Michigan Supreme Court

# MICHIGAN REPORTS

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## CASES DECIDED

IN THE

# SUPREME COURT

OF

# MICHIGAN

FROM

July 6, 1988 to December 29, 1988

WILLIAM F. HAGGERTY
REPORTER OF DECISIONS

## VOL. 431

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1989

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# SUPREME COURT

CHIEF JUSTICE

| | TERM EXPIRES JANUARY 1 OF |
|---|---|
| DOROTHY COMSTOCK RILEY, GROSSE POINTE FARMS ..... | 1993 |

ASSOCIATE JUSTICES

| | |
|---|---|
| CHARLES L. LEVIN, DETROIT ..... | 1989 |
| JAMES H. BRICKLEY, TRAVERSE CITY ..... | 1989 |
| MICHAEL F. CAVANAGH, EAST LANSING ..... | 1991 |
| PATRICIA J. BOYLE, DETROIT ..... | 1991 |
| DENNIS W. ARCHER, DETROIT ..... | 1995 |
| ROBERT P. GRIFFIN, TRAVERSE CITY ..... | 1995 |

COMMISSIONERS

ALOYSIUS J. LYNCH, CHIEF COMMISSIONER

| | |
|---|---|
| DENNIS DONOHUE | HARRY ZELIFF |
| JOSEPH B. SZEREMET | MARY C. SMITH |
| T. VICTOR JACKSON | PHILLIP M. STEVENS |
| FRANK J. GRECO | TERENCE DAVIS |
| MICHAEL L. PITTS | LINDA MOHNEY RHODUS |
| MICHAEL MURRAY | MICHAEL J. SCHMEDLEN |
| GLEN B. GRONSETH | JOHN K. PARKER |

STATE COURT ADMINISTRATOR: V. ROBERT PAYANT, EAST LANSING[1]
STATE COURT ADMINISTRATOR: MARILYN K. HALL, LANSING[2]

CLERK: CORBIN R. DAVIS, LANSING
CRIER: LOUIS E. HUSBAND, LANSING
REPORTER OF DECISIONS: WILLIAM F. HAGGERTY, EAST LANSING

ATTORNEY GENERAL: FRANK J. KELLEY, ALPENA
SOLICITOR GENERAL: LOUIS J. CARUSO, LANSING

[1] To July 31, 1988.

[2] From August 1, 1988.

# COURT OF APPEALS

CHIEF JUDGE

| | Term Expires January 1 of |
|---|---|
| ROBERT J. DANHOF, East Lansing, | 1993 |

CHIEF JUDGE PRO TEM

| | |
|---|---|
| JOHN H. GILLIS, Grosse Pointe Shores, | 1989 |

JUDGES

| | |
|---|---|
| DONALD E. HOLBROOK, Jr., Grand Ledge, | 1991 |
| MICHAEL J. KELLY, Southfield, | 1989 |
| RICHARD M. MAHER, Livonia, | 1991 |
| WILLIAM R. BEASLEY, Birmingham, | 1989 |
| WALTER P. CYNAR, Warren, | 1991 |
| BARBARA B. MacKENZIE, Petoskey, | 1991 |
| MYRON H. WAHLS, Detroit, | 1993 |
| HAROLD HOOD, Detroit, | 1991 |
| ROMAN S. GRIBBS, Detroit, | 1989 |
| JOHN H. SHEPHERD, Southfield, | 1991 |
| JOSEPH B. SULLIVAN, Grosse Pointe Park, | 1993 |
| DAVID H. SAWYER, Grand Rapids, | 1993 |
| ELIZABETH A. WEAVER, Glen Arbor, | 1993 |
| GARY R. McDONALD, Saginaw, | 1989 |
| MARTIN M. DOCTOROFF, Birmingham, | 1989 |
| WILLIAM B. MURPHY, Grand Rapids, | 1989 |

COMMISSIONERS:

JACK L. BORST, East Lansing[1]
JOHN H. STENGER, Lansing
MARILYN MORRIS WANGER, Lansing
ALLAN S. FALK, Lansing
TIMOTHY W. SANDERSON, East Lansing[2]
DAVID L. JORDON, East Lansing
NELSON S. LEAVITT, East Lansing[3]

| | |
|---|---|
| CHIEF CLERK: | RONALD L. DZIERBICKI, Lansing |
| ASSISTANT CLERKS: | NORBERT G. JAWORSKI, East Lansing |
| | ELLA WILLIAMS, Detroit |
| | HENRY L. HENSON, Detroit |
| | KAREN Z. PARKER, Grand Rapids |
| | LINDA C. RAGLAND-SHERER, Lansing |
| | THOMAS J. RASDALE, DeWitt |
| | BRIAN M. SMITH, East Lansing |

[1] Retired December 20, 1988.
[2] To July 7, 1988.
[3] From August 15, 1988.

# CIRCUIT JUDGES

| | Term Expires January 1 of |
|---|---|
| 1. HARVEY W. MOES, Hillsdale, | 1991 |
| 2. ZOE S. BURKHOLZ, Benton Harbor, | 1989 |
| CASPER OTHELLO GRATHWOHL, Niles, | 1993 |
| JOHN T. HAMMOND, St. Joseph, | 1993 |
| RONALD J. TAYLOR, Benton Harbor, | 1991 |
| 3. MARIANNE O. BATTANI, Detroit, | 1993 |
| SUSAN D. BORMAN, Detroit, | 1991 |
| THOMAS J. BRENNAN, Dearborn, | 1991 |
| WILLIAM LEO CAHALAN, Grosse Ile, | 1989 |
| ROBERT J. COLOMBO, Jr., Grosse Pointe, | 1989 |
| MICHAEL J. CONNOR, Detroit, | 1989 |
| HARRY J. DINGEMAN, Jr., Grosse Pointe Park, | 1991 |
| CHARLES S. FARMER, Detroit, | 1991 |
| SHARON TEVIS FINCH, Detroit, | 1989 |
| THOMAS J. FOLEY, Plymouth, | 1991 |
| JOHN H. GILLIS, Jr., Detroit, | 1991 |
| WILLIAM J. GIOVAN, Grosse Pointe Park, | 1991 |
| JAMES A. HATHAWAY, Grosse Pointe Shores, | 1993 |
| RICHARD P. HATHAWAY, Detroit, | 1991 |
| JOHN H. HAUSNER, Grosse Pointe Park, | 1989 |
| J. PHILLIP JOURDAN, Plymouth, | 1989 |
| CHARLES KAUFMAN, Dearborn Heights, | 1993 |
| RICHARD C. KAUFMAN, Plymouth, | 1993 |
| JOHN R. KIRWAN, Northville, | 1993 |
| KATHLEEN I. MACDONALD, Grosse Pointe, | 1993 |
| JAMES E. MIES, Livonia, | 1989 |
| CLAUDIA HOUSE MORCOM, Detroit, | 1993 |
| JOHN A. MURPHY, Detroit, | 1993 |
| ROLAND L. OLZARK, Grosse Pointe, | 1991 |
| JAMES J. RASHID, Northville, | 1993 |
| MAUREEN PULTE REILLY, Detroit, | 1991 |
| LOUIS F. SIMMONS, Jr., Detroit, | 1993 |
| MICHAEL L. STACEY, Detroit, | 1989 |
| MARVIN R. STEMPIEN, Livonia, | 1991 |
| CYNTHIA DIANE STEPHENS, Detroit, | 1989 |
| HENRY J. SZYMANSKI, Detroit, | 1993 |
| PAUL S. TERANES, Grosse Pointe, | 1989 |
| KAYE TERTZAG, Allen Park, | 1989 |
| LUCILE A. WATTS, Detroit, | 1993 |
| HELENE NITA WHITE, Detroit, | 1989 |
| 4. GORDON W. BRITTEN, Jackson, | 1989 |

| | | Term Expires January 1 of |
|---|---|---|
| | JAMES G. FLEMING, Jackson, | 1993 |
| | RUSSELL E. NOBLE, Jackson, | 1993 |
| | ALEXANDER CHARLES PERLOS, Jackson, | 1991 |
| 5. | HUDSON E. DEMING, Grand Ledge, | 1989 |
| | RICHARD M. SHUSTER, Hastings, | 1991 |
| 6. | ROBERT C. ANDERSON, Pontiac, | 1993 |
| | STEVEN N. ANDREWS, Bloomfield Hills, | 1991 |
| | DAVID F. BRECK, Birmingham, | 1989 |
| | JESSICA R. COOPER, Birmingham, | 1993 |
| | HILDA R. GAGE, Bloomfield Hills, | 1993 |
| | ALICE L. GILBERT, Orchard Lake, | 1989 |
| | RICHARD D. KUHN, Waterford, | 1993 |
| | NORMAN L. LIPPITT, Birmingham, | 1991 |
| | FRED M. MESTER, Huntington Woods, | 1991 |
| | FRANCIS X. O'BRIEN, Royal Oak, | 1989 |
| | JOHN N. O'BRIEN, Berkley, | 1993 |
| | GENE SCHNELZ, Walled Lake, | 1991 |
| | ROBERT LEWIS TEMPLIN, Jr., Bloomfield Hills, | 1991 |
| | JAMES S. THORBURN, Birmingham, | 1989 |
| 7. | EARL E. BORRADAILE, Davison, | 1989 |
| | PHILIP C. ELLIOTT, Flint, | 1993 |
| | DONALD R. FREEMAN, Flint, | 1991 |
| | JUDITH A. FULLERTON, Flint, | 1989 |
| | ROBERT M. RANSOM, Flushing, | 1991 |
| | VALDEMAR LUTHER WASHINGTON, Flint, | 1989 |
| | THOMAS C. YEOTIS, Flint, | 1993 |
| 8. | JAMES L. BANKS, Ionia, | 1991 |
| | CHARLES W. SIMON, Jr., Edmore, | 1993 |
| 9. | JOHN F. FOLEY, Schoolcraft, | 1993 |
| | RICHARD RYAN LAMB, Mattawan, | 1989 |
| | PHILIP D. SCHAEFER, Kalamazoo, | 1993 |
| | WILLIAM G. SCHMA, Kalamazoo, | 1989 |
| 10. | FRED J. BORCHARD, Saginaw, | 1989 |
| | LEOPOLD P. BORRELLO, Saginaw, | 1989 |
| | ROBERT S. GILBERT, Saginaw, | 1993 |
| | ROBERT L. KACZMAREK, Saginaw, | 1991 |
| | JOSEPH R. McDONALD, Saginaw, | 1993 |
| 11. | CHARLES H. STARK, Munising, | 1989 |
| 12. | STEPHEN D. CONDON, Hancock, | 1991 |
| 13. | WILLIAM R. BROWN, Traverse City, | 1991 |
| | CHARLES M. FORSTER, Williamsburg, | 1993 |
| 14. | R. MAX DANIELS, Muskegon, | 1993 |
| | JAMES M. GRAVES, Jr., Muskegon, | 1989 |
| | MICHAEL EUGENE KOBZA, Muskegon, | 1993 |
| | RONALD H. PANNUCCI, North Muskegon, | 1991 |
| 15. | MICHAEL H. CHERRY, Coldwater, | 1991 |
| 16. | FREDERICK D. BALKWILL, Mt. Clemens, | 1993 |
| | JOHN B. BRUFF, Mt. Clemens, | 1989 |
| | RAYMOND R. CASHEN, Roseville, | 1993 |
| | ROBERT J. CHRZANOWSKI, Warren, | 1993 |
| | GEORGE R. DENEWETH, Mt. Clemens, | 1989 |
| | KATHLEEN JANSEN, St. Clair Shores, | 1991 |

| | | Term Expires January 1 of |
|---|---|---|
| | KENNETH N. SANBORN, Mt. Clemens, | 1991 |
| | MICHAEL D. SCHWARTZ, Fraser, | 1989 |
| 17. | ROBERT A. BENSON, Grand Rapids, | 1991 |
| | GEORGE V. BOUCHER, Grand Rapids, | 1989 |
| | GEORGE S. BUTH, Grand Rapids, | 1993 |
| | GEORGE R. COOK, Grand Rapids, | 1993[1] |
| | STUART HOFFIUS, Grand Rapids, | 1989 |
| | ROMAN J. SNOW, Grand Rapids, | 1991 |
| | H. DAVID SOET, Grand Rapids, | 1991[2] |
| 18. | LAWRENCE M. BIELAWSKI, Bay City, | 1991[3] |
| | WILLIAM J. CAPRATHE, Bay City, | 1993 |
| | EUGENE C. PENZIEN, Bay City, | 1989 |
| 19. | JAMES M. BATZER, Manistee, | 1991 |
| 20. | CALVIN L. BOSMAN, Grand Haven, | 1993 |
| | JAMES E. TOWNSEND, Holland, | 1991 |
| 21. | PAUL F. O'CONNELL, Mt. Pleasant, | 1993 |
| 22. | WILLIAM F. AGER, Jr., Ann Arbor, | 1989 |
| | ROSS W. CAMPBELL, Jr., Ann Arbor, | 1993 |
| | HENRY T. CONLIN, Ann Arbor, | 1989[4] |
| | PATRICK J. CONLIN, Ann Arbor, | 1991 |
| | EDWARD D. DEAKE, Ypsilanti, | 1991 |
| 23. | J. RICHARD ERNST, East Tawas, | 1991 |
| 24. | ALLEN E. KEYES, Marlette, | 1991 |
| 25. | RAYMOND J. JASON, Marquette, | 1991 |
| | EDWARD A. QUINNELL, Marquette, | 1993 |
| 26. | ROBERT R. FERGUSON, Ossineke, | 1991 |
| | JOSEPH P. SWALLOW, Alpena, | 1993 |
| 27. | TERRENCE R. THOMAS, Newaygo, | 1991 |
| 28. | WILLIAM R. PETERSON, Cadillac, | 1991 |
| 29. | TIMOTHY M. GREEN, St. Johns, | 1993 |
| | RANDY L. TAHVONEN, Elsie, | 1991 |
| 30. | THOMAS LEO BROWN, Lansing, | 1993 |
| | JAMES R. GIDDINGS, Lansing, | 1993 |
| | LAWRENCE M. GLAZER, Okemos | 1989 |
| | MICHAEL G. HARRISON, East Lansing, | 1989 |
| | PETER D. HOUK, East Lansing, | 1991 |
| | JAMES T. KALLMAN, Okemos, | 1991 |
| | CAROLYN STELL, East Lansing, | 1989 |
| 31. | JAMES T. CORDEN, Port Huron, | 1989 |
| | PETER E. DEEGAN, Port Huron, | 1993 |
| | ERNEST F. OPPLIGER, Port Huron, | 1991 |
| 32. | WILLIAM G. CLOON, Jr., Ironwood, | 1991 |
| 33. | RICHARD M. PAJTAS, Charlevoix, | 1991 |
| 34. | CARL L. HORN, Standish, | 1991 |
| 35. | GERALD D. LOSTRACCO, Owosso, | 1991 |

[1] Died October 16, 1988.

[2] From December 19, 1988.

[3] From September 9, 1988.

[4] Died December 2, 1988.

| | Term Expires January 1 of |
|---|---|
| 36. MEYER WARSHAWSKY, South Haven, | 1991 |
| 37. JAMES C. KINGSLEY, Albion, | 1991 |
| STEPHEN B. MILLER, Battle Creek, | 1993 |
| PAUL NICOLICH, Battle Creek, | 1989 |
| 38. JAMES J. KELLEY, Monroe, | 1989 |
| WILLIAM F. LaVOY, Monroe, | 1993 |
| DANIEL L. SULLIVAN, Lambertville, | 1991 |
| 39. KENNETH B. GLASER, Jr., Adrian, | 1989 |
| JOHN C. TIMMS, Adrian, | 1991 |
| 40. NORMAN A. BAGULEY, Lapeer, | 1993 |
| MARTIN E. CLEMENTS, Lapeer, | 1991 |
| 41. FRANCIS D. BROUILLETTE, Iron Mountain, | 1993 |
| JOHN D. PAYANT, Kingsford, | 1991 |
| 42. PAUL J. CLULO, Midland, | 1991 |
| TYRONE GILLESPIE, Midland, | 1989[5] |
| 43. MICHAEL E. DODGE, Niles, | 1993 |
| 44. DANIEL A. BURRESS, Brighton, | 1993 |
| STANLEY J. LATREILLE, Howell, | 1989 |
| 45. JAMES P. NOECKER, Sturgis, | 1989 |
| 46. ALTON T. DAVIS, Jr., Grayling, | 1993 |
| WILLIAM A. PORTER, Gaylord, | 1991 |
| 47. DEAN J. SHIPMAN, Escanaba, | 1993 |
| 48. GEORGE R. CORSIGLIA, Fennville, | 1993 |
| 49. LAWRENCE C. ROOT, Big Rapids, | 1989 |
| 50. NICHOLAS J. LAMBROS, Sault Ste. Marie, | 1989 |
| 51. RICHARD I. COOPER, Ludington, | 1991 |
| 52. M. RICHARD KNOBLOCK, Port Austin, | 1991 |
| 53. ROBERT C. LIVO, Cheboygan, | 1993 |
| 54. PATRICK REED JOSLYN, Caro, | 1989 |
| 55. KURT N. HANSEN, Gladwin, | 1991 |

[5] To December 31, 1988.

# RECORDER'S COURT OF DETROIT

| | Term Expires January 1 of |
|---|---|
| WENDY M. BAXTER, | 1989 |
| TERRANCE K. BOYLE, | 1993 |
| DOMINICK R. CARNOVALE, | 1993 |
| JAMES R. CHYLINSKI, | 1991 |
| EVELYN K. COOPER, | 1991 |
| GEORGE W. CROCKETT, III, | 1989 |
| GERSHWIN ALLEN DRAIN, | 1989 |
| PRENTIS EDWARDS, | 1989 |
| ROBERT L. EVANS, | 1993 |
| GERALDINE BLEDSOE FORD, | 1993 |
| HENRY L. HEADING, | 1991 |
| DONALD LEWIS HOBSON, | 1991 |
| THOMAS EDWARD JACKSON, | 1989 |
| BEVERLEY ANNE JASPER, | 1989 |
| CLARICE JOBES, | 1991 |
| VERA MASSEY JONES, | 1991 |
| DAVID P. KERWIN, | 1993 |
| WARFIELD MOORE, Jr., | 1991 |
| JOHN PATRICK O'BRIEN, | 1989 |
| DALTON A. ROBERSON, | 1989 |
| JAMES E. ROBERTS, | 1993 |
| MICHAEL F. SAPALA, | 1989 |
| M. JOHN SHAMO, | 1991 |
| LAWRENCE D. SILVERMAN, | 1993 |
| CRAIG S. STRONG, | 1991 |
| MICHAEL J. TALBOT, | 1989 |
| EDWARD M. THOMAS, | 1991 |
| ISIDORE B. TORRES, | 1989 |
| LEONARD TOWNSEND, | 1993 |

# DISTRICT JUDGES

| | | Term Expires January 1 of |
|---|---|---|
| 1. | MARY PATRICIA COSTELLO, Monroe, | 1993 |
| | MICHAEL W. LaBEAU, Monroe, | 1991 |
| | WILLIAM L. TAFT, Monroe, | 1989 |
| 2-1. | NATALIA M. KOSELKA, Adrian, | 1993 |
| | JAMES E. SHERIDAN, Adrian, | 1991 |
| 2-2. | DONALD L. SANDERSON, Hillsdale, | 1991 |
| 3-1. | DAVID T. COYLE, Coldwater, | 1991 |
| 3-2. | WILLIAM L. McMANUS, Colon, | 1991 |
| 4. | PAUL E. DEATS, Edwardsburg, | 1991 |
| 5. | HUGH W. BLACK, Stevensville, | 1991 |
| | DANIEL R. DEJA, Baroda, | 1993 |
| | JOHN N. FIELDS, Niles, | 1993 |
| | DAVID M. PETERSON, St. Joseph, | 1991 |
| | LYNDA ALENE TOLEN, St. Joseph, | 1989 |
| 7. | WILLIAM C. BUHL, Paw Paw, | 1991 |
| | DAVID C. GRIER, South Haven, | 1993 |
| 8. | KARL G. ERICKSON, Kalamazoo, | 1993 |
| | KENNETH E. LONG, Kalamazoo, | 1991 |
| 9-1. | JAMES P. COYLE, Kalamazoo, | 1989 |
| | ARVIN L. DAVIS, Kalamazoo, | 1991 |
| | ANN L. HANNON, Kalamazoo, | 1993 |
| | DONALD E. JAMES, Kalamazoo, | 1993 |
| 9-2. | KENNETH A. FRICKE, Portage, | 1991 |
| 10. | ALLEN L. GARBRECHT, Battle Creek, | 1989 |
| | FRANKLIN K. LINE, Jr., Marshall, | 1989 |
| | ALFONSO A. MAGNOTTA, Albion, | 1993 |
| | SHELTON C. PENN, Battle Creek, | 1991 |
| 12. | ROBERT CRARY, Jr., Jackson, | 1991 |
| | CHARLES J. FALAHEE, Jr., Jackson, | 1989 |
| | LYSLE G. HALL, Jackson, | 1993 |
| | JAMES M. JUSTIN, Jackson, | 1989 |
| 14A. | KENNETH BRONSON, Ann Arbor, | 1993 |
| | KARL VOORHIES FINK, Dexter, | 1991 |
| | THOMAS F. SHEA, Dexter, | 1989 |
| 14B. | JOHN B. COLLINS, Ypsilanti, | 1991 |
| 15. | GEORGE W. ALEXANDER, Ann Arbor, | 1989 |
| | S. J. ELDEN, Ann Arbor, | 1993 |
| | PIETER G. V. THOMASSEN, Ann Arbor, | 1991 |
| 16. | ROBERT B. BRZEZINSKI, Livonia, | 1991 |
| | JAMES R. McCANN, Livonia, | 1989 |
| 17. | ROBERT F. BRANG, Redford, | 1991 |

