brought Defendant to the police's attention as a suspect, Defendant was seen talking with the victim on Thanksgiving Day, Defendant asked the person he stayed with for a month to shower on the Friday after Thanksgiving, which he had never done before, the victim told her friend that she was not comfortable having a man she had do odd jobs around anymore and she was not going to give him more money, the victim's wallet had no money in it when she was known to have cash, and Defendant was untruthful with police regarding his whereabouts around the time of her death.[23] 9/18/20 Tr, 21, 47, 94, 103, 118; 9/22/20 Tr, 43, 52–62, 89; 2/1/23 Tr, 22. The case would be admittedly lacking in DNA evidence, but first-degree murder has been proven with circumstantial evidence of opportunity and motive to kill before. See *People v Unger*, 278 Mich App 210; 749 NW2d 272 (2008) (holding there was sufficient evidence to prove first-degree murder even though there was no forensic evidence or eyewitness evidence tying the defendant to the murder).

[23] Ms. Anderson was seen speaking with a man who matched Defendant's description on her porch on Thanksgiving Day, November 23, 2017, and her body was discovered on November 27, 2017. 9/18/20 Tr, 93; 9/21/20 Tr, 44.

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Defense counsel's trial performance was not objectively unreasonable in light of prevailing professional norms. By the time trial counsel was appointed, Defendant had already been arraigned on first degree murder charges and had pled no contest to false pretenses while being represented by a different attorney. See Stipulated Timeline of Key Events in 2017-2018, Joint Exhibit AA. The DNA results were from pants that the police had collected from Defendant after he was arrested. 2/1/23 Tr, 13. Counsel testified at the evidentiary hearing that from very early on in his representation, he and Defendant agreed upon a trial strategy that included the pants as a way to discredit the People's theory of the case. *Id*. at 9, 17, 66. This was an objectively reasonable trial strategy since there was no confession, fingerprints, footprints, or other forensic evidence at the crime scene that tied Defendant to the death of Ms. Anderson, Defendant occasionally did handyman work for Ms. Anderson, Defendant had no injuries when arrested, and Defendant maintained his innocence throughout the case. This trial strategy was developed in concert with the Defendant and an investigation that was adequately supported by reasonable professional judgments. As the first trial ended in a hung jury, the strategy seemed to work.

Defense counsel is presumed to be effective and Defendant has failed to meet his heavy burden of proving otherwise. Additionally, the trial court's factual findings concluding defense counsel was not ineffective were not clearly erroneous. Based on the totality of the circumstances, a motion to suppress most likely would have been denied. "[D]efendant's claim that the evidence would have been suppressed had a motion been made falls just short on the facts of this case." *Serges*, ___ Mich App at ___ (Swartzle, J., concurring dubitante); slip op at 5. Defendant's Application for Leave to Appeal should be denied and the Court of Appeals' published opinion should stand.

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RELIEF

WHEREFORE, the People of the State of Michigan, through David S. Leyton, Prosecuting Attorney in and for the County of Genesee, by Katie R. Jory, Assistant Prosecuting Attorney, respectfully request that this Honorable Court DENY Defendant's Application for Leave to Appeal. In the event that this Court remands this case for new trial, the People respectfully request that the question of admissibility of Defendant's pants, and any evidence resulting from it, be left to the trial court and to allow police the opportunity to obtain a warrant to test Defendant's pants for the DNA of the victim. Especially because there may be other spots of her blood on his pants that were not tested due to MSP lab policy.

Respectfully Submitted,

DAVID S. LEYTON
PROSECUTING ATTORNEY
GENESEE COUNTY

DATED: October 21, 2025

/s/ Katie R. Jory
Katie R. Jory (P78698)
Assistant Prosecuting Attorney

WORD COUNT CERTIFICATION

I hereby certify that this document contains 15,825 words, including any captions or footnotes, but excluding the cover page, table of contents, index of authorities, statement of jurisdiction, judgment appealed from and relief sought, counter-statement of questions presented, and this word count certification. The body of the document is one-inch margins, 12-point Times New Roman font, and set to double spaced lining, except for quotations and footnotes.

/s/ Katie R. Jory
Katie R. Jory (P78698)
Assistant Prosecuting Attorney