| | | Term Expires January 1 of |
|---|---|---|
| | JOHN M. DILLON, Redford, | 1993 |
| 18. | GAIL McKNIGHT, Westland, | 1989 |
| | THOMAS G. SMITH, Westland, | 1991 |
| 19. | JOSEPH J. BURTELL, Dearborn, | 1993 |
| | VIRGINIA A. SOBOTKA, Dearborn, | 1989 |
| 20. | DUANE DUNICK, Dearborn Heights, | 1991 |
| | LEO K. FORAN, Dearborn Heights, | 1989 |
| 21. | RICHARD L. HAMMER, Garden City, | 1991 |
| 22. | JOHN H. McCARTNEY, Inkster, | 1989 |
| 23. | ANTHONY NICITA, Taylor, | 1991 |
| | WILLIAM J. SUTHERLAND, Taylor, | 1991 |
| 24. | A. R. DeBIASI, Allen Park, | 1993 |
| | MICHAEL T. RUSSELL, Allen Park, | 1991 |
| 25. | ROY B. CICOTTE, Lincoln Park, | 1991 |
| | JOSEPH H. DeLAURENTIIS, Lincoln Park, | 1993 |
| 26-1. | RAYMOND A. CHARRON, River Rouge, | 1991 |
| 26-2. | MICHAEL F. CIUNGAN, Ecorse, | 1991 |
| 27-1. | LAWRENCE L. EMMERT, Wyandotte, | 1989 |
| 27-2. | GLENN C. VALASCO, Riverview, | 1991 |
| 28. | DONALD C. NEITZEL, Southgate, | 1991 |
| 29. | CAROLYN A. ARCHBOLD, Wayne, | 1989 |
| 30. | WILLIAM F. BLEDSOE, Highland Park, | 1991 |
| | L. KIM HOAGLAND, Highland Park, | 1993 |
| 31. | WALTER ADAM PARUK, Hamtramck, | 1991 |
| 32A. | ROGER J. La ROSE, Harper Woods, | 1991 |
| 33. | KURT G. KERSTEN, Trenton, | 1991 |
| | DONALD L. SWANK, Trenton, | 1993 |
| 34. | JAMES B. STONE, Belleville, | 1991 |
| | HENRY ZABOROWSKI, Belleville, | 1993 |
| 35. | JAMES N. GARBER, Plymouth, | 1989 |
| | JOHN E. MacDONALD, Northville, | 1991 |
| 36. | ALEX J. ALLEN, Jr., Detroit, | 1993 |
| | JOSEPH N. BALTIMORE, Detroit, | 1989 |
| | NANCY McCAUGHAN BLOUNT, Detroit, | 1991 |
| | DAVID MARTIN BRADFIELD, Detroit, | 1991 |
| | GERALD BROCK, Detroit, | 1993 |
| | FREDERICK E. BYRD, Detroit, | 1989 |
| | WENDY COOLEY, Detroit, | 1991 |
| | JOHN COZART, Jr., Detroit, | 1989 |
| | DAPHNE MEANS CURTIS, Detroit, | 1989 |
| | R. PATRICK DONAHUE, Detroit, | 1989 |
| | THERESA DOSS, Detroit, | 1993 |
| | CLAUDIA LAUCHIÉ GARTIN, Detroit, | 1989 |
| | JIMMYLEE GRAY, Detroit, | 1989 |
| | RUFUS GRIFFIN, Jr., Detroit, | 1993 |
| | PAMELA R. HARWOOD, Detroit, | 1989 |
| | WILLIAM J. HATHAWAY, Detroit, | 1989 |
| | DENISE PAGE HOOD, Detroit, | 1991 |
| | LEON JENKINS, Detroit, | 1993 |
| | WILLIE G. LIPSCOMB, Jr., Detroit, | 1991 |
| | MARION A. MOORE, Detroit, | 1993 |

| | | Term Expires January 1 of |
|---|---|---|
| | ELBERT E. NANCE, JR., DETROIT, | 1993 |
| | JEANETTE O'BANNER-OWENS, DETROIT, | 1989 |
| | JOHN R. PERRY, DETROIT, | 1993 |
| | LONGWORTH D. QUINN, DETROIT, | 1989 |
| | ADAM A. SHAKOOR, DETROIT, | 1991 |
| | CHRIS E. STITH, DETROIT, | 1989 |
| | DANIEL J. VAN ANTWERP, DETROIT, | 1989 |
| | THOMAS A. VAN TIEM, SR., DETROIT, | 1993 |
| | ROBERT L. ZIOLKOWSKI, DETROIT, | 1989 |
| 37. | SHERMAN P. FAUNCE, II, WARREN, | 1991 |
| | THOMAS EDWARD KENNEDY, WARREN, | 1989 |
| | GEORGE E. MONTGOMERY, WARREN, | 1989 |
| | DEBORAH A. SERVITTO, WARREN, | 1993 |
| 39. | MARY E. McDEVITT, ROSEVILLE, | 1991 |
| | WILLIAM B. WARD, ROSEVILLE, | 1989 |
| 40. | WILLIAM A. CROUCHMAN, ST. CLAIR SHORES, | 1989 |
| | CRAIGEN J. OSTER, ST. CLAIR SHORES, | 1991 |
| 41A. | HERMAN C. CAMPBELL, UTICA, | 1989 |
| | ANDREW R. DRANCHAK, STERLING HEIGHTS, | 1991 |
| | KENNETH J. KOSNIC, STERLING HEIGHTS, | 1989 |
| | THOMAS W. McDONELL, UTICA, | 1993 |
| 41B. | WILLIAM H. CANNON, MT. CLEMENS, | 1989 |
| | GEORGE C. STEEH, MT. CLEMENS, | 1991 |
| 42-1. | RICHARD D. McLEAN, ROMEO, | 1991 |
| 42-2. | RICHARD E. CYRUL, MT. CLEMENS, | 1989 |
| 43. | JOSEPH S. AGNELLO, MADISON HEIGHTS, | 1989 |
| | ROBERT J. TURNER, FERNDALE, | 1991 |
| | DOUGLAS J. M. VOSS, MADISON HEIGHTS, | 1993 |
| 44. | JOHN R. MANN, ROYAL OAK, | 1991 |
| | DANIEL SAWICKI, ROYAL OAK, | 1989 |
| 45A. | JOHN H. NORTON, BERKLEY, | 1991 |
| 45B. | MARVIN F. FRANKEL, OAK PARK, | 1991 |
| | BENJAMIN J. FRIEDMAN, HUNTINGTON WOODS, | 1991 |
| 46. | STEPHEN C. COOPER, SOUTHFIELD, | 1993 |
| | BRYAN HOWARD LEVY, BIRMINGHAM, | 1989 |
| | SUSAN M. MOISEEV, SOUTHFIELD, | 1989 |
| 47. | MICHAEL J. HAND, FARMINGTON, | 1991 |
| | MARGARET G. SCHAEFFER, FARMINGTON HILLS, | 1993 |
| 48. | EDWARD AVADENKA, ORCHARD LAKE, | 1991[1] |
| | GUS CIFELLI, BLOOMFIELD HILLS, | 1989 |
| | EDWARD SOSNICK, BLOOMFIELD HILLS, | 1991 |
| 50. | CHRISTOPHER C. BROWN, PONTIAC, | 1991 |
| | LOUIS E. FAIRBROTHER, PONTIAC, | 1993 |
| | CHARLES W. McDONALD, FARMINGTON HILLS, | 1989[2] |
| | WILLIAM WATERMAN, PONTIAC, | 1989 |

[1] From September 6, 1988.

[2] From August 1, 1988.

| | | Term Expires January 1 of |
|---|---|---|
| 51. | ROBERT W. CARR, Waterford, | 1989 |
| | KENNETH H. HEMPSTEAD, Drayton Plains, | 1991 |
| 52-1. | MICHAEL BATCHIK, Union Lake, | 1993 |
| | HAROLD M. BULGARELLI, Walled Lake, | 1989 |
| | BRIAN W. MacKENZIE, Novi, | 1989 |
| 52-2. | GERALD E. McNALLY, Clarkston, | 1991 |
| 52-3. | JAMES P. SHEEHY, Lake Orion, | 1993 |
| | ROBERT L. SHIPPER, Rochester, | 1991 |
| 52-4. | WILLIAM E. BOLLE, Troy, | 1991 |
| | DENNIS C. DRURY, Troy, | 1989 |
| | BRISTOL E. HUNTER, Clawson, | 1993 |
| 53. | FRANK R. DEL VERO, Howell, | 1993 |
| | DAVID G. GEE, Brighton, | 1991 |
| | MICHAEL F. MERRITT, Howell, | 1989 |
| 54A. | PATRICK F. CHERRY, Lansing, | 1991 |
| | WILLIAM E. COLLETTE, Lansing, | 1993 |
| | JOHN W. DAVIS, Lansing, | 1989 |
| | CHARLES F. FILICE, Lansing, | 1991 |
| | CLAUDE R. THOMAS, Lansing, | 1993 |
| | JAMES J. WOOD, Lansing, | 1989 |
| 54B. | JULIUS I. HANSLOVSKY, East Lansing, | 1993 |
| 55. | THOMAS E. BRENNAN, Jr., East Lansing, | 1993 |
| | PAMELA J. McCABE, East Lansing, | 1989 |
| 56-1. | GARY R. HOLMAN, Hickory Corners, | 1989 |
| 56-2. | PAUL F. BERGER, Grand Ledge, | 1991 |
| | KENNETH A. HANSEN, Charlotte, | 1993 |
| 57. | HARRY A. BEACH, Otsego, | 1989 |
| | GARY A. STEWART, Allegan, | 1991 |
| 58. | JOHN GALIEN, Jr., Holland, | 1991 |
| | RICHARD J. KLOOTE, Jenison, | 1989 |
| | KENNETH D. POST, Zeeland, | 1993 |
| 59. | SHERWIN J. VENEMA, Grandville, | 1993 |
| 60. | WILLIAM J. COLE, Muskegon, | 1993 |
| | EDWARD CAMPBELL FARMER, Jr., Muskegon, | 1993 |
| | FREDRIC A. GRIMM, Jr., North Muskegon, | 1991 |
| | WILLIAM C. MARIETTI, North Muskegon, | 1989 |
| | RICHARD J. PASARELA, Muskegon, | 1991 |
| 61. | PATRICK C. BOWLER, Grand Rapids, | 1991 |
| | JOEL P. HOEKSTRA, Grand Rapids, | 1991 |
| | CAROL S. IRONS, Grand Rapids, | 1989[3] |
| | DONALD A. JOHNSTON, III, Grand Rapids, | 1993 |
| | MICHAEL ROBERT SMOLENSKI, Grand Rapids, | 1993 |
| 62A. | JACK R. JELSEMA, Wyoming, | 1991 |
| | RICHARD H. TIMMERS, Wyoming, | 1989 |
| 62B. | WILLIAM G. KELLY, Kentwood, | 1991 |
| 63-1. | STEVEN R. SERVAAS, Rockford, | 1991 |
| 63-2. | JOSEPH B. WHITE, East Grand Rapids, | 1991 |
| 64A. | JAMES R. WARD, Ionia, | 1991 |
| 64B. | ARNEY E. MUSTONEN, Sheridan, | 1991 |
| 65-1. | JAMES B. MACKIE, Alma, | 1991 |

[3] Died October 19, 1988.

| | | Term Expires January 1 of |
|---|---|---|
| 65-2. | JEFFREY L. MARTLEW, DeWitt, | 1991 |
| 66. | GEORGE L. BeGOLE, Morrice, | 1991 |
| | BRUCE A. FOX, Corunna, | 1989 |
| 67-1. | HARRY P. NEWBLATT, Flint, | 1991 |
| 67-2. | CHARLES B. MOSIER, Burton, | 1991 |
| | GERALD D. SNODGRASS, Burton, | 1993 |
| 67-3. | WILLIAM R. EVANS, Mt. Morris, | 1991 |
| 67-4. | RONALD W. BLACK, Fenton, | 1991 |
| | HARLAND R. CASWELL, Grand Blanc, | 1989 |
| 68. | PETER ANASTOR, Flint, | 1993 |
| | THOMAS M. DONNELLAN, Flint, | 1991 |
| | ALBERT P. HORRIGAN, Flint, | 1993 |
| | MICHAEL D. McARA, Flint, | 1991 |
| | GEOFFREY L. NEITHERCUT, Flint, | 1989 |
| | KENNETH M. SIEGEL, Flint, | 1989 |
| 70-1. | JOSEPH G. DeFRANCESCO, Saginaw, | 1993 |
| | HARRY M. TITUS, Saginaw, | 1991 |
| | DANIEL R. WEBBER, Saginaw, | 1989 |
| 70-2. | ROBERT E. BRIGHT, Saginaw, | 1993 |
| | BRUCE J. SCORSONE, Saginaw, | 1991 |
| | KYLE HIGGS TARRANT, Saginaw, | 1989 |
| 71A. | JOHN T. CONNOLLY, Lapeer, | 1989 |
| | MICHAEL C. DIONISE, Lapeer, | 1991 |
| 71B. | RICHARD F. KERN, Caro, | 1991 |
| 72. | RICHARD A. COOLEY, Jr., Port Huron, | 1993 |
| | JOHN G. CUMMINGS, St. Clair, | 1991 |
| | DANIEL J. KELLY, Port Huron, | 1989 |
| 73-1. | JOHN T. SCHUBEL, Port Hope, | 1991 |
| 73-2. | JAMES A. MARCUS, Applegate, | 1991 |
| 74. | CRAIG D. ALSTON, Bay City, | 1991 |
| | JOHN C. LEAMING, Essexville, | 1989 |
| | SCOTT J. NEWCOMBE, Bay City, | 1993 |
| 75. | THOMAS A. BEALE, Midland, | 1993 |
| | ROBERT G. FRASER, Midland, | 1991 |
| 76. | PETER D. O'CONNELL, Mt. Pleasant, | 1991 |
| 77. | GEORGE VAN KULA, Big Rapids, | 1991 |
| 78. | RICHARD J. FARABAUGH, Fremont, | 1991 |
| 79. | JOHN R. CARNEY, Jr., Ludington, | 1991 |
| 80. | GARY J. ALLEN, Gladwin, | 1991 |
| 81. | EDWARD M. KELLER, Oscoda, | 1989 |
| 82. | JOEL I. MILLS, West Branch, | 1991 |
| 83. | FRANCIS L. WALSH, Prudenville, | 1991 |
| 84. | CHARLES D. CORWIN, Cadillac, | 1991 |
| 85. | BRENT V. DANIELSON, Manistee, | 1991 |
| 86. | RICHARD L. BENEDICT, Traverse City, | 1991 |
| | JAMES R. McCORMICK, Traverse City, | 1989 |
| 87. | E. PATRICK MURRAY, Gaylord, | 1991 |
| 88. | THEODORE O. JOHNSON, Ossineke, | 1991 |
| 89. | HAROLD A. JOHNSON, Jr., Cheboygan, | 1991 |
| 90. | HARVEY C. VARNUM, Boyne City, | 1991 |
| 91. | MICHAEL W. MacDONALD, Sault Ste. Marie, | 1991 |

| | | Term Expires January 1 of |
|---|---|---|
| 92. | ROBERT A. WOOD, Newberry, | 1991 |
| 93. | BRUCE E. PLACKOWSKI, Manistique, | 1989 |
| 94. | ROBERT J. DeGRAND, Gladstone, | 1991 |
| 95A. | JEFFREY G. BARSTOW, Menominee, | 1991 |
| 95B. | WILLIAM R. BROUILLETTE, Iron Mountain, | 1991 |
| 96. | JAMES M. COLLINS, Neguanee, | 1991 |
| | PATRICIA L. MICKLOW, Marquette, | 1993 |
| 97. | WILLIAM G. KONSTENIUS, Baraga, | 1991 |
| 98. | ANDERS B. TINGSTAD, Jr., Bessemer, | 1991 |

# MUNICIPAL JUDGES

| | Term Expires January 1 of |
|---|---|
| STAN C. KAZUL, Grosse Pointe, | 1992 |
| KIRSTEN FRANK, Grosse Pointe Park, | 1990 |
| MATTHEW R. RUMORA, Grosse Pointe Farms, | 1990 |
| PATRICIA M. SCHNEIDER, Grosse Pointe Woods, | 1992 |
| BENEDICT SEGESTA, East Detroit, | 1992 |
| MARTIN J. SMITH, East Detroit, | 1992 |

# PROBATE JUDGES

| County | | Term Expires January 1 of |
|---|---|---|
| Alcona | PAUL T. DWYER, Jr. | 1989 |
| Alger | WILLIAM A. WERNER | 1989 |
| Allegan | GEORGE A. GREIG | 1989 |
| Alpena | DOUGLAS A. PUGH | 1989 |
| Antrim | JOHN W. UNGER | 1989 |
| Arenac | RONALD M. BERGERON | 1989 |
| Baraga | GARFIELD W. HOOD | 1989 |
| Barry | RICHARD H. SHAW | 1989 |
| Bay | PAUL N. DONER | 1989 |
| Benzie | JOHN F. HUFT | 1989 |
| Berrien | STUART F. MEEK, Jr., | 1989 |
| Berrien | WILBUR SCHILLINGER | 1989 |
| Branch | EDWARD R. DeVITO | 1989 |
| Calhoun | JOHN M. BRUNDAGE | 1989 |
| Calhoun | PHILLIP E. HARTER | 1993 |
| Cass | HERBERT E. PHILLIPSON, Jr. | 1989 |
| Cheboygan | JOANNA NEALE | 1989 |
| Chippewa | LOWELL R. ULRICH | 1989 |
| Clare | ALEXANDER T. STRANGE, II | 1989 |
| Clinton | MARVIN E. ROBERTSON | 1989 |
| Crawford | EMIL L. KRAUS | 1989 |
| Delta | ROBERT E. GOEBEL, Jr. | 1989 |
| Dickinson | ROBERT G. FOSTER | 1989 |
| Eaton | JAMES L. THEOPHELIS | 1989 |
| Emmet | JOHN T. MURPHY | 1989[1] |
| Genesee | THOMAS L. GADOLA | 1993 |
| Genesee | ALLEN J. NELSON | 1991 |
| Genesee | LUKE QUINN | 1989 |
| Gogebic | TIMOTHY J. MAHONEY | 1989 |
| Grand Traverse | WILLIAM C. BOWRON | 1989 |
| Gratiot | JACK T. ARNOLD | 1989[2] |
| Gratiot | JAMES A. HARMONY | 1989[3] |
| Hillsdale | ALBERT J. NEUKOM | 1989 |
| Houghton | JOHN A. MIKKOLA | 1989 |
| Huron | DAVID L. CLABUESCH | 1989 |

[1] Retired October 16, 1988.

[2] From October 26, 1988.

[3] Resigned October 3, 1988.

| County | | Term Expires January 1 of |
|---|---|---|
| Ingham | R. GEORGE ECONONY | 1989 |
| Ingham | DONALD S. OWENS | 1991 |
| Ionia | GERALD J. SUPINA | 1989 |
| Iosco | WILLIAM H. McCREADY | 1989 |
| Iron | OSWALD G. CASANOVA | 1989 |
| Isabella | WILLIAM T. ERVIN | 1989 |
| Jackson | KEVIN J. DALY | 1989 |
| Jackson | FREDERICK O. SILL | 1993 |
| Kalamazoo | JAMES S. CASEY | 1991 |
| Kalamazoo | DONALD R. HALSTEAD | 1993 |
| Kalamazoo | CAROLYN H. WILLIAMS | 1989 |
| Kalkaska | ODELL B. CARLISLE | 1989 |
| Kent | DONALD J. DeYOUNG | 1989 |
| Kent | JANET A. HAYNES | 1989 |
| Kent | RANDALL J. HEKMAN | 1993 |
| Kent | JOHN P. STEKETEE | 1989 |
| Keweenaw | JAMES G. JAASKELAINEN | 1989 |
| Lake | MARK S. WICKENS | 1989 |
| Lapeer | CLAYTON E. PREISEL | 1989 |
| Leelanau | JOHN MICHAEL SENGER | 1989 |
| Lenawee | ROBERT J. BAKER | 1989 |
| Livingston | DONALD E. RINK | 1989 |
| Luce | STEVEN E. FORD | 1989 |
| Mackinac | GEORGE J. THEUT | 1989 |
| Macomb | THOMAS L. BULLER | 1989 |
| Macomb | JAMES F. NOWICKI | 1991 |
| Macomb | ROBERT E. SPIER | 1993 |
| Manistee | JOHN R. DeVRIES | 1989 |
| Marquette | MICHAEL J. ANDEREGG | 1989 |
| Mason | FRANCIS K. BOURISSEAU | 1989 |
| Mecosta | LaVAIL E. HULL | 1989 |
| Menominee | CRAIG A. ROLFS | 1989 |
| Midland | DONNA T. MORRIS | 1989 |
| Missaukee | FREDERICK S. KRUPP | 1989 |
| Monroe | JOSEPH ANTHONY COSTELLO, Jr. | 1989 |
| Monroe | JAMES McCAULEY SEITZ | 1991 |
| Montcalm | JOHN R. VUSICH | 1989[4] |
| Montmorency | ROBERT P. M. NORDSTROM | 1989 |
| Muskegon | TOM H. LINCK | 1989 |
| Muskegon | NEIL G. MULLALLY | 1993 |
| Newaygo | THOMAS J. EGGLESTON | 1989 |
| Oakland | NORMAN R. BARNARD | 1989 |
| Oakland | BARRY M. GRANT | 1991 |
| Oakland | EUGENE ARTHUR MOORE | 1993 |
| Oakland | SANDRA G. SILVER | 1989 |
| Oceana | GERALD T. GRAHAM | 1989 |
| Ogemaw | RAYMOND L. KING | 1989 |
| Ontonagon | ROY D. GOTHAM | 1989 |
| Oscoda | KATHRYN JOAN ROOT | 1989 |
| Otsego | RICHARD J. LIEDEL | 1989 |

[4] To December 16, 1988.

| County | | Term Expires January 1 of |
|---|---|---|
| Ottawa | JACK A. VANDE BUNTE | 1989 |
| Presque Isle | KENNETH A. RADZIBON | 1989 |
| Roscommon | MICHAEL J. BAUMGARTNER | 1989 |
| Saginaw | FAYE M. HARRISON | 1991 |
| Saginaw | EDMUND M. TROESTER | 1989 |
| St. Clair | R. GERALD BARR | 1989 |
| St. Clair | ROBERT R. SPILLARD | 1991 |
| St. Joseph | JOHN E. MORLEY | 1989 |
| Sanilac | GEORGE E. BENKO | 1989 |
| Shiawassee | JAMES R. CLATTERBAUGH | 1989 |
| Tuscola | W. WALLACE KENT, Jr. | 1989 |
| Van Buren | FRANK D. WILLIS | 1989 |
| Washtenaw | JOHN N. KIRKENDALL | 1989 |
| Washtenaw | JUDITH J. WOOD | 1991 |
| Wayne | Y. GLADYS BARSAMIAN | 1993 |
| Wayne | FREDDIE G. BURTON, Jr. | 1989 |
| Wayne | JAMES E. LACEY | 1989 |
| Wayne | MARTIN T. MAHER | 1991 |
| Wayne | THOMAS A. MAHER | 1993 |
| Wayne | JOSEPH J. PERNICK | 1989 |
| Wayne | FRANCES PITTS | 1989 |
| Wayne | ANTHONY J. SZYMANSKI | 1991 |
| Wexford | WALTER F. RANSOM | 1989 |

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|---|---|---|
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| Allegan | Allegan | 48 |
| Alpena | Alpena | 26 |
| Antrim | Bellaire | 13 |
| Arenac | *Standish* | 34 |
| Baraga | L'Anse | 12 |
| Barry | Hastings | 5 |
| Bay | Bay City | 18 |
| Benzie | Beulah | 19 |
| Berrien | St. Joseph | 2 |
| Branch | Coldwater | 15 |
| Calhoun | Marshall, Battle Creek | 37 |
| Cass | Cassopolis | 43 |
| Charlevoix | Charlevoix | 33 |
| Cheboygan | Cheboygan | 53 |
| Chippewa | Sault Ste. Marie | 50 |
| Clare | Harrison | 55 |
| Clinton | St. Johns | 29 |
| Crawford | Grayling | 46 |
| Delta | Escanaba | 47 |
| Dickinson | Iron Mountain | 41 |
| Eaton | Charlotte | 5 |
| Emmet | Petoskey | 33 |
| Genesee | Flint | 7 |
| Gladwin | Gladwin | 55 |
| Gogebic | Bessemer | 32 |
| Grand Traverse | Traverse City | 13 |
| *Gratiot* | Ithaca | 29 |
| Hillsdale | Hillsdale | 1 |
| Houghton | Houghton | 12 |
| Huron | Bad Axe | 52 |
| Ingham | Mason, Lansing | 30 |
| Ionia | Ionia | 8 |
| Iosco | Tawas City | 23 |
| Iron | Crystal Falls | 41 |
| Isabella | Mount Pleasant | 21 |
| Jackson | Jackson | 4 |
| Kalamazoo | Kalamazoo | 9 |
| Kalkaska | Kalkaska | 46 |
| Kent | Grand Rapids | 17 |
| Keweenaw | Eagle River | 12 |
| Lake | Baldwin | 51 |
| Lapeer | Lapeer | 40 |
| Leelanau | Leland | 13 |
| Lenawee | Adrian | 39 |
| Livingston | Howell | 44 |
| Luce | *Newberry* | 11 |
| Mackinac | St. Ignace | 50 |
| Macomb | Mount Clemens | 16 |
| Manistee | Manistee | 19 |
| Marquette | Marquette | 25 |
| Mason | Ludington | 51 |
| Mecosta | *Big Rapids* | 49 |
| Menominee | Menominee | 41 |
| Midland | Midland | 42 |
| Missaukee | Lake City | 28 |
| Monroe | Monroe | 38 |
| Montcalm | Stanton | 8 |
| Montmorency | Atlanta | 26 |
| Muskegon | *Muskegon* | 14 |
| Newaygo | White Cloud | 27 |
| Oakland | Pontiac | 6 |
| Oceana | Hart | 27 |
| Ogemaw | West Branch | 34 |
| Ontonagon | *Ontonagon* | 32 |
| Osceola | Reed City | 49 |
| Oscoda | Mio | 23 |
| Otsego | Gaylord | 46 |
| Ottawa | Grand Haven | 20 |
| Presque Isle | Rogers City | 26 |
| Roscommon | Roscommon | 34 |
| Saginaw | Saginaw | 10 |
| St. Clair | Port Huron | 31 |
| St. Joseph | Centreville | 45 |
| Sanilac | Sandusky | 24 |
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| Shiawassee | Corunna | 35 |
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# ADMINISTRATIVE ORDER
# No. 1988-5

## PROPOSED RULES CONCERNING JUVENILES CHARGED AS ADULTS

Entered September 20, 1988—REPORTER.

The Court has received from the Juvenile Court Rules Committee proposed amendments to subchapter 5.900 and suggested changes in court procedures for handling juveniles tried as adult offenders as a result of legislation to take effect on October 1, 1988. The court staff has drafted a new subchapter 6.900 concerning rules applicable to juveniles charged as though adult offenders with certain life offenses. The proposals are responsive to 1988 PA 51-54, 64, 67, 73, 75-78 and 182.

It is ordered that the proposed amendments of MCR 5.903, 5.933, 5.934, 5.935, 5.944, and 5.950, and that the proposed new subchapter 6.900, rules applicable to juveniles charged with life offenses subject to jurisdiction of the circuit or Recorder's Court, together with the staff comment, be published for comment. The time for comment shall be from October 1, 1988, through December 31, 1988.

It is further directed that the juvenile division of the probate courts, the district courts, the circuit

courts and Recorder's Court are urged and encouraged to use these proposed rules as guidelines during the comment period and until such time as they are withdrawn or amended by the Court.

A copy of this order will be given to the secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. When filing a comment, please refer to AO 1988-5.

RULE 5.903. DEFINITIONS.

(A) [Unchanged.]

(B) Delinquency Proceedings. When used in delinquency proceedings, unless the context otherwise indicates:

(1)-(4) [Unchanged.]

(5) "Prosecuting attorney" means the prosecuting attorney for a county, an assistant prosecuting attorney for a county, the attorney general, the deputy attorney general, an assistant attorney general, a special prosecuting attorney, and, in connection with the prosecution of an ordinance violation, an attorney for the political subdivision or governmental entity which enacted the ordinance, charter, rule, or regulation upon which the ordinance violation is based.

(C) [Unchanged.]

RULE 5.933. ACQUIRING PHYSICAL CONTROL OF JUVENILE.

(A) Custody Without Court Order. When an officer apprehends a juvenile for an offense without court order and does not warn and release the juvenile, does not refer the juvenile to a diversion program, or does not have authorization from the prosecuting attorney to file a complaint and warrant charging the juvenile with an offense as

though an adult pursuant to MCL 764.1f; MSA 28.860(6), the officer may:

(1)-(3) [Unchanged.]

(B)-(D) [Unchanged.]

RULE 5.934. ARRANGING COURT APPEARANCE; DETAINED JUVENILE.

(A) General. Unless the prosecuting attorney has authorized a complaint and warrant charging the juvenile with an offense as though an adult pursuant to MCL 764.1f; MSA 28.860(6), when a juvenile is apprehended and not released, the officer shall:

(1) forthwith take the juvenile

(a) before the court for a preliminary hearing, or

(b) to a place designated by the court pending the scheduling of a preliminary hearing;

(2) ensure that the petition is prepared and presented to the court;

(3) notify the parent of the detaining of the juvenile, and of the need for the presence of the parent at the preliminary hearing;

(4) prepare a custody statement for submission to the court including:

(a) the grounds for and the time and location of detention, and

(b) the names of persons notified and the times of notification, or the reason for failure to notify.

(B) [Unchanged.]

RULE 5.935. PRELIMINARY HEARING.

(A) Time.

(1) Commencement; Preliminary Hearing. The preliminary hearing must commence no later than 24 hours after the juvenile has been taken into

court custody, excluding Sundays and holidays, or the juvenile must be released.

(2) General Adjournment. The court may adjourn the hearing for up to 14 days:

(a) to secure the attendance of the juvenile's parents or witnesses, or

(b) for other good cause shown.

(3) Special Adjournment; Life Offense. This subrule shall apply to a juvenile accused of an offense that allegedly was committed between the fifteenth and seventeenth birthdate of the juvenile and which, if committed by an adult, would constitute a life offense as specifically listed in MCL 712A.2(a)(1); MSA 27.3178(598.2)(a)(1). On request of a prosecuting attorney who has approved the submission of a petition with the court, conditioned on the opportunity to withdraw it within 5 days if the prosecuting attorney authorizes the filing of a complaint and warrant with a magistrate, the court shall comply with subrules (3)(a) through (c).

(a) The court shall adjourn the preliminary hearing for up to 5 days to give the prosecuting attorney the opportunity to determine whether to authorize the filing of a criminal complaint and warrant charging the juvenile with an offense as though an adult pursuant to MCL 764.1f; MSA 28.860(6), instead of unconditionally approving the filing of a petition with the court.

(b) The court, during the special adjournment under subrule 3(a), must defer a decision as to whether to authorize the filing of the petition.

(c) The court, during the special adjournment under subrule 3(a), must release the juvenile pursuant to MCR 5.935(C) or detain the juvenile pursuant to MCR 5.935(D).

If, at the resumption of the preliminary hearing following special adjournment, the prosecuting at-

torney has not authorized the filing of a criminal complaint and warrant on the charge with a magistrate concerning the juvenile, approval of the petition by the prosecuting attorney shall no longer be deemed conditional and the court shall proceed with the preliminary hearing and decide whether to authorize the petition to be filed. This rule shall not preclude the prosecuting attorney from moving for a waiver of jurisdiction over the juvenile under MCR 5.950.

(B)-(D) [Unchanged.]

RULE 5.944. SUPPLEMENTAL DISPOSITIONS; DISPOSITIONAL REHEARINGS.

(A) Probation Violation Hearings. [Unchanged.]

(B) Juveniles on Conditional Release. The procedures set forth in subrule (A) apply to juveniles committed under MCL 712A.18; MSA 27.3178(598.18) who have allegedly violated a condition of release after being returned to the community on release from a public institution. The court need not conduct such a hearing when there will be an administrative hearing by the agency to which the juvenile is committed provided the court has not retained jurisdiction.

(C) Progress Review of Court-Committed Juveniles.

(1) General. The court shall review the progress of a juvenile it has committed to a facility or institution under MCL 712A.18(1)(e); MSA 27.3178(598.18)(1)(e) when the court has retained jurisdiction over the juvenile as required by law.

(2) Time. The court must conduct the progress review one year after entry of the order of commitment, and annually thereafter, so long as the juvenile remains in placement.

(3) Review Report. The court shall examine the report prepared by the department of social services covering placement, services being provided the juvenile, and the progress of the juvenile.

(4) No Restrictive Placement Change Without Hearing. The court may not order a more physically restrictive change in the placement of the juvenile or in the treatment plan absent a hearing as provided in subrule (D)(4).

(D) Commitment Review Hearings.

(1) General. The objectives of the commitment review hearing include deciding whether to release a court-committed juvenile, whether to continue jurisdiction over the court-committed juvenile until age 21 pursuant to MCL 712A.18d; MSA 27.3178(598.18d), and to give the juvenile an opportunity to be heard before moving a juvenile to a more physically restrictive placement or ordering more restrictive treatment.

(2) Notice. Notice of the hearing must be given to the prosecuting attorney, the juvenile, and the parent of the juvenile if the parent's address or whereabouts are known, at least 14 days prior to the hearing.

(3) Required Commitment Review Hearing. When a juvenile has been placed in a facility or institution under MCL 712A.18(1)(e); MSA 27.3178(598.18)(1)(e) for having committed, after October 1, 1988, a reportable juvenile offense other than (g), (k) and (l) of MCR 5.903(B)(6), the court shall schedule a commitment review hearing to be held within 42 days before the juvenile attains age 19 unless adjourned for good cause.

(a) Notice. Notice of the required hearing must clearly indicate that the court may extend jurisdiction over the juvenile until age 21. The notice shall include advice to the juvenile and the parent

of the juvenile that the juvenile has the right to an attorney.

(b) Appointment of an Attorney. The court must appoint an attorney to represent the juvenile at the required review hearing unless legal counsel has been retained.

(c) Findings; Criteria. Before the court may continue jurisdiction over the juvenile until age 21, the prosecuting attorney must demonstrate by a preponderance of the evidence that the juvenile has not been rehabilitated or that the juvenile presents a serious risk to public safety. Evidence shall be received under the rules applicable to a dispositional hearing pursuant to MCR 5.943(C). In making the determination, the court must consider the following factors:

(i) the extent and nature of the juvenile's participation in education, counseling, or work programs;

(ii) the juvenile's willingness to accept responsibility for prior behavior;

(iii) the juvenile's behavior in the current placement;

(iv) the prior record and character of the juvenile and physical and mental maturity;

(v) the juvenile's potential for violent conduct as demonstrated by prior behavior;

(vi) the recommendations of the institution, agency, or facility charged with the juvenile's care for the juvenile's release or continued custody; and

(vii) any other information the prosecuting attorney or the juvenile may submit.

(4) Other Commitment Review Hearings. The court, on motion of the institution, agency, or facility to which the juvenile is committed, may at any time release a juvenile upon a showing by clear and convincing evidence that the juvenile

has been rehabilitated and is not a risk to public safety. The notice provisions and criteria in subrule (3) shall apply. Evidence shall be received under the same rules as applicable to a dispositional hearing pursuant to MCR 5.943(C). The court must appoint an attorney to represent the juvenile at the hearing unless legal counsel has been retained. The court, upon notice and opportunity to be heard, may order the juvenile moved to a more physically restrictive place or may order more restrictive treatment.

(E) Dispositional Review Hearings. An order entered in a delinquency case may be supplemented or amended in accordance with MCL 712A.18; MSA 27.3178(598.18), as long as the juvenile remains under the jurisdiction of the court. If not specified in the order of the court, the juvenile shall not be moved to a more physically restrictive place absent a hearing and further order of the court, or absent the consent of the juvenile.

RULE 5.950. WAIVER OF JURISDICTION.

(A) Motion by Prosecuting Attorney. A motion by the prosecuting attorney that requests the juvenile court waive its jurisdiction over the juvenile to a court having general criminal jurisdiction of the offense must be in writing and must clearly indicate the charges and that if the motion is granted the juvenile will be prosecuted as though an adult.

(1) A motion to waive jurisdiction of the juvenile must be filed within 14 days after the filing of the petition. Absent a timely motion and good cause shown, the juvenile shall no longer be subject to waiver of jurisdiction on the charges.

(2) A copy of the motion seeking waiver shall be personally served on the juvenile and the parent

of the juvenile, if their addresses or whereabouts are known or can be determined by the exercise of due diligence.

(B) Hearing Procedure. The waiver hearing shall consist of two phases. Notice of the date, time, and place of the hearing phases may be given either on the record directly to the juvenile or to the attorney of the juvenile, the prosecuting attorney, and all other parties, or in writing, served on each individual.

(1) First Phase. The first-phase hearing is to determine whether an offense has been committed which if committed by an adult would be a felony, and that there is probable cause to believe that the juvenile who is 15 years of age or older committed the offense.

(a) The probable cause hearing shall be commenced within 28 days after the filing of the petition unless adjourned for good cause.

(b) At the hearing, the prosecuting attorney has the burden to present legally admissible evidence to establish each element of the offense and to establish probable cause that the juvenile committed the offense.

(c) The court need not conduct the first phase of the waiver hearing, if:

(i) the court has found the requisite probable cause at a hearing under MCR 5.935(D)(1), provided that at the earlier hearing only legally admissible evidence was used to establish that the offense was committed and probable cause that the juvenile committed the offense; or

(ii) the juvenile, after being informed by the court on the record that the probable cause hearing is equivalent to and held in place of preliminary examination in district court, waives the hearing. The court must determine that the

waiver of hearing is freely, voluntarily, and understandingly given and that the juvenile knows there will be no preliminary examination in district court if the court waives jurisdiction.

(2) Second Phase. If the court finds the requisite probable cause at the first-phase hearing, or if there was no hearing pursuant to subrule (B)(1)(c), the second-phase hearing shall be held to determine whether the interests of the juvenile and the public would best be served by granting the motion.

(a) The second-phase hearing shall be commenced within 28 days after the conclusion of the first phase or within 35 days after the filing of the petition if there was no hearing pursuant to subrule (B)(1)(c), unless adjourned for good cause.

(b) The prosecuting attorney has the burden of establishing by a preponderance of the evidence that the best interests of the juvenile and the public would be served by waiver. The Michigan Rules of Evidence do not apply to the second phase of the waiver hearing.

(c) The court, in determining whether to waive the juvenile to the court having general criminal jurisdiction, shall consider and make findings on the following criteria, giving each weight as appropriate to the circumstances:

(i) the juvenile's prior record and character, physical and mental maturity, and pattern of living;

(ii) the seriousness of the offense;

(iii) whether the offense is part of a repetitive pattern of offenses which would lead to the determination either that the juvenile is not amenable to treatment, or that, owing to the nature of the delinquent behavior, the juvenile is likely to disrupt the rehabilitation of others in the treatment

program, despite the juvenile's potential for treatment;

(iv) whether, despite the juvenile's potential for treatment, the nature of the juvenile's delinquent behavior is likely to render the juvenile dangerous to the public when released at age 19 or 21;

(v) whether the juvenile is more likely to be rehabilitated by the services and facilities available in adult programs and procedures than in juvenile programs and procedures;

(vi) whether the best interest of the public welfare and the protection of the public security require that the juvenile stand trial as an adult offender.

The court may also consider any stipulation by the defense to a finding that the best interests of the juvenile and the public support a waiver, and any prior court order waiving the juvenile to a court of general criminal jurisdiction.

(C) Grant of Waiver. If the court determines that it is in the best interests of the juvenile and public to waive jurisdiction over the juvenile, the court must comply with subrules (C)(1) through (C)(3).

(1) The court must enter a written order granting the motion to waive jurisdiction and transferring the matter to the appropriate court having general criminal jurisdiction for arraignment of the juvenile on an information.

(2) The court must make findings of fact and conclusions of law forming the basis for entry of the waiver order. The findings and conclusions may be incorporated in a written opinion or stated on the record.

(3) The court shall send a copy of the order, and, upon request of the court having general criminal jurisdiction, shall send a copy of the written opin-

ion or transcript of the findings and conclusions of the court, to the court having general criminal jurisdiction without charge.

(D) Denial of Waiver. If the court does not waive jurisdiction, the court shall enter an order and make written findings or place them on the record. A transcript of the court's findings or a copy of the written opinion shall be sent to the prosecutor, juvenile, or juvenile's attorney upon request. If the juvenile is detained and the trial of the matter in juvenile court has not started within 28 days after entry of the order denying waiver, the court shall forthwith order the juvenile released pending trial without requiring that bail be posted.

(E) [Unchanged.]

## CHAPTER 6 CRIMINAL PROCEDURE

### SUBCHAPTER 6.900 RULES APPLICABLE TO JUVENILES CHARGED WITH LIFE OFFENSES SUBJECT TO THE JURISDICTION OF CIRCUIT AND RECORDER'S COURT

#### RULE 6.901. APPLICABILITY.

(A) Precedence. The rules in this subchapter take precedence over, but are not exclusive of, the rules of procedure applicable to criminal actions against adult offenders.

(B) Scope. Except as otherwise specifically provided, the rules do not apply to a person charged solely with an offense in which the juvenile court has waived jurisdiction pursuant to MCL 712A.4; MSA 27.3178(598.4).

#### RULE 6.903. DEFINITIONS.

When used in this subchapter, unless the context otherwise indicates:

(A) "Commitment review hearing" includes a hearing as required by MCL 769.1; MSA 28.1072, as added by 1988 PA 78, to decide whether the jurisdiction of the court shall continue over a juvenile who was placed on probation and committed to state wardship.

(B) "Commitment review report" means a report on a juvenile committed to state wardship for use at a commitment review hearing prepared by the department of social services pursuant to section 5 of the Juvenile Facilities Act, 1988 PA 73, MCL 803.225; MSA 25.399(225).

(C) "Court" means the circuit court and Recorder's Court of the City of Detroit as provided in MCL 600.606; MSA 27A.606, and MCL 725.10a(1)(c); MSA 27.3950(1)(1)(c).

(D) "Juvenile" means a person 15 years of age or older who is subject to the jurisdiction of the court for having allegedly committed a life offense between the person's 15th and 17th birthdays.

(E) "Juvenile court" means the juvenile division of the probate court.

(F) "Juvenile dispositional hearing" means a hearing conducted by the court at the sentencing of a juvenile following a criminal conviction to determine whether the best interests of the juvenile and of the public would be served:

(1) by retaining jurisdiction over the juvenile, placing the juvenile on probation, and committing the juvenile to a state institution or agency as a state ward, as provided in MCL 769.1; MSA 28.1072; or

(2) by imposing sentence as provided by law for an adult offender.

(G) "Juvenile facility" means a county facility or institution operated as an agency of the county other than a facility designed or used to incarcer-

ate adults, an institution operated by the juvenile division of the probate court, or a state institution or agency described in the Youth Rehabilitation Services Act, 1974 PA 150, MCL 803.301 *et seq.;* MSA 25.399(51) *et seq.*

(H) "Life offense" means one or more of the following offenses allegedly committed by a juvenile in which the prosecuting attorney has authorized the filing of a criminal complaint and warrant instead of proceeding in the juvenile court:

(1) assault with intent to commit murder, MCL 750.83; MSA 28.278;

(2) assault with intent to rob while armed, MCL 750.89; MSA 28.284;

(3) attempted murder, MCL 750.91; MSA 28.286;

(4) first-degree murder, MCL 750.316; MSA 28.548;

(5) second-degree murder, MCL 750.317; MSA 28.549;

(6) first-degree criminal sexual conduct, MCL 750.520b; MSA 28.788(2);

(7) armed robbery, MCL 750.529; MSA 28.797; or

(8) possession of or manufacture, delivery, or possession with intent to manufacture or deliver 650 grams or more of any schedule I or II controlled substance, MCL 333.7401-333.7403; MSA 14.15(7401)-14.15(7403).

(I) "Magistrate" means a judge of the district court or a judge of a municipal court as described in MCL 761.1(f); MSA 28.843(f).

(J) "Progress report" means the annual report on a juvenile in state wardship prepared by the department of social services for the court as required by section 3 of the Juvenile Facilities Act, 1988 PA 73, MCL 803.223; MSA 25.399(223).

(K) "Social report" means the written report on a juvenile for use at the juvenile dispositional

hearing prepared by the department of social services as required by section 4 of the Juvenile Facilities Act, 1988 PA 73, MCL 803.224; MSA 25.399(224).

(L) "State wardship" means care and control of a juvenile for up to the twenty-first birthday of the juvenile by an institution or agency within or under the supervision of the department of social services as provided in the Youth Rehabilitation Services Act, MCL 803.301 *et seq.;* MSA 25.399(51) *et seq.,* as amended by 1988 PA 76, while the juvenile remains under the jurisdiction of the court on the basis of a court order of probation and commitment as provided in MCL 769.1; MSA 28.1072.

RULE 6.905. ARRAIGNMENT ON COMPLAINT AND WARRANT.

(A) Time. When the prosecuting attorney authorizes the filing of a complaint and warrant charging a juvenile with a life offense instead of approving the filing of a petition in juvenile court, the juvenile in custody must be taken forthwith to the magistrate for arraignment on the charge. The juvenile must be released if arraignment has not commenced:

(1) within 24 hours of the arrest of the juvenile, excluding Sundays and holidays; or

(2) the same day that the prosecuting attorney authorized the complaint and warrant during special adjournment pursuant to MCR 5.935(A)(3), provided the juvenile was taken immediately after apprehension to juvenile court.

(B) Procedure. At the arraignment on the complaint and warrant, the magistrate shall comply with subrules (1) through (6).

(1) The magistrate shall determine whether a parent of the juvenile is present. Arraignment

may be conducted without a parent present provided the magistrate appoints an attorney to appear at arraignment with the juvenile unless legal counsel has been retained and appears with the juvenile.

(2) The magistrate shall inform the juvenile of the nature of the offense and its maximum penalty.

(3) The magistrate must advise the juvenile on the record in plain language of the right to a preliminary examination and to an attorney.

(4) The magistrate must advise the juvenile, if the attorney of the juvenile is not present,

(a) that the juvenile has a right to remain silent,

(b) that anything the juvenile says orally or in writing can be used against the juvenile in court, and

(c) that the juvenile has a right to have an attorney with the juvenile during any questioning the juvenile consents to.

(5) The magistrate shall set a date for the juvenile's preliminary examination within the next 12 days, less any time given and used by the prosecuting attorney under special adjournment pursuant to MCR 5.935(A)(3). The magistrate shall notify the juvenile and the parent of the juvenile of that date and ensure that the juvenile has been fingerprinted as required by law.

(6) The magistrate may neither question the juvenile about the alleged offense nor request that the juvenile enter a plea.

RULE 6.907. ASSISTANCE OF ATTORNEY.

(A) Advice of Right. If the juvenile is not represented by an attorney, the magistrate or court

shall advise the juvenile at each stage of the criminal proceedings of the right to the assistance of an attorney. If the juvenile has waived the right to an attorney, the court at later proceedings must reaffirm that the juvenile continues to not want an attorney to represent the juvenile.

(B) Court Appointed Attorney. Unless the juvenile has retained an attorney, or has waived the right to an attorney, the magistrate or the court must ensure that the juvenile is represented by an attorney at each stage of the criminal proceedings by appointing counsel if:

(1) the parent refuses or fails to appear;

(2) the parent is the complainant or victim;

(3) the juvenile and those responsible for the support of the juvenile are found financially unable to retain an attorney and the juvenile does not waive the right to an attorney;

(4) those responsible for the support of the juvenile refuse or neglect to retain an attorney for the juvenile and the juvenile does not waive the right to an attorney; or

(5) the magistrate or court determines that the best interest of the juvenile or the public requires appointment.

(C) Waiver of Attorney. The magistrate or court may permit a juvenile to waive representation by an attorney if:

(1) an attorney is appointed to give the juvenile advice on the question of waiver;

(2) the court finds that the juvenile is literate and is competent to conduct a defense;

(3) the court advises the juvenile of the dangers and of the disadvantages of self-representation;

(4) the court finds on the record that the waiver is voluntarily and understandingly made; and

(5) the court appoints standby counsel to assist the juvenile at trial and at the juvenile dispositional hearing.

(D) Cost. The court may include in the judgment of sentence an order assessing cost of legal representation, or part thereof, against the juvenile or against a person responsible for the support of the juvenile, or both. The order assessing costs shall not be binding on any person responsible for the support of the juvenile absent written notice and opportunity for hearing on the cost assessment.

RULE 6.909. RELEASING OR DETAINING JUVENILES PRIOR TO TRIAL OR JUDGMENT OF SENTENCE.

(A) Bail; Detention.

(1) Temporary Custody; District Court Not Open. If the prosecuting attorney has authorized the filing of a complaint and warrant charging a life offense instead of approving the filing of a petition in juvenile court, and if the district court is not open, a juvenile may, following apprehension, be detained in a juvenile facility other than an institution operated by the juvenile court, provided the magistrate verbally authorizes temporary detention. The juvenile may be lodged temporarily in a juvenile-court-operated facility with the consent of the juvenile court or on order of a court as defined in these rules.

(2) Bail. Except as provided in subrule (3), the magistrate or court must advise the juvenile of a right to bail as provided in MCR 6.110. The magistrate or the court may order a juvenile released to a parent or guardian on the basis of any lawful condition, including that bail be posted.

(3) Detention Without Bail. The magistrate or the court may deny bail to a juvenile charged with

first-degree murder, second-degree murder, first-degree criminal sexual conduct, or robbery armed:

(a) if the proof is evident or the presumption is great that the juvenile committed the offense; and

(b) unless the court finds by clear and convincing evidence that the juvenile is not likely to flee or present a danger to others when the charge is armed robbery or first-degree criminal sexual conduct.

(B) Place of Confinement.

(1) Definition. For purposes of this subrule "juvenile" means any person under 17 years of age at the time of arrest or order of detention on a criminal charge.

(2) Juvenile Facility. Except as provided in subrule (B)(3), the juvenile charged with a crime and not released must be placed in a juvenile facility while awaiting trial rather than being placed in a jail or similar facility designed to incarcerate adult prisoners.

(3) Jailing of Juveniles; Restricted. On motion of a prosecuting attorney or superintendent of a juvenile facility where the juvenile is detained, the magistrate or court may order the juvenile confined in a jail or similar facility designed to incarcerate adult prisoners upon a showing that:

(a) the juvenile's habits or conduct are considered a menace to other juveniles; or

(b) the juvenile may not otherwise be safely detained in a juvenile facility.

(4) Juvenile-Court-Operated Facility. The juvenile shall not be placed in an institution operated by the juvenile court except with the consent of the juvenile court or on order of a court as defined in these rules.

(5) Separate Custody of Juvenile. While awaiting appearance before the magistrate or court, or

otherwise, the juvenile must be maintained separately from adult prisoners to prevent any verbal, visual, or physical contact. If the juvenile is placed in a facility designed or used to incarcerate adults, the juvenile shall be housed out of sight and sound of adults.

(C) Speedy Trial. The court, on motion, shall within 7 days of the filing of the motion release a juvenile who has remained in detention while awaiting trial for more than 42 days after the arraignment on the information unless:

(1) the trial has commenced;

(2) the reason for the detention was other than because the juvenile was denied bail pursuant to subrule (A)(3) or other than because the juvenile was unable to make bail; or

(3) the prosecuting attorney demonstrates by clear and convincing evidence that the release of the juvenile would present a clear and present danger to the public.

RULE 6.911. PRELIMINARY EXAMINATION.

(A) Waiver. The juvenile may waive a preliminary examination if the juvenile is represented by an attorney and the waiver is made in open court. The magistrate shall find and place on the record that the waiver was freely, understandingly, and voluntarily given.

(B) Transfer to Juvenile Court. If the magistrate, following preliminary examination, finds that a life offense did not occur or that there is no probable cause to believe that the juvenile committed the life offense, but that some other offense occurred and that there is probable cause to believe that the juvenile committed that offense, the magistrate shall transfer the matter to the juvenile court of the county where the offense is al-

leged to have been committed for further proceedings.

RULE 6.931. JUVENILE DISPOSITIONAL HEARING.

(A) General. After a juvenile has been convicted following trial on a life offense, the court must conduct a dispositional hearing unless waived as provided in subrule (B).

(B) No Juvenile Dispositional Hearing; Consent. The court need not conduct a juvenile dispositional hearing if the prosecuting attorney, the juvenile, and the attorney of the juvenile, consent that it is not in the best interests of the juvenile and the public to sentence the juvenile as though an adult offender. In the absence of a dispositional hearing, the court shall not impose a sentence as provided by law for an adult offender. The court must place the juvenile on probation and commit the juvenile to state wardship.

(C) Notice of Juvenile Dispositional Hearing. The prosecuting attorney, the juvenile, and the attorney of the juvenile, must be advised on the record immediately following conviction of the juvenile by plea or verdict of guilty that a dispositional hearing will be conducted at sentencing. The court must inform the parties of the nature of the hearing and announce the scheduled date of the hearing. On request, the court shall notify the victim of the dispositional hearing.

(D) Review of Reports. The court must give the prosecuting attorney, the juvenile, and the attorney of the juvenile, an opportunity to review the presentence report and the social report prior to the dispositional hearing. The court may exempt information from the reports as provided in MCL 771.14, 771.14a; MSA 28.1144, 28.1144(1).

(E) Dispositional Hearing Procedure.

(1) Evidence. At the juvenile dispositional hearing all relevant and material evidence may be received by the court and relied upon to the extent of its probative value, even though such evidence may not be admissible at trial. The rules of evidence do not apply. The court shall receive and consider the presentence report prepared by the probation officer and the social report prepared by the department of social services.

(2) Burden of Proof. The prosecuting attorney has the burden of establishing by a preponderance of the evidence that the best interests of the juvenile and the public would be served by imposing a sentence against the juvenile as though the juvenile were an adult offender.

(3) Criteria. The court shall consider the following criteria in determining whether to impose a sentence against the juvenile as though an adult offender or whether to place the juvenile on probation and commit the juvenile to state wardship, giving each weight as appropriate to the circumstances:

(a) the juvenile's prior record and character, physical and mental maturity, and pattern of living;

(b) the seriousness and circumstances of the offense;

(c) whether the offense is part of a repetitive pattern of offenses which would lead to the determination either that the juvenile is not amenable to treatment, or that, owing to the nature of the delinquent behavior, the juvenile is likely to disrupt the rehabilitation of others in the treatment program, despite the juvenile's potential for treatment;

(d) whether, despite the juvenile's potential for treatment, the nature of the juvenile's delinquent

behavior is likely to render the juvenile dangerous to the public when released at age 21;

(e) whether the juvenile is more likely to be rehabilitated by the services and facilities available in the adult programs and procedures than in the juvenile programs and procedures; and

(f) what is in the best interests of the public welfare and the protection of the public security.

(4) Findings. The court must make findings of fact and conclusions of law forming the basis for the probation and commitment decision or the decision to sentence the juvenile as though an adult offender. The findings and conclusions may be incorporated in a written opinion or stated on the record.

(F) Postjudgment Procedure; Probation and Commitment to State Wardship. If the court retains jurisdiction over the juvenile, places the juvenile on probation, and commits the juvenile to state wardship, the court shall comply with subrules (1) through (11):

(1) The court shall enter a judgment which shall contain a provision for reimbursement by the juvenile or those responsible for the juvenile's support, or both, for the cost of care and services pursuant to MCL 769.1(6); MSA 28.1072(6). An order assessing such cost against a person responsible for the support of the juvenile shall not be binding on the person, absent a written notice and an opportunity to be heard.

(2) The court shall send a copy of the order and a copy of the written opinion or transcript of the findings and conclusions of law to the department of social services.

(3) The court may not place the juvenile on deferred sentencing, as provided in MCL 771.1(2); MSA 28.1131(2).

(4) The court may not place the juvenile on life probation for conviction of a controlled substance violation, as set forth in MCL 771.1(3); MSA 28.1131(3).

(5) The five-year limit on the term of probation for an adult felony offender shall not apply.

(6) The court may not require as a condition of probation that the juvenile report to a department of corrections probation officer.

(7) The court may not, as a condition of probation, impose jail time against the juvenile except as provided in MCR 6.933(B)(2).

(8) The court may not commit the juvenile to the department of corrections for failing to comply with a restitution order.

(9) The court may not place the juvenile in a department of corrections camp for one year, as otherwise provided in MCL 771.3a(1); MSA 28.1133(1)(1).

(10) The court shall advise the juvenile that if the juvenile, while on probation, is convicted of a felony or a misdemeanor punishable by more than one year imprisonment, the court will revoke probation and must sentence the juvenile to a term of years in prison not to exceed the penalty that might have been imposed for the offense for which the juvenile was originally convicted.

(11) The court shall assure that the juvenile receives a copy of the social report.

RULE 6.933. JUVENILE PROBATION REVOCATION.

(A) General Procedure. When a juvenile, who was placed on probation and committed to an institution as a state ward, is alleged to have violated probation, the court shall proceed as provided in MCR 6.111(A) through (E).

(B) Disposition.

(1) Certain Criminal Offense Violations. If the court finds that the juvenile has violated probation by being convicted of a felony or a misdemeanor punishable by more than one year's imprisonment, the court must revoke the probation of the juvenile and order the juvenile committed to the department of corrections for a term of years not to exceed the penalty that could have been imposed for the offense that led to the probation. The court in imposing sentence shall grant credit against the sentence for the period of time the juvenile served on probation.

(2) Other Violations. If the court finds that the juvenile has violated probation, other than as provided in subrule (B)(1), the juvenile must be continued on probation and remain under state wardship provided that the court may order:

(a) a change of placement,

(b) restitution,

(c) community service,

(d) substance abuse counseling,

(e) mental health counseling,

(f) participation in a vocational-technical education program,

(g) incarceration in a county jail for not more than 30 days, and

(h) any other participation or performance as the court considers necessary.

If the court determines to place the juvenile in jail for up to 30 days, and the juvenile is under 17 years of age, the juvenile must be placed in a room or ward out of sight and sound from adult prisoners.

(3) If the court revokes probation pursuant to subrule (B)(1), the court must receive an updated presentence report and comply with MCR 6.101(G) before it imposes a prison sentence on the juvenile.

(C) Review. The juvenile may appeal as of right from the imposition of a sentence of incarceration after a finding of probation violation.

RULE 6.935. ANNUAL PROGRESS REVIEW OF COURT-COMMITTED JUVENILES.

(A) General. The court shall review the progress of a juvenile it has placed on probation and committed to state wardship under MCL 769.1; MSA 28.1072.

(B) Time. The court must conduct the progress review one year after the entry of the order placing the juvenile on probation and committing the juvenile to state wardship. The review shall be made annually thereafter so long as the juvenile remains in state wardship.

(C) Progress Review Report. The court shall examine the progress review report prepared by the department of social services covering placement, services being provided the juvenile, and the progress of the juvenile.

(D) The court may not order a more physically restrictive change in the placement of the juvenile or treatment plan absent a hearing as provided in MCR 6.937.

RULE 6.937. COMMITMENT REVIEW HEARING.

(A) Required Hearing. When a juvenile has been placed on probation and committed to state wardship, the court must schedule a commitment review hearing to be held within 42 days before the juvenile attains age 19 unless adjourned for good cause.

(1) Notice. Notice of the hearing must be given to the prosecuting attorney, the juvenile, and the parent of the juvenile if the parent's address or

whereabouts are known, at least 14 days prior to the hearing. Notice must clearly indicate that the court may extend jurisdiction over the juvenile until age 21. The notice shall include advice to the juvenile and the parent of the juvenile that the juvenile has the right to an attorney.

(2) Appointment of an Attorney. The court must appoint an attorney to represent the juvenile at the hearing unless legal counsel has been retained or is waived pursuant to MCR 6.907(C).

(3) Findings; Criteria. Before the court continues the jurisdiction over the juvenile until age 21, the prosecutor must demonstrate by a preponderance of the evidence that the juvenile has not been rehabilitated or that the juvenile presents a serious risk to public safety. The rules of evidence shall not apply. In making the determination, the court must consider the following factors:

(a) the extent and nature of the juvenile's participation in education, counseling, or work programs;

(b) the juvenile's willingness to accept responsibility for prior behavior;

(c) the juvenile's behavior in the current placement;

(d) the prior record and character of the juvenile and physical and mental maturity;

(e) the juvenile's potential for violent conduct as demonstrated by prior behavior;

(f) the recommendations of the state institution or agency charged with the juvenile's care for the juvenile's release or continued custody; and

(g) other information the prosecuting attorney or the juvenile may submit.

(B) Other Commitment Review Hearings. The court, on motion of the institution, agency, or facility to which the juvenile is committed, may

release a juvenile at any time upon a showing by clear and convincing evidence that the juvenile has been rehabilitated and is not a risk to public safety. The notice provision, other than the requirement that the court clearly indicate that it may extend jurisdiction over the juvenile until age 21, and the criteria in subrule (A) shall apply. The rules of evidence shall not apply. The court must appoint an attorney to represent the juvenile at the hearing unless legal counsel has been retained or the right to counsel waived. The court, upon notice and opportunity to be heard as provided in this rule, may also move the juvenile to a more restrictive placement or treatment program.

*Staff Comment:* The staff comment is published only for the benefit of the bench and bar and is not an authoritative construction by the court.

The proposed amendments of rules in subchapter 5.900, rules governing practice and procedure in the juvenile division of the probate court, and the proposed new subchapter 6.900 are responsive to the following public acts: 1988 PA 51, 52, 53, 54, 64, 67, 73, 75, 76, 77, 78, and 182.

BACKGROUND

Prior to October 1, 1988, the *juvenile court*[1] *has exclusive jurisdiction* over juveniles under 17 years of age charged with offenses that would be criminal if committed by adults.[2] The juvenile who is charged in a petition, and not diverted to a social program, faces adjudication, by trial or plea of admission; the ultimate decision to be made is whether the juvenile court will take jurisdiction over the juvenile. The phrase "take jurisdiction over the juvenile" refers to the authority of the state, in particular the juvenile court, to assume parental authority as guardian of all children within its borders, when the authority of the natural parent or guardian or adoptive parent falters by virtue of juvenile delinquency, child abuse, or child neglect.

The juvenile who is found to come within the jurisdiction of the juvenile court may, as a delinquent, be civilly committed until age 19. If the juvenile is committed as a state ward to a public institution under § 18 of the Juvenile Code,[3] the youth parole and review board has the authority to release the juvenile.[4]

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[1] The term "juvenile court" refers to the juvenile division of the probate court.

[2] MCL 712A.2(a)(1); MSA 27.3178(598.2)(a)(1).

[3] MCL 712A.18(1)(e); MSA 27.3178(598.18)(1)(e).

[4] *In re Jackson,* 163 Mich App 105; 414 NW2d 156 (1987), lv den 429

The *juvenile court has authority to waive its exclusive jurisdiction* over juveniles who are alleged to have committed acts while between the age of 15 and 17 years that would constitute felonies if committed by adults.[5] A waiver of jurisdiction hearing is held on the motion of the prosecuting attorney. At the hearing the juvenile court must decide whether the best interests of the juvenile and the public would be served by waiving its exclusive jurisdiction over the juvenile so that the juvenile could be prosecuted as though an adult offender.

Should the juvenile court waive its exclusive jurisdiction, the waived juvenile would be arraigned on a complaint and warrant in district court. Further, the magistrate (district court judge) must, as with an adult offender, conduct a preliminary examination, unless waived, to decide whether the juvenile will stand trial on the charge in circuit court or Recorder's Court of the City of Detroit.[6] The circuit or Recorder's Court acquires jurisdiction over the juvenile upon the making of a proper return from the magistrate before whom the juvenile was examined or waived examination.[7] The circuit or Recorder's Court must impose a sentence provided by law for an adult offender if the juvenile is convicted following trial or a plea of guilty.

NEW LEGISLATION

*A. General.* After October 1, 1988, the prosecuting attorney has discretion to criminally charge a juvenile who, at age 15 or 16 allegedly committed one or more of nine enumerated offenses carrying penalties of up to life in prison,[8] including murder, armed robbery, and first-degree criminal sexual conduct. No longer will the prosecuting attorney have to obtain a waiver of the juvenile court's exclusive jurisdiction under § 4 of the Juvenile Code[9] to charge the juvenile as though an adult offender. The exclusive jurisdiction of the juvenile court will depend on the prosecuting attorney's approval of the filing of a petition in the juvenile court instead of authorization of the filing of a criminal complaint and warrant with a magistrate.[10] Once the prosecuting attorney authorizes the filing of a criminal complaint and warrant charging an enumerated life offense, the juvenile becomes *subject to* the jurisdiction of a court having general criminal jurisdiction.[11] On the other hand, the juvenile court's juris-

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Mich 885 (1987).

[5] MCL 712A.4; MSA 27.3178(598.4).

[6] *People v Dunigan,* 409 Mich 765; 298 NW2d 430 (1980).

[7] *People v Curtis,* 389 Mich 698, 707; 209 NW2d 243 (1973).

[8] The enumerated life offenses are assault with intent to murder, attempted murder, first-degree murder, second-degree murder, assault with intent to commit armed robbery, armed robbery, first-degree criminal sexual conduct, and possession of or manufacture, delivery, or possession with intent to deliver 650 grams or more of a schedule 1 or 2 controlled substance.

[9] MCL 712A.4; MSA 27.3178(598.4).

[10] See MCL 712A.2(a)(1); MSA 27.3178(598.2)(a)(1), as amended by 1988 PA 53; MCL 764.1f; MSA 28.860(6), as added by 1988 PA 67.

[11] MCL 600.606; MSA 27A.606, as added by 1988 PA 52; MCL 725.10a(1)(c); MSA 27.3950(1)(1)(c), as amended by 1988 PA 51.

diction becomes exclusive when the prosecuting attorney unconditionally approves a filing of a petition in juvenile court rather than authorizing the filing of a criminal complaint and warrant with the magistrate.

*B. Juvenile Court Jurisdiction—Before Authorization of Criminal Complaint.* It is arguable, under the new language in § 2 of the Juvenile Code,[12] that the circuit or Recorder's Court has jurisdiction over the juvenile at the point following apprehension of a juvenile on an enumerated life offense, but before the prosecuting attorney has decided to prosecute the juvenile as though an adult offender. The Juvenile Court Rules Committee based its proposed rules to the Court on the premise that *an apprehended juvenile under 17 is not to be treated as an adult before it is known whether the prosecuting attorney will exercise the discretion to treat the juvenile as though an adult offender.* This appears to be in keeping with the intent of the Legislature. When the legislation is read as a whole, it manifests the intent that the juvenile be treated as though an adult offender only for purposes of court proceedings until after a conviction and dispositional hearing. Owing to the juvenile's minority and to the language in Const 1963, art 6, § 15, providing the juvenile court original jurisdiction over all juvenile delinquents except as otherwise provided by law, the jurisdiction over the juvenile who has been apprehended

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[12] MCL 712A.2(a)(1); MSA 27.3178(598.2)(a)(1), as amended by 1988 PA 53 reads:

> The juvenile division of the probate court shall have the following authority and jurisdiction:
>
> (a) Exclusive original jurisdiction superior to and regardless of the jurisdiction of any other court in proceedings concerning a child under 17 years of age who is found within the county if 1 or more of the following applies:
>
> (1) Except as otherwise provided in this subparagraph, the child has violated any municipal ordinance or law of the state or of the United States. The juvenile division of the probate court shall have jurisdiction over a child of 15 years of age or older who is charged with a violation of section 83, 89, 91, 316, 317, 520b, or 529 of the Michigan penal code, Act No. 328 of the Public Acts of 1931, being sections 750.83, 750.89, 750.91, 750.316, 750.317, 750.520b, and 750.529 of the Michigan Compiled Laws, or section 7401(2)(a)(i) or 7403(2)(a)(i) of the public health code, Act No. 368 of the Public Acts of 1978, being sections 333.7401 and 333.7403 of the Michigan Compiled Laws, if the prosecuting attorney files a petition in the juvenile court instead of authorizing a complaint and warrant.

It should be noted that the original bill on waiver provided only that the circuit or Recorder's Court would have authority to hear and determine a violation of one of the enumerated life offenses allegedly committed by a juvenile. The Legislature subsequently amended the provisions to give the prosecuting attorney discretion to authorize the filing of a criminal complaint and warrant or to approve the filing of a petition in juvenile court.

on a life offense is with the juvenile court unless and until the prosecutor decides to prosecute the juvenile as though an adult offender or until the prosecutor obtains a waiver of the juvenile court's jurisdiction under § 4 of the Juvenile Code.[13]

*C. District Court Proceedings.* After the prosecuting attorney decides to proceed against a juvenile on a life offense as though an adult offender, the juvenile must be arraigned on an authorized complaint and warrant in district court and is entitled to a preliminary examination. Should the magistrate find at the preliminary examination that the prosecuting attorney has *not* made a prima facie showing that an enumerated life offense has been committed, or that probable cause does not exist that the juvenile committed the life offense, the magistrate may not bind the juvenile over to stand trial as an adult. The magistrate must transfer the case to juvenile court provided it is shown that some criminal offense occurred and that probable cause exists to believe the juvenile committed the offense.[14]

*D. Postconviction Proceedings in Circuit or Recorder's Court.* A juvenile who is bound over and convicted of an enumerated life offense must be given a special dispositional hearing at sentencing unless waived. Following the dispositional hearing, the court must decide whether to place the juvenile on probation and commit the juvenile to a public institution as a state ward until age 21, or sooner, or to impose a sentence as provided by law for an adult.[15]

The criteria used at the dispositional hearing to decide whether to civilly commit or criminally punish are similar to the criteria used by the juvenile court when it waives its exclusive jurisdiction over the juvenile under § 4 of the code. See *post,* p cxxxi.

The circuit or Recorder's Court retains jurisdiction over the juvenile when it places the juvenile on probation and makes the juvenile a state ward under the Youth Rehabilitation Services Act.[16] The court

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[13] At best the jurisdiction of the circuit or Recorder's Court may be concurrent until the prosecutor decides to proceed in juvenile court. In other words, the exclusive jurisdiction of the juvenile court is conditional on the prosecuting attorney "filing a petition" in juvenile court "*instead* of authorizing" the filing of a complaint and warrant. The language in §§ 2(a)(1) and 11 of the Juvenile Code about the prosecutor "filing" the petition is a term of art meaning approved for filing. It is similar to the authorization to file a criminal complaint. However, authorization was not used because it is a juvenile court judge or referee that authorizes the filing of a petition.

[14] See MCL 766.14; MSA 28.932, as added by 1988 PA 67.

[15] MCL 769.1; MSA 28.1072, as added by 1988 PA 78. It appears questionable whether a circuit court or the Recorder's Court will lose jurisdiction to the juvenile court if the juvenile is not found guilty of an enumerated life offense (i.e., convicted of a lesser included offense) or the juvenile tenders a plea of guilty to an offense other than an enumerated life offense.

[16] See MCL 803.301 *et seq.;* MSA 25.399(51) *et seq.,* as amended by 1988 PA 76. Under § 2(b)(ii) a state ward includes "a person accepted for care by the department [of social services] who is at least 15 years of age at the time committed to the department by the court of

that retains jurisdiction must conduct annual progress reviews of the juvenile and must hold a commitment review hearing before the juvenile reaches age 19. The purpose of the commitment review hearing is to decide whether jurisdiction over the juvenile should continue until the juvenile reaches age 21. The court must retain jurisdiction over the juvenile if at the commitment review hearing it is shown that the juvenile remains a public safety risk or has not been rehabilitated.[17] The Department of Social Services is required by the Juvenile Facilities Act[18] to make written reports to assist the circuit or Recorder's Court in its effort to decide what to do at the original juvenile dispositional hearing, the commitment review hearing, and when the court undertakes its annual progress review.

*E. Probation Revocation.* The juvenile who commits a felony or misdemeanor punishable by imprisonment for one year or more while under the jurisdiction of the circuit or Recorder's Court as a state ward must, following a probation violation hearing, be sentenced to "a term of years" not to exceed what an adult offender could have received. Presumably, under the literal language of 1988 PA 78, the juvenile who is civilly committed after conviction for first-degree murder and who is subsequently convicted of committing another felony, may only receive a "term of years" rather than mandatory life. This is not the case, however, with respect to the juvenile who is initially sentenced as an adult following the juvenile disposition hearing. It should be noted that it takes "a conviction" to revoke the probation. This may mean that if the juvenile is still on probation and committed to state wardship when the juvenile commits another felony while still under age 17, the prosecutor will have to obtain a waiver of the juvenile court's jurisdiction under § 4, before obtaining a conviction unless, of course, the offense that is the subject of the probation violation is one of the nine enumerated life offenses.[19]

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general criminal jurisdiction under section 1 of chapter IX of the code of criminal procedure . . . and if the act for which the youth is committed occurred before his or her seventeenth birthday."

[17] MCL 769.1b; MSA 28.1073(1), as added by 1988 PA 78.

[18] See 1988 PA 73.

[19] Section 7(1) of Chapter XI of the Code of Criminal Procedure, MCL 771.7; MSA 28.1137, as added by 1988 PA 78, provides:

> If a juvenile placed on probation and committed under section 1(3) or (4) of chapter IX to a state institution or agency described in the youth rehabilitation services act, Act No. 150 of the Public Acts of 1974, being sections 803.301 to 803.309 of the Michigan Compiled Laws, is found by the court to have violated probation by being convicted of a felony or a misdemeanor punishable by more than 1 year imprisonment, the court shall revoke probation and order the juvenile committed to the department of corrections for a term of years that shall not exceed the penalty that could have been imposed for the offense for which the juvenile was originally convicted and placed on probation with credit granted against the sentence for the period of time the juvenile served on probation.

*F. New Statutory Procedures for Juvenile Court Waiver of its Jurisdiction.* The prosecuting attorney, for whatever reason,[20] may decide to move the juvenile court to waive its exclusive jurisdiction over the juvenile even when the juvenile is accused of an enumerated life offense, rather than proceed directly against the juvenile as though an adult offender. After October 1, 1988, the criteria set forth in § 4 of the Juvenile Code for waiving the juvenile over to stand trial as an adult have been refined along the general lines of the decisions in *People v Dunbar,* 423 Mich 380; 377 NW2d 262 (1985), and *People v Schumacher,* 75 Mich App 505, 511-512; 256 NW2d 39 (1977). Nevertheless, the juvenile court at the waiver hearing, as well as the circuit court at the juvenile dispositional hearing, may now give more weight to one criterion than another on the basis of legislative language: "consider the following criteria giving each weight as appropriate to the circumstances."[21] The waiver of the juvenile court's exclusive jurisdiction so the juvenile may stand trial as an adult means that the case will now go directly to the circuit or Recorder's Court for arraignment on an information. There no longer will be an arraignment on the complaint and warrant or a preliminary examination. The first phase of the waiver hearing, the probable cause phase, will serve as the equivalent of the preliminary examination stage.[22] There is, however, an apparent inconsistency in the language in the new legislation concerning the standard for establishing probable cause.

Under § 4 of the Juvenile Code, as amended, the Legislature has provided that the standard for establishing probable cause at the first phase of the waiver hearing to decide whether the juvenile court will waive its jurisdiction is "if there is probable cause to believe that an offense has been committed which if committed by an adult would be a felony and if there is probable cause to believe that the child [juvenile] committed the offense."[23] Under § 14(2) of Chapter VI of the Code of Criminal Procedure, the standard at the preliminary examination involving juveniles is whether an offense took place and probable cause to believe that the juvenile committed it.[24] This apparent inconsistency has been addressed in the proposed amendment of the rules for the juvenile court. See MCR 5.950 and *post,* p cxxxvii.

*G. Keeping the Juvenile in Juvenile Court.* In many cases, particularly criminal sexual conduct charges, the prosecuting attorney will

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[20] The prosecuting attorney may believe that the question whether the juvenile should be treated as an adult is close enough to warrant a hearing and to obtain the guidance of the juvenile court. The prosecuting attorney may not want to go to the time and expense of criminal proceedings in circuit or Recorder's Court only to have the court, after conviction, place the juvenile on probation for a life offense and civilly commit the juvenile to state wardship.

[21] See MCL 712A.4; MSA 27.3178(598.4), as amended by 1988 PA 182, and MCL 769.1(3); MSA 28.1072(3), as added by 1988 PA 78.

[22] See MCL 712A.4(9); MSA 27.3178(598.4)(9), as added by 1988 PA 182, and MCL 766.4; MSA 28.922, as amended by 1988 PA 64.

[23] MCL 712A.4(3); MSA 27.3178(598.4)(3), as added by 1988 PA 182.

[24] MCL 766.14(2); MSA 28.932(2), as added by 1988 PA 67.

approve the filing of the petition in juvenile court without seeking a waiver of jurisdiction or proceeding directly to a court having general criminal jurisdiction. When the juvenile is adjudicated for having committed one or more acts which if committed by an adult would be a felony, and the juvenile court orders the juvenile committed to an institution under § 18(1)(e) of the Juvenile Code,[25] the juvenile court will retain jurisdiction over the juvenile and conduct annual review of the juvenile's progress. Should the juvenile be committed for a specific offense that is more serious than just any felony,[26] the jurisdiction of the juvenile court may be extended over the juvenile who has been committed to a public institution under § 18(1)(e) of the Juvenile Code until age 21. However, there must be an automatic commitment review hearing before the juvenile reaches age 19 to determine if the juvenile remains a public safety risk or is not rehabilitated. It seems the law that extends jurisdiction over the juvenile until age 21 applies only to those juveniles who have committed the offense which subjects them to the extended jurisdiction after October 1, 1988.[27] Further, the Youth Parole and Review Board within the Department of Social Services is being phased out.[28]

*H. Detention.* With limited exceptions, Const 1963, art 1, § 15, gives the individual charged with a crime the right to bail: "All persons shall, *before conviction,* be bailable by sufficient sureties, except that bail may be denied . . . ." (Emphasis added.) The juvenile court delinquency proceeding is not criminal.[29] A juvenile court adjudication is not a criminal conviction. The traditional purpose of the juvenile court has been for the benefit of the juvenile. Further,

> juveniles, unlike adults, are always in some form of custody. *Lehman v Lycoming County Children's Services,* 458 US 502, 510-511 [102 S Ct 3231; 73 L Ed 2d 928] (1982); *In re Gault* [387 US 1, 17; 87 S Ct 1428; 18 L Ed 2d 527 (1967)]. Children, by definition, are not assumed to have the capacity to take care of

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[25] See MCL 712A.18c; MSA 27.3178(598.18c), as added by 1988 PA 54.

[26] See MCL 712A.18d; MSA 27.3178(598.18d), as added by 1988 PA 54. A serious offense that may lead to commitment until age 21 is basically a reportable juvenile offense as defined in MCR 5.903(B)(6), as added by court order of May 26, 1988, 430 Mich cvi, other than the offenses of breaking and entering, unauthorized driving away an automobile and larceny from a building.

[27] See *People ex rel Oakland Prosecutor v Bureau of Pardons & Paroles* and *State Defender v Director of Elections,* 405 Mich 815 (1979).

[28] See § 121(1) of the Social Welfare Act, 1939 PA 280, MCL 400.121(1); MSA 16.490(31)(1), as amended by 1988 PA 75, and § 18c of the Juvenile Code, MCL 712A.18c; MSA 27.3178(598.18c), as added by 1988 PA 54.

[29] MCL 712A.1; MSA 27.3178(598.1) provides in part:

> Proceedings under this chapter shall not be deemed to be criminal proceedings.

themselves. They are assumed to be subject to the control of their parents, and if parental control falters, the State must play its part as *parens patriae.* See *State v Gleason,* 404 A2d 573, 580 (Me, 1979); *People ex rel Wayburn v Schupf* [39 NY2d 682, 690]; 350 NE2d [906 (1976)]; *Baker v Smith,* 477 SW2d 149, 150-151 (Ky App, 1971). In this respect, the juvenile's liberty interest may, in appropriate circumstances, be subordinated to the State's "*parens patriae* interest in preserving and promoting the welfare of the child." *Santosky v Kramer* [455 US 745, 766; 102 S Ct 1388; 71 L Ed 2d 599 (1982)].[30]

In juvenile court proceedings, the parent may, by statute, post bail to assure that the juvenile is going to appear in court for trial.[31] A juvenile court may order a juvenile detained if there is probable cause to believe that the juvenile committed the offense alleged and the juvenile fits a circumstance, such as that the offense is so serious that release of the juvenile would be a risk to the public. MCR 5.935(D). However, the juvenile court is supposed to detain a juvenile in the least restrictive environment that will meet the needs of the juvenile and public. MCR 5.935(D)(5). Thus, when the juvenile is detained by the juvenile court and placed in a less restrictive environment than a secure detention facility equal to a pretrial detention of an adult prisoner, such as foster care, shelter, etc., the juvenile court may not be required to set bail if the grounds exist to detain unless the reason for detention was solely to assure that the juvenile shows up for trial.

Although it is not clear, it seems that when a juvenile is charged with an offense which if committed by an adult would be a crime, and the juvenile is placed in secure detention equivalent to pretrial incarceration of an adult prisoner, the juvenile ought to be given a chance to post bail if an adult could.[32]

When the juvenile is prosecuted as an adult, the state constitutional provision noted above directly applies, limiting the right of the government to detain.

It is clear from the new Public Acts that the Legislature intended that a juvenile under 17, who is criminally prosecuted without a waiver hearing under § 4 of the Juvenile Code, may not be detained in a jail with adult prisoners pending trial, acquittal or conviction, or decision at a juvenile dispositional hearing. The Legislature intended that the juvenile who is criminally charged with one or more enumerated life offenses without being waived over must be housed in a juvenile facility.[33] The exceptions are if the juvenile is considered to

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[30] *Schall v Martin,* 467 US 253, 265; 104 S Ct 2403; 81 L Ed 2d 207 (1984).

[31] MCL 712A.15; MSA 27.3178(598.15).

[32] A secure detention facility would be one that prevents the juvenile from leaving the premises as a result of restraints stemming from the structure or perhaps regulation of the facility.

[33] "Juvenile facility" is defined in MCL 761.1(s); MSA 28.843(s), as added by 1988 PA 67. See, also, MCL 764.27a; MSA 28.886(1), as added by 1988 PA 67; MCL 400.115d(1); MSA 16.490(25d)(1), as amended by 1988 PA 75. MCL 720.651; MSA 25.398(1), as added by 1988 PA 77. See, also, §§ 2(c) and 4(1) of the Juvenile Facilities Act, 1988 PA 73.

be a menace to other juveniles because of habit or conduct, or may not otherwise be safely detained. In such cases the juvenile may be housed in a jail or similar institution designed to incarcerate adult prisoners, if placed in a room or ward out of sight and sound from the other adults.[34] Note further that the juvenile, from the point of apprehension, must be kept separate from adult prisoners.

The Juvenile Court Rules Committee, when it formulated suggested proposals based on the new legislation, debated the question whether the district court was authorized to place a juvenile in a facility pending trial. The committee found no specific express provision because there is none.

The statutory waiver package, read as a whole, establishes that the Legislature believed that the source of authority to detain a juvenile in a juvenile facility pending trial is § 27a of Chapter IV (arrests) in the Code of Criminal Procedure:

> (1) If a juvenile is taken into custody or detained, the juvenile shall not be confined in a police station, prison, jail, lockup, or reformatory, or be transported with, or compelled or permitted to associate or mingle with, criminal persons while awaiting trial. However, a juvenile whose habits or conduct are considered to be a menace to other children, or who may not otherwise be safely detained, may be ordered by a court to be placed in a jail or other place of detention for adults, but in a room or ward out of sight and sound from adults.
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> (2) If a person is convicted of a crime within this state and has served time in a juvenile facility prior to sentencing because of being denied or being unable to furnish bond for the offense of which he or she is convicted, the trial court in imposing sentence shall specifically grant credit against the sentence for time served in a juvenile facility prior to sentencing. [MCL 764.27a; MSA 28.886(1), as added by 1988 PA 67.]

It would have been preferable for the Legislature to have expressly stated that the juvenile may be detained in a juvenile facility with court sanction pending trial or disposition. Nevertheless, when a juvenile is apprehended and the prosecutor has authorized the filing of a criminal complaint and warrant, it is believed that the juvenile may be placed in a juvenile facility unless and until the court, including a district court, either orders the juvenile released with or without bail at arraignment, or other hearing, orders the juvenile committed to jail, because the juvenile is a menace to other children or may not otherwise be safely detained, or continues the detention in the juvenile facility. Commitment pending trial, if at all, was clearly intended by the Legislature to be in a juvenile facility. Unlike the juvenile system, which is civil in nature and which requires specific statutory authority in order to hold a juvenile pending adjudication, the accused in the adult criminal system is detained on a charge until

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[34] See MCL 764.27a; MSA 28.886(1): Jail includes juvenile facility "in which a juvenile has been placed pending trial under section 27a of chapter IV." MCL 761.1(q); MSA 28.843(q), added by 1988 PA 67. Juvenile means a person *subject* to the jurisdiction of the circuit or Recorder's Court although the Legislature inartfully used the term "within."

arraigned and ordered released, even if arrested without a warrant. The written authority to detain if needed is provided by the complaint and warrant.

Section 27a represents a further limitation on government than just the Fourth Amendment and the like when it comes to juveniles who are to be criminally prosecuted as though adults. But a limitation implies authority that needs limits. The first sentence of § 27a(1) assumes not only that the juvenile has been taken into custody; it also assumes that the juvenile may be subject to detention. This is followed by the limitation that the juvenile not be put with adult prisoners while awaiting trial.

The second sentence of § 27a(1), making provision for the juvenile who may be a menace to other children, assumes that the juvenile will probably be in a facility with children—a juvenile facility. It should be remembered that jail has been defined by the Legislature in the Code of Criminal Procedure to include a juvenile facility for purposes of placement under § 27a. This indicates there is an absolute prohibition against placing a juvenile with adult prisoners in any facility whatsoever. The second sentence of § 27a also indicates that a court may put a juvenile in jail who may not otherwise be safely detained. "Juvenile facility" equates with jail for purposes of placement under § 27a. This may mean that the court that had earlier conditioned release of the juvenile on in-home detention, foster care and the like, and later finds that the juvenile cannot otherwise be safely detained in such lesser restrictive environment, or is a menace to others, may place that juvenile in secure detention in a juvenile facility or, if necessary, in a jail used to incarcerate adults so long as the juvenile is out of sight and sound from adults. In short, the only apparent thing that a district court cannot do that a circuit court can do concerning juvenile detention pending trial is to order that the juvenile be placed in a *juvenile-court-operated* facility without the consent of the juvenile court.[35] Section 27a is one of the last provisions in the chapter of the Code of Criminal Procedure entitled "Arrest." It is followed by the chapter on bail, the first section of which authorizes a court, including a district court, to release a detained person "brought before the judge or district court magistrate to bail pursuant to section 15 of article 1 of the state constitution of 1963."[36]

### PROPOSED AMENDMENTS OF THE JUVENILE COURT RULES

The Juvenile Court Rules Committee proposes that MCR 5.933 and 5.934 be amended to make it clear that a juvenile will no longer be taken immediately to the *juvenile court* following apprehension on a life offense if the prosecuting attorney has authorized the filing of a criminal complaint and warrant. In that case the juvenile must be taken forthwith to the district court for arraignment on the complaint. See MCR 6.905(A). In the absence of an authorization from the prosecuting attorney, however, the juvenile must be brought to juvenile court or to a designated facility if following apprehension the court is not open.

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[35] See MCL 712A.2(f); MSA 27.3178(598.2)(f), as added by 1988 PA 53.

[36] See MCL 765.1(1); MSA 28.888(1).

*A. Special Adjournment.* The Juvenile Court Rules Committee proposes to create a special adjournment at the preliminary hearing stage to allow the prosecutor time to decide whether to criminally prosecute the juvenile or remain in the juvenile court. MCR 5.935(A)(3). The adjournment (for up to five days) must be granted on motion of the prosecuting attorney if the prosecutor has approved submitting a petition in juvenile court conditional on withdrawal within five days if the prosecuting attorney authorizes a criminal complaint and warrant. The juvenile must be released during the adjournment period unless the juvenile court satisfies the requirements for detention in MCR 5.935(D). The juvenile court must not authorize the petition during the special adjournment. If the prosecuting attorney takes no action to authorize a criminal complaint during the five-day adjournment, this acts as an effective bar to the prosecuting attorney from pursuing criminal prosecution, unless a waiver of the juvenile court's exclusive jurisdiction is obtained.

Should the prosecuting attorney authorize the filing of a criminal complaint during the adjournment period, the time used must be deducted from the twelve days given to conduct the preliminary examination following arraignment on the complaint and warrant.

*B. Postcommitment Reviews.* MCR 5.944 would be changed to implement the new procedure for dealing with juveniles who remain under the jurisdiction of the juvenile court after commitment to a public institution pursuant to § 18(1)(e) of the Juvenile Code. No actual hearing is held when the juvenile court undertakes an annual progress review of the committed juvenile. However, the court may not, following progress review, order a juvenile moved to a more restrictive placement without giving the juvenile notice and opportunity to be heard.[37]

At the automatic commitment review hearing held 42 days before the 19th birthday of the juvenile who has been committed to a public institution on a "reportable offense" as defined in the court rules, other than breaking and entering, larceny from a building, and unauthorized driving away of an automobile, the prosecutor has the burden of proof. The prosecutor must show that the juvenile is not rehabilitated or that the juvenile is a public safety risk if released at 19. If the court is satisfied following a hearing that the prosecuting attorney met the burden of proof, the jurisdiction of the court over the juvenile continues until age 21 or further order of the court.

A commitment review hearing may also be held at any time on motion of the institution where the juvenile is committed. The juvenile personally may not move for a commitment review hearing. At the nonautomatic commitment review hearing, it is the moving party that has the burden to show that the juvenile is rehabilitated and not a public safety risk. The Juvenile Court Rules Committee proposes that the burden standard at a nonautomatic commitment review hearing be clear and convincing evidence. This standard appears to be something more than a mere preponderance but less than beyond a reasonable doubt. See *Serafin v Serafin,* 401 Mich 629, 637; 258 NW2d

[37] The superintendent of the public institution where the juvenile is committed may be able to move the juvenile without court hearing. See MCL 720.601; MSA 27.3178(598.31), as amended by 1988 PA 74.

461 (1977), concurring opinion by COLEMAN, J. See generally 30 Am Jur 2d, Evidence, § 1167, pp 344-346. The criteria to decide if the juvenile court will continue jurisdiction past 19 stem from 1988 PA 54.

*C. Rule on Waiver Hearing.* The Juvenile Court Rules Committee proposes that existing MCR 5.950 on waiver be amended to reflect the changes in § 4 of the Juvenile Code, as amended by 1988 PA 182. The juvenile who wants to waive the probable cause phase of the waiver hearing must be advised that the probable cause phase is the equivalent of and substitute for a preliminary examination in district court. The proposal resolves the legislative inconsistency concerning the standard of probable cause. The committee opted for the traditional burden that the prosecutor make a prima facie showing that the offense was committed, not just that there was probable cause to believe that the offense occurred. The probable cause standard pertains to the aspect that links the juvenile to the offense.

The Juvenile Court Rules Committee adopts the legislative view that the court's findings on waiver now may be stated on the record as an alternative to incorporating them into a written opinion. The committee proposes that the findings need only be sent to the circuit court along with the order of waiver if the circuit court requests them. Compare MCL 712A.4; MSA 27.3178(598.4), as added by 1988 PA 182.

DISTRICT AND CIRCUIT COURT RULES PERTAINING TO JUVENILES CHARGED WITH ENUMERATED LIFE OFFENSES

*A. Scope and Definitions.* A new subchapter 6.900 covers the individual over 15 who is criminally charged, without the juvenile court having waived its jurisdiction following hearing, with committing an enumerated life offense between ages 15 and 17. However, the rule that a juvenile ought to be housed in juvenile facilities pending trial in adult courts as proposed would apply to all persons under 17, whether waived over or brought into the criminal justice system on discretion of the prosecuting attorney. Any other proposal might mean juveniles who may have committed less serious offenses end up in jail incarcerated along with adults while awaiting trial simply because they do not technically fall within the definition of juvenile in the Code of Criminal Procedure.

The definitions in the new subchapter pertaining to juveniles are very detailed, but facilitate organization by giving names to hearings not expressly designated in the legislation, including juvenile dispositional hearing, commitment review hearing, and progress report. These terms are consistent with those used in rules governing similar procedures in juvenile court.

*B. Pretrial Rules.* When a juvenile is apprehended for an offense including a life offense, unless the prosecuting attorney has authorized the filing of a complaint and warrant, the juvenile is to be taken immediately to the juvenile court for preliminary hearing.[38] A similar approach is taken for the juvenile who is apprehended for an enumerated life offense and the prosecutor has authorized the filing of a complaint and warrant except that the juvenile is to be taken forth-

[38] See MCL 764.27; MSA 28.886.

with to the district court. The juvenile must be released within 24 hours of the arrest unless the juvenile was first taken to the juvenile court and a special adjournment obtained. In the latter case, the juvenile will be arraigned on the complaint and warrant the same day the prosecuting attorney authorizes the complaint. At the arraignment on the complaint and warrant, the magistrate must appoint counsel to appear at the arraignment when no parent or guardian of the juvenile is present. Further, the time for holding the preliminary examination following arraignment may be as short as seven days, depending on the time given the prosecuting attorney by a probate court to decide whether to proceed criminally against the juvenile following apprehension. The magistrate or court will have to appoint an attorney for the juvenile in virtually every instance unless waived. In any proceeding the magistrate or court is required to appoint an attorney if the juvenile or the parents are indigent, or if the parents even refuse to pay for an attorney. If the parent is the victim, then the attorney is to be appointed, and, if the parent refuses to appear and participate, the attorney must be appointed. There is also a clause that says that the court must appoint an attorney for the juvenile when the public's interest or the minor's interest require it. See MCR 5.915. This may include appointing an attorney for a juvenile who insists on waiving an attorney and trying the case in propria persona. See Const 1963, art 1, § 13, which provides a "suitor in any court of this state has the right to prosecute or defend his suit, either in his own proper person or by an attorney." On the "dangers and disadvantages" of self-representation, see *People v Anderson,* 398 Mich 361; 247 NW2d 857 (1976); *People v Riley,* 156 Mich App 396, 399; 401 NW2d 875 (1986). Waiver of the right to an attorney is made difficult because of the age of the juvenile and the seriousness of the charge. Note that the cost of a court-appointed attorney, or a part thereof, may be recovered, even against a third party who is responsible for the juvenile following notice and opportunity to be heard. At the preliminary hearing, if the magistrate does not find the requisite probable cause for bindover on the enumerated life offense, the court must determine whether any other offense has taken place and whether there is probable cause to believe that the juvenile did it. If so, the juvenile must be transferred to the juvenile court in the county where the offense allegedly occurred. See MCR 6.911.

*C. Detention.* Bail must be set pursuant to MCR 6.110. However, the magistrate or court is not prohibited from looking to the factors used by the juvenile court. MCR 5.935. Furthermore, the rule contemplates some continuity between the courts in lodging the juvenile. If possible, the juvenile who is placed in a juvenile-court-operated detention facility pending decision by the prosecuting attorney on whether to authorize the filing of a criminal complaint and warrant might, with the consent of the juvenile court, remain in that facility, if not released, rather than be transported to another facility simply because the prosecutor chooses to proceed in adult court. On the other hand, unless the juvenile court consents to the magistrate's decision that the juvenile will remain in detention pending arraignment on the information, or unless the circuit court orders the juvenile to remain in the juvenile-court-operated facility while awaiting trial in adult court, the juvenile will likely have to be moved to a non-court-

operated facility. The Legislature in adding § 2(f) to the Juvenile Code may have believed that only a court of general criminal jurisdiction should be directing the juvenile court to place a person within its juvenile-court-operated facility when the person is no longer within the jurisdiction of the juvenile court.

The juvenile who is detained in the juvenile court system is entitled to be tried within 42 days after having been taken into custody or released. A similar proposal is made for the juvenile in detention while awaiting trial in adult court for more than 42 days from arraignment on the information. MCR 6.909(C).

*D. Circuit or Recorder's Court Rules.* MCR 6.931 reflects the procedure for a juvenile dispositional hearing at sentencing. The purpose is to decide whether the circuit court will put the juvenile on probation and send the juvenile to a public institution or agency under the direction of the department of social services, or to impose a sentence as though the juvenile were an adult. The criteria for deciding whether to make the juvenile a state ward, while still retaining jurisdiction over the juvenile, or imposing a prison sentence are essentially the same criteria used by the juvenile court when it waives its jurisdiction over the juvenile so that the juvenile may stand trial as an adult. See *ante,* p cxxxi.

The procedure in the proposed rule on probation revocation is self-explanatory. The prosecuting attorney will probably have to get a waiver of jurisdiction by the juvenile court as well as a conviction before seeking to revoke the juvenile's probation for having committed a felony or a high misdemeanor since the language in the statute requires that there be a conviction. The annual progress review and the commitment review hearings are similar to those proceedings in juvenile court, as explained earlier.

# AMENDMENTS OF MICHIGAN COURT RULES OF 1985

Adopted October 27, 1988, effective January 1, 1989—REPORTER.

Because it was perceived necessary to issue this order without the usual notice provided for in MCR 1.201, prompt comments regarding these rules are invited.

(The present language is repealed and replaced by the following language unless otherwise indicated below:)

RULE 5.106. PUBLICATION.

(A) Requirements. A notice of hearing required to be made by publication must be published in a newspaper as defined by MCR 2.106(F) one time at least 14 days before the date of the hearing, except that publication of a notice involving the estate of a disappeared person or an absent apparent beneficiary must be made once a month for 4 consecutive months before the hearing.

(B)-(D) [Unchanged.]

RULE 5.505. TRIAL OF CLAIMS AGAINST ESTATES.

The judge may consolidate or sever claims against the estate for hearing.

RULE 5.509. TRIAL OF CLAIMS AGAINST ESTATES.

[Deleted.]

RULE 5.702. COMMENCEMENT OF ESTATE PROCEEDINGS.

(A) [Unchanged.]

(B) [Deleted.]

(B)-(D) [Formerly (C)-(E), redesignated, but otherwise unchanged.]

RULE 5.706. PUBLICATION AND CLAIMS.

(A) Publication of Notice; Contents. A notice of settlement of the estate of a decedent or disappeared person and presentment of claims must be published by the petitioner or personal representative in a newspaper, as defined by MCR 2.106(F), in the county in which a resident decedent was domiciled or in which the proceeding as to a nonresident was initiated. The notice must include:

(1) The decedent's name, last known address, date of death, and social security number, if known;

(2) That the estate will be assigned and distributed to the persons entitled to it;

(3) In a testate estate, that an instrument has been admitted or is proposed to be admitted to probate, including the date or dates of execution;

(4) The name and address of the personal representative or proposed personal representative; and

(5) That claims will be forever barred unless presented within 4 months after the publication of the notice to the personal representative or the proposed personal representative, or to both the personal representative or proposed personal representative and the probate court.

Except as may be required for making substituted service under MCR 5.105 and as required by MCR 5.104(B)(4) for the entering of an order deter-

mining heirs, this is the only notice required to be published during the administration of the estate.

(B) Form of Claims. Claims filed with the court must be substantially in the form approved by the state court administrator.

(C) Notice to Known Creditors.

(1) Within the time limits prescribed by law, the fiduciary shall cause a copy of the published notice or a similar notice to be served personally or by mail on each creditor of the estate who at the time of publication or during the 4 months following publication is known to the fiduciary.

(2) If, at the time of publication, the address is unknown and cannot be ascertained after diligent inquiry, the name of the creditor must be included in the published notice.

(3) In the event no personal representative has been appointed and qualified within 42 days after the date of the publication of the claims notice, the court will appoint a temporary personal representative who will give notice to known creditors.

(D) Small Estates. Such notices are not required if the estate qualifies as a small estate under MCL 700.101 or 700.102; MSA 27.5101 or 27.5102.

RULE 5.709. INDEPENDENT PROBATE.

(A)-(B) [Unchanged.]

(C) Notices.

(1) [Unchanged.]

(2) Notice of Appointment; Service.

(a) [Unchanged.]

(b) The notice of appointment need not be served on an interested party whose name or address is unknown and cannot be ascertained after diligent inquiry if

(i) [Unchanged.]

(ii) in addition to the information required by MCR 5.706(A), the published notice regarding claims included the statements that the estate is not being supervised by the probate court, and that any interested party may file a written petition with the court and with the independent personal representative objecting to the appointment and, if applicable, to the admission of the will to probate.

(c) [Unchanged.]

(3) Claims Notice; Publication. The independent personal representative must publish a notice as provided by MCR 5.706(A) and must give notice to known creditors as provided by MCR 5.706(C), except the independent personal representative must be identified as such in the notices. Notices are not required if the estate qualifies for summary proceedings under MCL 700.325; MSA 27.5325.

(4) [Unchanged.]

(D)-(F) [Unchanged.]

*Staff Comment:* The October 27, 1988, amendments of several rules in Subchapter 5 of the Michigan Court Rules are to take account of the new provisions regarding claims against estates found in 1988 PA 222.

The amendments, which are based on recommendations by the State Bar Probate and Estate Planning Section, were made without publication for comment because of the January 1, 1989, effective date of the act. However, the order adopting the amendments invited prompt comments from interested persons.

In MCR 5.106(A), the provision regarding the time for making claims is deleted in view of the statutory provision setting the time at four months after the published notice. MCL 700.703(1); MSA 27.5703(1).

New MCR 5.505 contains the provision on severance and consolidation of claims that was formerly found in MCR 5.509. The remaining provisions of MCR 5.509 are deleted in view of the repeal of the statutory authorization for using referees to hear claims.

Former MCR 5.702(B) is deleted and a revised version placed in MCR 5.706(A). MCR 5.706 is significantly revised in light of the new statute. Subrule (C) covers the subject of giving notice to known creditors. Subrule (D) makes clear that the notice requirements do not

apply if the estate qualifies as a small estate under the Revised Probate Code.

In accord with the provisions of the statute applying the same notice requirements in independent probate proceedings as in supervised ones, several changes are made in MCR 5.709, deleting the former provisions covering notice in independent probate proceedings and referring to the MCR 5.706 notice rules, with minor variations.

The staff comment is published only for the benefit of the bench and bar and is not an authoritative construction by the Court.

# AMENDMENT OF THE RULES FOR THE BOARD OF LAW EXAMINERS

Adopted August 19, 1988, effective January 1, 1990—REPORTER.

[The present language is repealed and replaced by the following language unless otherwise indicated below:]

RULE 2. ADMISSION BY EXAMINATION.

(A)-(D) [Unchanged.]

(E) Deleted.

(E)-(F) [Formerly (F)-(G), relettered but otherwise unchanged.]

*Staff Comment:* The amendment conforms the Rules for the Board of Law Examiners concerning admission to the practice of law by examination to the requirements of MCL 600.940; MSA 27A.940, which requires, inter alia, that every applicant for the bar examination be a graduate of a reputable and qualified law school. The amendment rescinds the summer school exception which allowed students attending summer law school to sit for the bar exam if the student would be graduated at the end of the summer term.

Adopted August 19, 1988, effective September 9, 1988—REPORTER.

RULE 5. ADMISSION WITHOUT EXAMINATION.

(A) An applicant for admission without examination must

(1)-(3) [Unchanged.]

(4) intend in good faith to maintain an office in this state for the practice of law;

(5)-(6) [Unchanged.]

(B)-(E) [Unchanged.]

*Staff Comment:* The amendment conforms the Rules for the Board of Law Examiners concerning admission to the practice of law without examination to the requirements of MCL 600.946; MSA 27A.946, which requires, inter alia, that for admission to the practice of law without examination, an applicant must intend in good faith either to maintain an office in the state for the practice of law and to practice actively in this state, or to engage in the teaching of law as a full-time instructor in a reputable and qualified law school duly incorporated under the laws of this state. The residency requirement formerly a part of Rule 5(A)(4) of the Rules for the Board of Law Examiners is rescinded so that the Rules conform with MCL 600.946; MSA 27A.946, and the United States Supreme Court decision of *Supreme Court of Virginia v Friedman,* 487 US —; 108 S Ct 2260; 101 L Ed 2d 56 (1988).

BOWERMAN v MacDONALD

MOON v BALLINGER

Docket Nos. 80273, 80424. Argued December 8, 1987 (Calendar Nos. 4-5). Decided July 13, 1988.

Elizabeth A. Bowerman filed a verified paternity complaint and a motion for blood or tissue tests in the Marquette Circuit Court against Michael MacDonald. The court, Edward A. Quinnell, J., ordered the defendant to submit to blood tests or be held in contempt. The Court of Appeals, ALLEN, P.J., and CYNAR and R. C. LIVO, JJ., reversed, holding that a trial court may not order a blood test until a plaintiff has presented proofs to support the allegations in the complaint (Docket No. 90776). The plaintiff appeals.

Kathy A. Moon brought a paternity action in the Gratiot Circuit Court against Jerry Ballinger. The court, Randy L. Tahvonen, J., granted a default judgment against the defendant for failure to submit to a court-ordered blood test. The Court of Appeals, WALSH and HOOD, JJ. (BEASLEY, J., dissenting), affirmed in an opinion per curiam, holding that entry of a default judgment was within the trial court's discretion (Docket No. 85378). The defendant appeals.

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

A verified complaint filed by the mother of a child in accordance with § 4 of the Paternity Act is sufficient ground upon which to order blood and tissue tests; neither a search warrant nor an evidentiary hearing is required prior to the ordering of the tests. A defendant father's refusal to submit to such tests may be sanctioned by the use of a court's contempt power. However, the entry of a default judgment against him for refusal to submit conflicts with the Paternity Act and may not be used as a sanction.

1. Paternity actions are special creations of the Legislature

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REFERENCES

Am Jur 2d, Bastards §§ 104 *et seq.*, 118.

Admissibility and weight of blood-grouping tests in disputed paternity cases. 43 ALR4th 579.

Admissibility, weight and sufficiency of Human Leukocyte Antigen (HLA) tissue typing tests in paternity cases. 37 ALR4th 167.

and fundamentally civil in nature. The Paternity Act was a significant break from its predecessor statute, introducing the use of new and dispositive types of evidence as well as direction for the application of the rules of civil procedure, including the use of verified complaints and default judgments. Further, the act recognizes the evolution of blood testing technology to determine the probability of paternity with great precision through blood and tissue tests and allows blood test results to be introduced, not only to exclude an alleged father from paternity, but also, if he is not excluded, to determine the likelihood that he is, in fact, the father.

2. Since a paternity action is essentially civil in nature, it is unnecessary to require a hearing to establish probable cause before ordering blood or tissue tests. The order for testing initially is given by a neutral judge who already has the sworn complaint of the plaintiff indicating when and where she was impregnated and that she believes the defendant to be the father of her child. The complaint clearly places the child's and the parties' blood and tissue types in controversy and provides good cause for the motion.

3. Procedure in paternity actions is controlled by the Michigan Court Rules, absent contradiction in the Paternity Act. The court rules provide for a judgment of default and the use of the contempt power against a party who refuses to submit to blood and tissue tests. Section 6(a) of the Paternity Act provides that the refusal of a party to submit to blood and tissue tests must be disclosed at trial. Properly interpreted, the provision precludes use of the default sanction. Default, if applied, would obviate the need for a trial, making impossible the remedy of a trial as mandated by the act.

*Bowerman,* reversed.

*Moon,* reversed and remanded.

157 Mich App 368; 403 NW2d 140 (1987) reversed.

157 Mich App 676; 403 NW2d 194 (1987) reversed.

PARENT AND CHILD — PATERNITY ACT — BLOOD TESTS — DEFAULT — CONTEMPT.

A verified complaint filed by the mother of a child in accordance with § 4 of the Paternity Act is sufficient grounds upon which to order blood and tissue tests; neither a search warrant nor an evidentiary hearing is required prior to the ordering of the tests; refusal by a defendant father to submit to such tests may be sanctioned by the use of a court's contempt power, however, the entry of a default judgment against him for refusal to

submit conflicts with the act and may not be used as a sanction (MCL 722.714, 722.716, 722.717; MSA 25.494, 25.496, 25.497; MCR 2.311, 2.313).

*Gary L. Walker,* Prosecuting Attorney, and *Mary Lou Strisar,* Assistant Prosecuting Attorney, for plaintiff Bowerman.

*Mark A. Gates,* Prosecuting Attorney, and *Keith J. Kushion,* Chief Assistant Prosecuting Attorney, for plaintiff Moon.

*Richard John Jason* for defendant MacDonald.

*Goggin & Baker* (by *William E. Goggin*) for defendant Ballinger.

Amicus Curiae:

*Gerald D. Warner* and *David G. Case* for Prosecuting Attorneys Association of Michigan.

BRICKLEY, J. We granted leave in these two cases limited to three issues. First, whether a search warrant or an evidentiary hearing is necessary prior to a trial court's order of a blood test in a paternity case. Second, whether a defendant father in a paternity case may be held in contempt where he refuses to submit to a blood test. Third, whether a default judgment may be entered in favor of a plaintiff mother in a paternity case where the defendant refuses to submit to a blood test.

We hold that where the mother of a child files a verified complaint in accordance with § 4 of the Paternity Act,[1] neither a search warrant nor an evidentiary hearing is required prior to ordering blood tests. We further hold that a contempt citation is a permissible sanction where the alleged

[1] MCL 722.711 *et seq.;* MSA 25.491 *et seq.*

father refuses to submit to the testing, but, that the use of a default judgment conflicts with the Paternity Act.

I

In *Bowerman v MacDonald,* the plaintiff filed a verified paternity complaint and subsequently filed a motion for blood or tissue tests which the court granted. At a pretrial conference, the defendant's attorney notified the court that MacDonald would not submit to the testing. The trial court tentatively ruled that defendant would be held in contempt and would be jailed for thirty days or until he agreed to submit to the tests, whichever occurred first. After a challenge from the defendant and briefing on the issue, the trial judge concluded that contempt was an appropriate sanction, and issued an order to that effect after giving defendant another forty-eight hours to submit to the testing. On appeal, the Court of Appeals[2] did not reach the question of the propriety of the contempt order, since it reversed the trial court's original order that defendant submit to the blood tests. Plaintiff appeals from that decision.[3]

In *Moon v Ballinger,* defendant also refused to submit to blood testing, and the trial court conditionally entered a default judgment in plaintiff's favor pursuant to Michigan Court Rules 2.311 and 2.313. The Court of Appeals[4] affirmed the judgment, and defendant appealed in this Court.

[2] *Bowerman v MacDonald,* 157 Mich App 368; 403 NW2d 140 (1987).

[3] The defendant did not cross appeal on the issue of the propriety of the contempt order. However, in light of the similarity to the default issue in *Moon v Ballinger,* we ordered it briefed. Rather than remand this question for Court of Appeals consideration, we resolve it now in the interests of judicial economy.

[4] *Moon v Ballinger,* 157 Mich App 676; 403 NW2d 194 (1987).

II

The nature of paternity actions has undergone considerable evolution since the passage of the original Bastardy Act of 1846.[5] With minor exceptions, the civil aspects of the action, as defined by statute and case law have steadily increased while those aspects reflecting principles of criminal procedure have been reduced or eliminated altogether. Indeed, the Legislature's explicit purpose in passing the 1986 amendment of the Paternity Act was to "make[ ] it finally clear that paternity is a civil issue."[6] In addition, the relevant technology has, over time, developed so as to allow blood and tissue testing to play an increasingly important and probative role in such cases.[7]

At common law, a father had no duty to care for his child born out of wedlock. *State v Lindskog,* 175 Minn 533; 221 NW 911 (1928). In 1846, the Legislature enacted the Bastardy Act to define such a duty and provide a statutory mechanism by which he could be required to fulfill it. The act was said to have two purposes: to require the child's father to provide support, and to protect society from having to provide that support in his stead. *Cross v People,* 8 Mich 113 (1860). Even under this early statute, however, punishment of the father was never among its purposes, and the act did not provide for criminal penalties. Moreover, as is described below, the cases decided pursuant to the Bastardy Act tended to apply civil

[5] 1846 RS, ch 42.

[6] Senate Bill Analysis, SB 225 (June 20, 1986).

[7] For a discussion of these technological developments, see, e.g., Kolins, *The role of paternity testing in cases of disputed parentage,* 63 Mich B J 1169 (1984); comment, *Proving paternity by means of serological testing: Should it be admitted as evidence by the courts?,* 1981 Det C L R 47; *Joint AMA-ABA guidelines: Present status of serologic testing in problems of disputed parentage,* 10 Family L Q 247 (1976).

rules, absent specific statutory instruction to the contrary.

Nevertheless, the proceeding was considered "quasi-criminal," in light of the many aspects of criminal procedure present in the statute. The 1846 statute provided that the mother was to bring her complaint to a justice of the peace in order to "institute a prosecution," following which the justice of the peace was to "take her accusation and examination, in writing, under oath, respecting the person accused, the time when and place where the complainant was begotten with child, and such other circumstances as the said justice shall deem necessary, for the discovery of the truth of such accusation." A warrant was then to be issued for the defendant's arrest. No provision was made for any means of service other than arrest. Upon the delivery of the defendant, the justice of the peace was to "hear[ ] him in his defence" and could then require him to supply a bond or be jailed until trial if he did not supply the bond. The trial was to be by jury, and the verdict was to be in the form of "guilty or not guilty." In addition, the mother of the child was not referred to as "plaintiff" in the statute (she was instead termed "the complainant"), while the alleged father was termed, "the defendant." The action was accordingly instituted in the name of "the people" and representation was by the local prosecutor.

This Court evaluated the Bastardy Act on many occasions. In spite of the numerous aspects of criminal procedure provided for in the act itself, we applied rules of civil procedure in the great majority of cases where the act was silent. We held that the burden of proof was "preponderance of [the] evidence" rather than "beyond a reason-

able doubt,"[8] that extradition could not be had in a bastardy case,[9] that jurisdiction did not lie in a court having a purely criminal jurisdiction,[10] that the paternity defendant need not enter a plea,[11] that any detention of the defendant had to take place in a jail rather than in a prison,[12] that the mother may employ her own attorney,[13] that reversal was not required where there was instructional error which would have required reversal in a criminal case,[14] and that offers to compromise would be treated as they would in a civil matter.[15]

At the same time, a small number of cases did apply rules more associated with criminal procedure. The result in most of these cases, however, was mandated by statute. For example, in *Cady v St Clair Circuit Judge,* 139 Mich 618; 102 NW 1025 (1905), we held that a bastardy defendant could be arrested even though he was immune from civil process. That holding rested upon the fact that the act required that the defendant be arrested and did not permit the use of civil process. Similarly, in *People v Kaminsky,* 73 Mich 637; 41 NW 833 (1889), we found that the police courts had jurisdiction to bind over bastardy defendants. However, that decision was mandated by the court's jurisdictional statute.

The only two cases in which we applied criminal rules to Bastardy Act cases, absent a statutory imperative, were *People v Stoeckl,* 347 Mich 1; 78 NW2d 640 (1956), and *People v McFadden,* 347

[8] *Semon v People,* 42 Mich 141, 142; 3 NW 304 (1879).

[9] *In re Cannon,* 47 Mich 481; 11 NW 280 (1882).

[10] *People v Harty,* 49 Mich 490; 13 NW 829 (1882).

[11] *Pangborn v Smith,* 65 Mich 1; 31 NW 599 (1887).

[12] *In re Kaminsky,* 70 Mich 653; 38 NW 659 (1888).

[13] *Harley v Ionia Circuit Judge,* 140 Mich 642; 104 NW 21 (1905).

[14] *People v Oppenheimer,* 170 Mich 595; 136 NW 399 (1912).

[15] *People v Gill,* 247 Mich 479; 226 NW 214 (1929).

Mich 357; 79 NW2d 869 (1956). In the former, we held that it constituted error requiring reversal for the prosecutor to comment on a defendant's refusal to testify. In the latter, we held that a bastardy defendant must give notice of an alibi defense.[16]

In 1956, the Legislature passed the Paternity Act, MCL 722.711 *et seq.;* MSA 25.491 *et seq.,* which in a number of respects decriminalized the procedure governing bastardy cases. Most important, it eliminated the *requirement* of the issuance of an arrest warrant unless the purported father failed to respond to notice by summons. While warrants were still permitted, the court, in its discretion, could use a summons instead of a warrant. MCL 722.714(c); MSA 25.494(c). Even where a warrant was issued, the statute barred the fingerprinting or the photographing of the alleged father, or the listing of his name on any criminal record. MCL 722.714(e); MSA 25.494(e).

The statute also adopted the civil approach to jury trials. Rather than providing for the right to a jury, it instead required that the defendant demand a trial by jury, should he want one. MCL 722.715(a); MSA 25.495(a). In 1966, the statute was amended so as to fully accord with general civil procedure by stating that "[e]ither party may demand a trial by jury." In addition, the Paternity Act eliminated the requirement of a preliminary hearing and required instead that the complaint be verified by oath or affirmation of the complainant. MCL 722.714(c); MSA 25.494(c). Consistent with these provisions for civil procedure, the Paternity Act also included a provision allowing for default in paternity actions. MCL 722.717(a); MSA 25.497(a).

[16] *McFadden* was later distinguished in *Skidmore v Czapiga,* 82 Mich App 689; 267 NW2d 150 (1978), in light of a revision in the statute governing notice of alibi defenses.

The Paternity Act also made it possible to sue a defendant residing in Michigan even though the mother and child resided out of state. This change indicates a stronger emphasis on the protection of the mother and child, i.e., private parties to the suit, rather than the state, since no state funds could, in such a setting, have been sought for the support of the child.

In the same vein, while the Bastardy Act had referred to "the defendant," the Paternity Act refers to "the alleged father," and all actions after the passage of the act were taken in the name of the mother rather than the people.

Perhaps in recognition of the fact that a purported father could still face arrest and incarceration under the Paternity Act, the Legislature also provided that he had a right to refuse to testify.

Lastly, the act reflected the technological developments of the times. Blood typing more and more had become a common component of paternity cases, and the act included a provision which gave the purported father the right to request blood typing of the mother and child. This provision reflected our holding in *People v Nichols,* 341 Mich 311; 67 NW2d 230 (1954). In that case, we held that the results of blood testing could be introduced in paternity cases only to prove *nonpaternity.* The use of blood testing to check for the possibility of paternity was only a few years old at that time, and the plaintiff had introduced evidence of nonexclusion. This Court, focusing essentially on the state of the technology, held that evidence of exclusion was admissible, but that evidence of nonexclusion was not, since it "had not the slightest probative value or tendency to prove defendant's paternity." *Id.* at 331. The technology of the day was such that if the defendant was not excluded, he remained in a very large population

of possible fathers. Comment, *Proving paternity by means of serological testing: Should it be admitted as evidence by the courts?,* 1981 Det C L R 47. Pursuant to the Paternity Act, if the mother refused testing, the fact of her refusal would be made known to the jury. MCL 722.716(a); MSA 25.496(a).

The Paternity Act was, in numerous respects, a significant break from its predecessor statute. It introduced the use of a new and often dispositive type of evidence, and, in nearly all respects, it directed the judiciary to apply rules of civil procedure.[17]

Prior to any decisions of record under the new act, the General Court Rules of 1963 were adopted. They contained a special rule, GCR 1963, 730, for paternity cases. GCR 1963, 730.1 stated the general rule of procedure for such cases:

> The procedure in actions under the Paternity Act shall be in accordance with Rule 730, and the general court rules which are not in conflict with the provisions of the Paternity Act.[18]

The adoption of this rule went a long way to resolve arguments as to the nature of the pater-

[17] Shortly after the passage of the Paternity Act, two Attorney General opinions were issued which specifically analyzed its nature. OAG, 1957, No 2883, 160, 162 (April 12, 1957), stated that paternity proceedings "are to be viewed . . . as primarily civil in nature." In a subsequent opinion, the Attorney General stated that it was not necessary for the mother to be examined by the court prior to issuance of the summons and concluded that the "proceedings under the act would be civil proceedings." OAG, 1957, No 3020, 495, 497 (November 1, 1957).

[18] The remaining two subsections of the rule dealt specifically with procedure concerning jury demands and blood testing in paternity cases. GCR 1963, 730.2 originally stated that the alleged father may demand a jury trial. In 1967 this was amended to allow either party to demand a jury, as permitted by the 1966 amendment to the Paternity Act. GCR 1963, 730.3 defined the time limits for requesting blood tests.

nity action. Since its adoption, every Court of Appeals decision has applied the general rules of civil procedure to paternity cases, providing they did not contradict the Paternity Act or Rule 730. The first three decisions of the Court of Appeals clearly reflected this approach. In *Houfek v Shafer,* 7 Mich App 161; 151 NW2d 385 (1967), the Court of Appeals applied the general court rule as to pretrial conferences. In *Romain v Peters,* 9 Mich App 60; 155 NW2d 700 (1967), the Court held that, unlike criminal trials, paternity cases do not require that the jury's verdict be unanimous. In *Butler v Cann,* 62 Mich App 663; 233 NW2d 827 (1975), the Court of Appeals held that a default judgment may be entered against a paternity defendant when he fails to appear for trial.

After these three Court of Appeals decisions, this Court decided the only case in which we have addressed the Paternity Act. In *Artibee v Cheboygan Circuit Judge,* 397 Mich 54; 243 NW2d 248 (1976), we held that Paternity Act defendants have a right to appointed counsel pursuant to the due process provision of the Michigan Constitution, art 1, § 17. The Court observed that

> the interests of the individuals affected are substantial, and the nature of the proceedings is sufficiently complex so as to require counsel to insure a fair trial. [*Id.* at 57.]

Of primary importance to the Court was the fact that, if the mother was unable to afford an attorney, the county would pursue the action for her. We stated that

> [t]he Legislature has expressed its opinion that the complainant and her child would not receive a fair trial without benefit of counsel. The same consider-

> ation of fundamental fairness should apply to the defendant . . . . [*Id.* at 59.]

We also noted that unlike divorce proceedings, paternity cases involve sharply contested questions of fact and their purpose is to "determine with finality the obligation of support, and not merely . . . an appropriate level of support." *Id.* at 58. In other words, the Court was concerned with an indigent purported father's ability to defend himself in a complex matter which would create financial obligations lasting until the child attained majority. For example, "[a]n unrepresented paternity defendant . . . may be unaware of his statutory right to demand blood tests or unable to analyze the legal implications of the results." *Id.* The Court also noted the remaining element of criminal procedure in paternity cases, i.e., the fact that the purported father could be arrested rather than served by civil process.[19]

The Court of Appeals has consistently interpreted *Artibee* in a narrow manner and correctly so. The asymmetry of providing an indigent plaintiff with an attorney, while denying the same to an indigent defendant, presents obvious problems of fundamental fairness. In addition, the importance of representation by counsel is heightened where

[19] The 1986 amendments of the Paternity Act eliminated any possibility that a paternity defendant will be arrested. At the same time that it deleted the arrest provision of the Paternity Act, it added a new provision which states:

> The amendatory act which added this subsection shall not be construed to affect the rights of an indigent defendant in proceedings under this act as established by decisions of the courts of this state before the effective date of that amendatory act. [MCL 722.714(9); MSA 25.494(9).]

The only previously determined judicial protection for an indigent defendant in a paternity case was the right to counsel defined in *Artibee*.

the question is one regarding parental and custodial responsibilities. See *Reist v Bay Circuit Judge,* 396 Mich 326; 241 NW2d 55 (1976). It would be erroneous to conclude that the application of this particular and clearly demarcated right was intended to suggest that the full panoply of criminal procedural rights were to be afforded.

This has been recognized by the Court of Appeals which continues to approach paternity cases as essentially civil, and, in accordance with GCR 1963, 730.1, has applied the rules of civil procedure. Indeed, the Court has refused numerous opportunities to extend *Artibee* beyond its facts. In *People v Marshall,* 82 Mich App 92; 266 NW2d 678 (1978), it held that a showing of indigency for purposes of obtaining appointed counsel did not, in and of itself, entitle a defendant to blood testing and a jury trial at county expense. The Court stated that "[w]e cannot say that a paternity action is a 'criminal prosecution' for purposes of the constitutional jury trial guarantee." *Id.* at 96. In *Covington v Cox,* 82 Mich App 644; 267 NW2d 469 (1978), lv den 405 Mich 826 (1979), the Court of Appeals confirmed that view, holding that a defendant must demand a jury. Moreover, the *Covington* panel held that a paternity defendant who receives ineffective assistance of counsel may not seek reversal on that basis. His only remedy in such a case is a malpractice suit. The Court stated:

> There are pertinent distinctions between a criminal action and a paternity proceeding that obviate the necessity for vacating an order of filiation granted because of a serious mistake made by defense counsel. First . . . the consequences of such an order are not so severe as to mandate reversal in the interests of the integrity of the judicial system. Second, insofar as the consequences of a filiation and support order are mone-

> tary, an action for malpractice provides an adequate remedy for incompetent representation; whereas, such an action obviously would be ineffectual to compensate a wrongfully convicted criminal defendant. [*Id.* at 651.]

Shortly thereafter, another panel of the Court of Appeals held that *Artibee* did not overrule *Semon v People,* 42 Mich 141; 3 NW 304 (1879), which had held that the standard of proof in a paternity case is "preponderance of the evidence." *Huggins v Rahfeldt,* 83 Mich App 740; 269 NW2d 286 (1972).

In the most recent set of cases, the Court of Appeals has carefully adhered to the requirements of the court rules. In *Elmore v Ellis,* 115 Mich App 609; 321 NW2d 744 (1982), the Court of Appeals, finding no contradiction in GCR 1963, 710 or the act itself, applied the civil rule governing witness lists. In *Hoffman v Campbell,* 129 Mich App 114; 341 NW2d 246 (1983), the Court held that a voluntary dismissal of a paternity case did not bar a subsequent action, since GCR 1963, 504.1(2) so provided for civil cases and there was no contradictory provision in GCR 1963, 730 or in the Paternity Act. *Pridemore v Williams,* 90 Mich App 483; 282 NW2d 363 (1979), was the only case in which the Court of Appeals did not apply the relevant rule of civil procedure. However, in that case the panel held that GCR 1963, 309 and 313, which would have required the defendant to answer interrogatories, were contradicted by the Paternity Act provision which permits a paternity defendant to refuse to testify. Indeed, the Court based its conclusion that the act must control on the language of GCR 1963, 730 itself. In that sense, the court rules controlled in even this case.

While the judiciary has continued to stress the primarily civil nature of paternity actions, the

Legislature recently acted to eliminate virtually all remaining vestiges of criminal procedure. In 1986, an amendment was enacted which eliminated all provisions permitting arrest of a paternity defendant or requiring that he post bond prior to trial. Instead, the amendment requires that service be accomplished only by summons "served in the same manner as is provided by court rules for the service of process in civil actions." MCL 722.714(5); MSA 25.494(5). In the Senate Legislative Analysis of the amendments, it is stated:

> The bill goes a long way toward completing changes in the act that were begun in 1956. Though the act at that time was amended to decriminalize the determination of paternity, some of the criminal procedures were retained, leaving the law quasi-criminal. . . . The bill makes it finally clear that paternity is a civil issue. [Senate Bill Analysis, SB 225 (June 20, 1986).][20]

These amendments are consistent as well with the amendment adopted in 1982, which recognized the evolution of blood testing technology. The 1982 amendment provides that blood test results may be introduced, not only to exclude an alleged father from paternity, but also, if he is not excluded, to determine the likelihood that he is, in fact, the father. MCL 722.716(4); MSA 25.496(4). This amendment reflects the development of a technological ability to determine the probability

[20] The two cases now before us both arose prior to the passage of the 1986 amendments, and, therefore, we do not rely upon the amendments for the conclusions that we reach in these cases. However, as the Legislative Analysis of the amendments indicate, reference to the amendments is helpful in achieving a complete understanding of the development of the paternity cause of action. In addition, the defendants in these cases were served by civil process, and, therefore, they were not subjected to the arrest provisions repealed by the 1986 amendments.

of paternity with great precision through blood and tissue typing tests.[21]

In sum, while we recognize that paternity actions are a "special legislative creation," *Artibee* at 68 (COLEMAN, J., dissenting), we conclude that they are fundamentally civil in nature. The aspects of the action which led courts to define it as "quasi-criminal" have consistently been limited since the enactment of the Bastardy Act. Accordingly, procedure in paternity cases is controlled by MCR 3.212, which corresponds to GCR 1963, 730.

With this understanding of the nature of the paternity action, we can move to the cases at bar.

III

The first question presented in *Bowerman v MacDonald* is what, if any, level of proof, beyond the information contained in a verified complaint, is required prior to an issuance of an order for blood tests.

In reversing the order that defendant submit to a blood test, the Court of Appeals noted that in *Schmerber v California,* 384 US 757; 86 S Ct 1826; 16 L Ed 2d 908 (1966), a drunk driving case, the United States Supreme Court held that a blood test constitutes a search. It then stated:

> Thus, because a blood test is a search which should not be conducted unless justified under the circumstances, we hold that a trial court may not order a blood test until a plaintiff has presented proofs to support the allegations in the complaint. Once a showing of paternity has been presented, a

[21] The United States Supreme Court recently observed that "Congress [has] . . . recognized that increasingly sophisticated tests for genetic markers permit the exclusion of over 99% of those who might be accused of paternity . . . . H.R. Rep No. 98-527, p 38 (1983)." *Clark v Jeter,* 486 US 456, —; 108 S Ct 1910, 1916; 100 L Ed 2d 465 (1988). See also n 7.

> blood test is justified because of the great importance to society that parents care for their children.
>
> We wish to reiterate that we are not requiring a finding of probable cause. A paternity case is only quasi-criminal, *Artibee v Cheboygan Circuit Judge,* 397 Mich 54, 57; 243 NW2d 248 (1976), and a defendant is not afforded a full panoply of criminal procedural protections, *Smith v Robbins,* 91 Mich App 284, 292; 283 NW2d 725 (1979), *lv den* 408 Mich 853 (1980). For instance, the standard of proof in a paternity trial is not proof beyond a reasonable doubt, but rather the lesser burden of proof by a preponderance of the evidence. Therefore, because a paternity case is only quasi-criminal, we decline defendant's invitation to use probable cause or reasonable grounds as the test. However, something more than filing a complaint alleging paternity is needed when the answer filed denies paternity. While we are not suggesting extensive proofs, at least sworn testimony by the complainant should be considered. [157 Mich App 373-374.]

In essence, the Court of Appeals said that since the action is quasi-criminal, it requires a showing of "quasi-probable cause" or "quasi-reasonableness." It did not, beyond requiring sworn testimony from the plaintiff, attempt to define such a standard. In our view, the Court of Appeals opinion is flawed both in its view of the nature of paternity cases and in its conclusion that more than a sworn complaint is required to provide a sufficient basis for the testing. The paternity case is essentially a civil case controlled by MCR 3.212, and therefore there is no reason to define a "quasi-criminal" requirement of a "quasi-probable cause" hearing. Moreover, to the degree that a paternity action is, in fact, a "special legislative creation" with some vestiges of a criminal action, the requirement that the mother file a sworn complaint

indicating when and where she was impregnated, as well as naming the defendant as the father, is sufficient to provide reasonable grounds to order the tests, and it is therefore unnecessary to hold a hearing.[22]

Consistent with the Court of Appeals approach, defendant argues that the procedure defined by the statute barring driving while intoxicated, MCL 257.625 *et seq.;* MSA 9.2325 *et seq.,* should serve as a model for blood testing procedures in paternity cases. MCL 257.625a(5); MSA 9.2325(1)(5) requires that a police officer have "reasonable grounds" before administering a chemical test and that if the person charged refuses to take the test, it may not be given without court order.

We do not agree that this statute sets forth procedures appropriate to paternity cases. Initially we note that driving under the influence of intoxicating liquor, unlike fathering a child out of wedlock, is a punishable offense. Further, where a police officer stops a driver and seeks to administer a test, it may be that no reasonable grounds for the test exist. The person may have been driving normally. Therefore, once there has been a refusal, the statute requires a court order in order to administer the test. In the paternity setting, the order is *initially* given by a neutral judge, and he already has before him the sworn complaint of plaintiff. Nothing more is necessary to determine the "reasonableness" of the test. The mother has, as required by § 4 of the act, stated under oath or affirmation when and where she became pregnant and that she believes that the defendant is the

[22] Where the Michigan Department of Social Services acts as plaintiff, it files its complaints on the basis of information and belief. Therefore, it may be that, where the DSS files the complaint, a sworn statement from the mother indicating where, when, and by whom she became pregnant should be required prior to blood testing. However, that question is not now before us.

father. This, in and of itself, constitutes "probable cause" insofar as such a standard is relevant here.

In a similarly flawed argument, defendant posits that the Fourth Amendment limits the use of blood tests in paternity cases, even if they are considered civil cases, and that the amendment is violated unless a search warrant is obtained or an evidentiary hearing is held prior to issuance of an order. He argues that the blood test in a paternity case implicates the Fourth Amendment since it involves state action, which he finds in the fact that the blood test is ordered by a court pursuant to statute. In his words,

> the Plaintiff-Appellant is requesting the State, through the judicial branch of government, to coerce the Defendant into submitting to the blood test. . . . The Defendant contends that once the State, through its Court system, becomes involved in this process then the Defendant's Fourth Amendment rights . . . is [sic] triggered . . . .

The defendant has not cited, nor has our research revealed, any cases in which otherwise properly constituted discovery in a civil action has been held to constitute a violation of the Fourth Amendment.[23] Assuming, nevertheless, that the Fourth Amendment is implicated, the search involved in the blood testing is, as we just described, a reasonable one. The plaintiff has filed a sworn complaint indicating when and where she became impregnated and her belief that the defendant is the father of her child. The statute accordingly requires that the court, on a motion of either party or on its own motion, order the testing. Such

[23] Indeed, the United States Supreme Court found that the federal rule of civil procedure governing the ordering of blood tests was "free of constitutional difficulty . . . ." *Schlagenhauf v Holder,* 379 US 104, 114; 85 S Ct 234; 13 L Ed 2d 152 (1964).

a complaint clearly places the relationship of the child's and parties' blood and tissue types squarely in controversy and provides good cause for the motion. In addition, the decision to order the testing, i.e., engage in a search, was not made by a law enforcement officer or other nonjudicial officer of the state. It was made by a neutral judge, pursuant to a closely circumscribed statute which focuses upon a particular kind of evidence critical to all parties and perhaps, more importantly, to the child. The Legislature's decision to require the provision of this evidence was based on an obvious rationale, and the requirement was, in this case, triggered by a verified complaint reviewed by a judge. To require a separate probable cause or quasi-probable cause determination would be repetitious, and to require sworn testimony as to information not required to be provided for in the verified complaint would place a burden greater than a showing of probable cause on the plaintiff. In addition, requiring such a hearing would burden the courts without reason and make determinations of paternity, particularly in the case of out-of-state mothers, all the more difficult.

Lastly, the defendant argues that there is a statutory and case law prohibition against using civil discovery in paternity cases. He observes that *Pridemore v Williams, supra,* held that a paternity defendant cannot be required to answer written interrogatories, since he has a statutory right to refuse to testify. Defendant thus argues that *Pridemore* demonstrated that the Paternity Act bars all discovery from a paternity defendant. However, the Paternity Act itself states:

> In a proceeding under this act before trial, the court, upon application made by or on behalf of either party, or on its own motion, shall order that the mother, child, and alleged father submit to

> blood or tissue typing tests . . . . [MCL 722.716(1); MSA 25.496(1).][24]

In light of this explicit requirement of the Paternity Act, any reliance upon it to limit blood testing is mistaken.

Finding no basis to require more than a sworn complaint upon which to base a blood test order in paternity cases, we reverse the judgment of the Court of Appeals in *Bowerman* and reinstate the trial court order requiring defendant to submit to blood and tissue typing tests.

IV

The remaining question in *Bowerman* is whether defendant may be held in contempt for refusing to submit to a blood test. This question bears a close resemblance to the one raised in *Moon v Ballinger,* in which defendant argues that a court may not enter a default judgment in plaintiff's favor where a paternity defendant refuses blood testing. However, the language of the applicable statutory provisions mandates differing answers to these two questions.

The trial court in *Moon* entered the default judgment in plaintiff's favor pursuant to MCR 2.311 and 2.313. MCR 2.311 is captioned, "Physical and Mental Examination of Persons," and it reads in pertinent part:

> (A) Order for Examination. When the mental or physical condition (*including the blood group*) of a party . . . is in controversy, the court in which the action is pending may order the party to submit to a physical or mental or blood examination . . . . [Emphasis added.]

[24] The 1986 amendments of the act left this provision unchanged. However, the amendment reorganized the section, and the provision is now listed as MCL 722.716(1); MSA 25.496(1).

This provision is then referred to in MCR 2.313, which is captioned, "Failure to Provide or to Permit Discovery; Sanctions," and provides in subsection (B)(2):

> *Sanctions by Court in Which Action is Pending.* If a party . . . fails to obey an order to provide or permit discovery, including an order entered under subrule (A) of this rule or under MCR 2.311, the court in which the action is pending may order such sanctions as are just, including, but not limited to the following:
>
> * * *
>
> (c) an order striking pleadings or parts of pleadings, staying further proceedings until the order is obeyed, dismissing the action or proceeding or a part of it, *or rendering a judgment by default against the disobedient party.* [Emphasis added.]

The trial court in *Bowerman* held defendant in contempt for refusal to submit to the test pursuant to MCR 2.313(B)(2)(d) which provides that a refusal to submit to discovery provided for in MCR 2.311 may be sanctioned by

> an order treating as a contempt of court the failure to obey an order, except an order to submit to a physical or mental examination.[25]

Ballinger argues that the default sanction may not be used in a paternity case because § 6(a) of the Paternity Act states:

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[25] In this context, a "physical examination" does not include a blood test. This is apparent from the fact that until 1984 the court rule explicitly listed an order of a blood examination along with mental and physical examinations as an order which could not be enforced by a contempt citation. With the adoption of the Michigan Court Rules in 1985, the reference to blood examinations was deleted, thus allowing contempt to be used as a sanction where a party refuses to take a blood test.

> If the court orders any blood or tissue typing test to be taken and any party refuses to submit to the test, in addition to any other remedies available, the fact of the refusal *shall be disclosed at the trial* unless good cause is shown for not disclosing the fact of refusal. [MCL 722.716(a); MSA 25.496(a).][26]

Plaintiff Moon refers to the same statute, but instead emphasizes the phrase "in addition to any other remedies available," suggesting that while disclosure is mandatory where there is a trial, it does not require that the case actually reach the trial. In other words, plaintiff suggests that where the "other remedy" of default is appropriate, no trial is required.

In our view, the proper interpretation of this statute is made apparent in the contrast between the use of the contempt sanction and the use of the default sanction. Contempt can be applied *in addition* to the disclosure of the refusal at trial. Default, if applied, obviates the need for a trial and cannot therefore be said to be used *in addition* to the disclosure at trial. Unlike the use of the contempt sanction, if a default judgment is entered, the very remedy which the statute mandates cannot be applied. We therefore conclude that while a contempt order may be used to sanction a refusal to submit to a blood test, a default sanction may not.

This conclusion is further supported by reference to another section of the statute.[27] MCL 722.717(a); MSA 25.497(a) states:

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[26] See n 24.

[27] "[T]he entire act must be read, and the interpretation to be given to a particular word in one section arrived at after due consideration of every other section so as to produce, if possible, a harmonious and consistent enactment as a whole." [*Dussia v*

> If the finding of the court or verdict be against the defendant, or if the defendant acknowledges paternity orally to the court or by the filing in the case of his written acknowledgment of paternity, or if he is served with summons or a warrant *and a default is duly taken against him,* the court shall make an order of filiation declaring paternity and for the support and education of the child. [Emphasis added.]

In this section the Legislature listed those events after which an order of filiation may be issued, i.e., a finding or verdict against the defendant, acknowledgment of paternity by the defendant, and a default due to a failure to appear. See *Butler v Cann, supra.* In doing so, the Legislature's events expressed its intention[28] to limit the grounds for a judgment of filiation to only those events listed. Therefore, the Paternity Act conflicts with the Michigan Court Rules insofar as they provide for a default judgment and thus an order of filiation, for failure to submit to a blood test. Indeed, to allow a default judgment to enter would contradict the clear and specific language of the statute.

We therefore vacate the default judgment in *Moon v Ballinger* and remand to the circuit court for proceedings consistent with this opinion.

V

We conclude that a plaintiff mother's verified complaint is sufficient ground upon which to order

*Monroe Co Employees,* 386 Mich 244, 248; 197 NW2d 307 (1974) (quoting *Grand Rapids v Crocker,* 219 Mich 178, 182; 189 NW 221 (1922). *State Treasurer v Wilson,* 423 Mich 138; 377 NW2d 703 (1985).]

[28] The words of a statute, however, should not be construed in the void but must be read together to effectuate the intention of the legislature. [*Dussia, supra,* 248.]

blood and tissue tests. Paternity actions are in essence civil actions and procedure in such actions is controlled by the Michigan Court Rules, absent contradiction in the Paternity Act. We therefore also conclude that a defendant father's refusal to submit to such tests may be sanctioned by the use of the contempt power. However, while MCR 2.313(B)(2) provides that a trial court may enter a judgment by default against a party who disobeys a discovery order, in light of a conflicting provision in the Paternity Act, we hold that entry of a default judgment may not be used to sanction a defendant father for refusing to submit to testing.

RILEY, C.J., and LEVIN, CAVANAGH, BOYLE, ARCHER, and GRIFFIN, JJ., concurred with BRICKLEY, J.

EIDE v KELSEY-HAYES COMPANY

Docket No. 79392. Argued November 4, 1987 (Calendar No. 7). Decided July 13, 1988. Rehearing denied *post,* 1205.

Valerie A. Eide brought an action in the Wayne Circuit Court against her employer, the Kelsey-Hayes Company, alleging employment discrimination on the basis of sex. Her husband, Craig, brought a derivative claim for loss of consortium. The court, Paul S. Teranes, J., entered judgment on a jury verdict for Valerie Eide for compensatory and exemplary damages, and for Craig Eide for loss of consortium. The Court of Appeals, BRONSON, P.J., and GRIBBS and M. E. CLEMENTS, JJ., affirmed in an opinion per curiam (Docket No. 79637). The defendant appeals.

In an opinion by Justice BOYLE, joined by Justices BRICKLEY, CAVANAGH, and ARCHER, the Supreme Court *held:*

A derivative claim for loss of consortium is not precluded under the Civil Rights Act. However, exemplary damages may not be awarded under the act apart from actual damages.

1. A claim for loss of consortium is an independent derivative cause of action and not merely an item of damages. It is a legal remedy that existed prior to the adoption of the 1963 Constitution. Because the claim is derivative, a complaining spouse must allege a violation of the act to substantiate it. Nothing in the language of the Civil Rights Act suggests a legislative intent to preclude a cause of action for loss of consortium based upon violation of the act. Nor are such actions precluded under Const 1963, art 5, § 29. The fact that the Civil Rights Act confers no civil rights upon the spouse of a person alleging violation of the act is irrelevant to whether the cause of action exists. Properly perceived, the derivative claim for loss of consortium is not a claim under the Civil Rights Act, but one at common law. The complainant does not claim to be aggrieved by an alleged violation of the act, but by the injury to the complainant's spouse.

2. The Civil Rights Act was intended as an extensive expan-

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REFERENCES

Am Jur 2d, Civil Rights §§ 261, 262.

Am Jur 2d, Damages §§ 731 *et seq.*

See the Index to Annotations under Consortium; Damages; Derivative Action; Discrimination.

sion of preëxisting substantive provisions of civil rights legislation. The comprehensive nature of the act makes it qualitatively different from the predecessor statutes which were administrative schemes that focused on the employment relationship and the equitable remedies designed to address such problems. The act contains its own civil enforcement provision, allowing both legal and equitable remedies without qualification.

Affirmed in part, reversed in part, and remanded.

Justice GRIFFIN, joined by Chief Justice RILEY and Justice LEVIN, concurring in part and dissenting in part, stated that the Civil Rights Act does not provide the spouse of a person claiming employment discrimination a cause of action for loss of consortium; nor does the act provide for recovery of exemplary damages in addition to compensatory damages by a person subjected to employment discrimination.

1. The Civil Rights Act prohibits, inter alia, employment discrimination on the basis of sex. The opportunity to obtain employment without discrimination is a right conferred upon employees or applicants for employment. The conduct prohibited is that which directly affects a person with respect to employment, compensation, or a term, condition, or privilege of employment. The focus of the act is on persons who bring actions in their own right, i.e., victims of discrimination. The spouse of a person claiming employment discrimination who asserts loss of consortium is not a victim of discrimination within the meaning of the act. Absent a legislative intent to provide such a derivative cause of action, the spouse does not have a right of recovery.

2. There is no express provision in the Civil Rights Act for exemplary damages and no basis for inferring a legislative intent to provide such a remedy. In this case, the jury was erroneously instructed to award Mrs. Eide both actual and exemplary damages on the basis of mental distress.

154 Mich App 142; 397 NW2d 532 (1986) affirmed in part and reversed in part.

CIVIL RIGHTS — EMPLOYMENT DISCRIMINATION — DERIVATIVE CLAIMS — LOSS OF CONSORTIUM — EXEMPLARY DAMAGES.

A derivative claim for loss of consortium is not precluded under the Civil Rights Act; however, exemplary damages may not be awarded under the act apart from actual damages (MCL 37.2101 *et seq.*; MSA 3.548[101] *et seq.*).

*Susan Winshall & Associates, P.C.* (by *Susan Winshall* and *Francyne Stacey*), for the plaintiffs.

*Berry, Moorman, King, Cook & Hudson, P.C.* (by *Thomas M. Sullivan* and *Sheryl A. Laughren*), for the defendant.

Amici Curiae:

*Dickinson, Wright, Moon, Van Dusen & Freeman* (by *John Corbett O'Meara, Robert P. Young, Jr.,* and *Noel D. Massie*) for Greater Detroit Chamber of Commerce.

*Clark, Klein & Beaumont* (by *Dwight H. Vincent*); *(Christine M. Weinert* and *Francis S. Jaworski,* of counsel) for Michigan Manufacturers Association.

*Kelman, Loria, Downing, Schneider & Simpson* (by *Michael L. Pitt* and *Stuart N. Dowty*) for Michigan Trial Lawyers Association.

BOYLE, J. Two issues are presented in this review of the plaintiff's award of damages for violators of the Civil Rights Act, MCL 37.2101 *et seq.;* MSA 3.548(101) *et seq.* First, we must consider whether a derivative cause of action for loss of consortium is precluded by the Civil Rights Act. In our view, there is nothing in the statute which suggests a legislative purpose to preclude this derivative cause of action, and, indeed, to conclude otherwise would undermine the legislative purpose underlying the act. Thus, we believe, contrary to the partial dissent of Justice GRIFFIN, that a derivative claim for loss of consortium should be recognized under the Civil Rights Act.

Second, we must consider whether exemplary damages, apart from actual damages, may be awarded for violations of the Civil Rights Act. In this respect, we are in agreement with Justice GRIFFIN and conclude that exemplary damages

may not be awarded apart from actual damages. However, we would emphasize that, under long-standing Michigan law, the award of exemplary damages was duplicative of certain aspects of actual damages.

Michigan has long recognized a cause of action for loss of consortium in favor of spouses, *Montgomery v Stephan,* 359 Mich 33, 38; 101 NW2d 227 (1960). But see *Sizemore v Smock,* 430 Mich 283, 299; 422 NW2d 666 (1988) (concurring opinion of Justice GRIFFIN suggesting that *Berger v Weber,* 411 Mich 1; 303 NW2d 424 [1981], is no longer to be regarded as precedent). A claim for loss of consortium is simply one for loss of society and companionship. As Justice GRIFFIN explains, a claim for loss of consortium is usually considered to be derivative, but only in the sense that it does not arise at all unless the other, impaired spouse has sustained some legally cognizable harm or injury. Thus, courts have consistently treated loss of consortium not as an item of damages, but as a separate cause of action. *Montgomery, supra.* See also Prosser & Keeton, Torts (5th ed), § 125, pp 931-934. This fact is often obscured by the use of the term "derivative" and also by the common procedural requirement that the claim be joined with that of the impaired spouse. As one commentator has explained:

> So far as damages are based on intangible losses of society and affection, there is some risk that a jury hearing the husband's claim will consciously or not, include something in the verdict for the wife's loss as well, and vice versa. To minimize this risk, some courts have required that the main claim and the consortium claim be tried together, at least in the ordinary situation. [Prosser & Keeton, *supra,* p 933. See also *Rusinek v Schultz, Snyder & Steele Lumber Co,* 411 Mich 502, 508; 309 NW2d 163 (1981).]

In our view, the partial dissent of Justice GRIFFIN obscures the fact that loss of consortium is a separate cause of action and thus misstates the issue presented in this case. The question is not whether a cause of action is available under the Civil Rights Act, but whether there is anything in the act which would preclude this independent cause of action. We believe that this question must be answered in the negative.

In *Boscaglia v Michigan Bell Telephone Co,* 420 Mich 308; 362 NW2d 642 (1984), we considered a distinctly different question—whether Michigan's Fair Employment Practices Act, 1955 PA 251, authorized a claim for loss of consortium. In doing so, we principally relied upon the remedial language of the FEPA and its focus on equitable relief. *Boscaglia, supra* at 322. That language specified:

> If, upon the preponderance of the evidence on the record considered as a whole, the [fair employment practices] commission shall determine that the respondent has engaged in or is engaging in any unfair employment practice, the commission shall state its findings of fact and shall issue and cause to be served on such respondent an order requiring such respondent to cease and desist from such unfair employment practice and to take such further affirmative or other action as will effectuate the purposes of this act, including, but not limited to, hiring, reinstatement or upgrading of employees with or without back pay, or admission or restoration to union membership, including a requirement for reports of the manner of compliance. [1955 PA 251, § 7(h).]

In addition, the *Boscaglia* Court noted that title VII of the federal Civil Rights Act of 1964, 42 USC 2000e-5(g), was similarly limited to equitable remedies and had been construed to preclude a cause of

action for loss of consortium. *Boscaglia, supra* at 323.

The Civil Rights Act, 1976 PA 453, which supplanted the FEPA, is not limited to remedying discrimination in employment, but extends to public accommodations, services, and educational institutions. In language befitting this comprehensive scheme, art 8 of the Civil Rights Act includes its own civil action enforcement provision:

> A person alleging a violation of this act may bring a civil action for appropriate injunctive relief or damages, or both. [MCL 37.2801(1); MSA 3.548(801)(1).]

Nothing in the language of this provision suggests a legislative intent to preclude a cause of action for loss of consortium. Indeed, elsewhere in art 8 of the act it is emphasized:

> This act shall not be construed to diminish the right of a person to direct or immediate legal or equitable remedies in the courts of this state. [MCL 37.2803; MSA 3.548(803)(1).]

The interpretive provision of § 803 of the Civil Rights Act mirrors the interpretive provision of Const 1963, art 5, § 29:

> Nothing contained in this section shall be construed to diminish the right of any party to direct and immediate legal or equitable remedies in the courts of this state.[1]

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[1] Const 1963, art 5, § 29 provides in full:

> There is hereby established a civil rights commission which shall consist of eight persons, not more than four of whom shall be members of the same political party, who shall be appointed by the governor, by and with the advice and consent of the senate, for four-year terms not more than two of which shall

It is therefore apparent that the legislative purpose underlying the civil enforcement provision of the Civil Rights Act was intended to provide all rights embraced in Const 1963, art 5, § 29.[2] More-

expire in the same year. It shall be the duty of the commission in a manner which may be prescribed by law to investigate alleged discrimination against any person because of religion, race, color or national origin in the enjoyment of the civil rights guaranteed by law and by this constitution, and to secure the equal protection of such civil rights without such discrimination. The legislature shall provide an annual appropriation for the effective operation of the commission.

The commission shall have power, in accordance with the provisions of this constitution and of general laws governing administrative agencies, to promulgate rules and regulations for its own procedures, to hold hearings, administer oaths, through court authorization to require the attendance of witnesses and the submission of records, to take testimony, and to issue appropriate orders. The commission shall have other powers provided by law to carry out its purposes. Nothing contained in this section shall be construed to diminish the right of any party to direct and immediate legal or equitable remedies in the courts of this state.

Appeals from final orders of the commission, including cease and desist orders and refusals to issue complaints, shall be tried de novo before the circuit court having jurisdiction provided by law.

[2] Further indication that the interpretive language of Const 1963, art 5, § 29 was intended to preclude this article from restricting any known legal or equitable remedies can be gleaned from the debate on the Garvin Amendment which would have given the Civil Rights Commission exclusive jurisdiction during the processing of complaints before the commission. The Garvin Amendment ultimately failed, but in support of it, Delegate William Ford remarked:

> What is happening here, when we look at it in the first instance, is that we are creating an administrative body which we hope will have the general characteristics of an administrative body and that when the legislature defines its powers, the legislature is going to be directed to do certain things, but is not going to be restricted any more than necessary. It is possible to construe this language to be a restriction on the legislature never to ever give to this administrative body original jurisdiction over any matter involving civil rights in the first instance.
>
> *There isn't anyone, I am sure, including Mr. Garvin, who would advocate an administrative remedy to the exclusion of your rights in the court,* but the whole principle of administrative law is that you have a specialized tribunal that deals with

over, it is apparent that Const 1963, art 5, § 29 itself cannot be construed to limit the legal and equitable remedies of the Michigan citizen. A right of action for loss of consortium is not only an existing legal remedy, but one which was in existence long before the adoption of Const 1963. *Montgomery, supra.*

Nothing in the language of the statute itself warrants such a restrictive interpretation. The partial dissent has fixed upon the opening clause of § 801(1), which provides: "A person alleging a violation of this act . . . ." The partial dissent asserts that a spouse in an action for loss of consortium is not such a person. This is obviously incorrect. However, it is undisputed that loss of consortium is a *derivative* cause of action and the complaining spouse must allege a violation of the act to substantiate the claim. Thus, the clear language of the statute would support recognition of a cause of action for loss of consortium. *Hiltz v Phil's Quality Market,* 417 Mich 335, 343; 337 NW2d 237 (1983). Moreover, the fact that the act itself does not confer civil rights upon the spouse is entirely irrelevant to whether an independent cause of action exists for loss of consortium.[3] Properly perceived, Craig Eide's claim for loss of con-

> special subject matter and has people especially trained to deal with that subject matter, and because they are dealing only with a certain limited area, have day to day actual knowledge of the conditions that exist. [2 Official Record, Constitutional Convention 1961, p 2192.]

[3] Contrary to the assertion of the partial dissent, the Civil Rights Act does not confer civil rights only upon employees and applicants for employment. The act also creates a cause of action for discrimination in public accommodations, MCL 37.2301 *et seq.;* MSA 3.548(301) *et seq.,* education, MCL 37.2401 *et seq.;* MSA 3.548(401) *et seq.,* and in housing, MCL 37.2501 *et seq.;* MSA 3.548(501) *et seq.* Furthermore, it is misleading to suggest that civil rights of employees and job applicants are "created" by the Civil Rights Act since, in my view, these rights are created in the United States or Michigan Constitutions, and the act merely creates certain remedies for their violation.

sortium is not a claim under the Civil Rights Act, but a claim at common law. Prosser & Keeton, *supra.*

Assuming that any construction of § 801(1) of the act is necessary, it must first be compared with the correlative language of its statutory predecessor, the FEPA. The opening clause of the FEPA, § 7(b) was: "Any individual claiming to be aggrieved by an alleged unlawful employment practice . . . ." As we emphasized in *Boscaglia,* the complainant in a derivative cause of action, such as loss of consortium, does not claim to be aggrieved by an alleged unlawful employment practice, but by the subsequent injury to the impaired spouse. *Boscaglia, supra* at 322. In contrast, the opening clause of the civil enforcement provision of the Civil Rights Act is: "A person alleging a violation of this act . . . ." It is presumed that a change of language in a statute is intended to change the result of the statute. 2A Sands, Sutherland Statutory Construction (4th ed), § 45.12, pp 54-55. We would, therefore, construe this broadening of the statutory language to imply a broadening of the remedy to which it is addressed. Such a construction is also consistent with the well-established rule that remedial statutes are to be liberally construed to suppress the evil and advance the remedy. 3 Sands, Sutherland Statutory Construction (4th ed), § 60.01, p 55. Therefore, in our view, neither the clear language of the act nor conventional rules of statutory construction support the partial dissent's view that § 801(1) precludes a claim for loss of consortium.[4]

[4] Although the partial dissent quotes the House Legislative Analysis, Second Analysis, HB 4055, December 30, 1976 (as enrolled), it does so selectively. The full text of the analysis of the civil action provision explains:

We have addressed the intrinsic analysis of the partial dissent because we believe that it is ultimately flawed. However, we cannot embrace the partial dissent's implicit assumption that resolution of this question may be found in the letter of the statute. As this Court has previously explained:

> The Civil Rights Act did not merely codify preëxisting statutes and procedural remedies. It worked an extensive expansion of the preëxisting substantive provisions of civil rights legislation. [*Matras v Amoco Oil Co,* 424 Mich 675, 696-697; 385 NW2d 586 (1986).][5]

In our view, the comprehensive nature of the Civil Rights Act makes it qualitatively different from any predecessor statute, such as the FEPA, and far greater than the sum of these "parts." The FEPA remedies provision was modeled after the federal Fair Employment Practices Act, *Boscaglia, supra* at 323, which was in turn modeled after the Labor-Management Relations Act, 29 USC 160. *Albemarle Paper Co v Moody,* 422 US 405, 417-419; 95 S Ct 2362; 45 L Ed 2d 280 (1975). All are essentially administrative schemes that focus upon the *employment* relationship, and the equitable remedies provided therein were designed to address

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The bill would allow a person alleging a violation of this Act to bring a civil action in the circuit court for injunctive relief, damages, or both. *The Act could not be construed to diminish the right of a person to legal or equitable remedies in Michigan courts.* [Emphasis added.]

[5] We are not persuaded by the partial dissent's suggestion, contrary to *Matras,* that the Civil Rights Act merely codified existing rights. Read in its full context, Department of Labor Analysis, HB 4055, April 5, 1976, provides scant support for the general statement that the purpose of the bill was merely to codify remedies. In any case, the Department of Labor's unique vantage suggests a rather limited analysis of the act, consistent with the scope of that department's interests. See opinion of Justice GRIFFIN, *post,* p 46, n 10.

problems in that relationship. See 1955 PA 251, § 7(h). The Civil Rights Act is much broader in scope.[6] To focus upon any particular language of the statute, much less a flawed reading of that language, is to ignore the manifest breadth and comprehensive nature of this remedial statute.

This Court was acutely aware of the limitations of the FEPA when it fashioned a judicially created, private remedy for racial discrimination in employment. *Pompey v General Motors Corp,* 385 Mich 537; 189 NW2d 243 (1971). Our restraint in further extending this judicially created remedy under *Boscaglia* was heavily influenced, if not solely dependent upon, the limitations of the FEPA remedy.[7] No such limitation is presented under the Civil Rights Act. Indeed, the Court of Appeals and federal courts have consistently extended the remedies provided under the Civil Rights Act to damages for humiliation, embarrassment, and outrage. See, e.g., *Schafke v Chrysler Corp,* 147 Mich App 751, 754; 383 NW2d 141 (1985), lv den 424 Mich 892 (1986); *Slayton v Michigan Host, Inc,* 122 Mich App 411, 416-417; 332 NW2d 498 (1983); *Freeman v Kelvinator, Inc,* 469 F Supp 999, 1004 (ED Mich, 1979).

Finally, we believe that the partial dissent is flawed in its continuing reliance upon federal precedent under title VII of the Civil Rights Act of 1964, 42 USC 2000e-5(g). While we have previously noted the refusal of federal courts to recognize claims for loss of consortium under title VII, *Boscaglia, supra,* we have not based our interpretation

[6] See n 3.

[7] The New York decision cited in *Boscaglia, Hart v Sullivan,* 84 AD2d 865, 866; 445 NYS2d 40 (1981), aff'd 55 NY2d 1011; 449 NYS2d 481; 434 NE2d 717 (1982), was based upon New York statutes which, like the FEPA, have very limited remedy provisions. See NY, Civil Rights Law, § 40-c, 40-d (McKinney). See also NY, Executive Law, § 297(9) (McKinney).

of Michigan law upon them. Again, it must be emphasized that a claim for loss of consortium is an *independent* cause of action and not merely an item of damages. That claims for loss of consortium are not properly brought under title VII is apparent from the language of its remedies provision:

> If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. [42 USC 2000e-5(g).]

The title VII remedies provision does not merely omit loss of consortium, but actually limits the claimant to equitable relief.[8] In contrast, loss of consortium is a legal remedy and therefore unavailable under title VII. *Hooten v Pennsylvania College of Optometry,* 601 F Supp 1151, 1155, n 2 (ED Pa, 1984); *Pryor v United States Gypsum,* 585 F Supp 311, 317 (WD Mo, 1984). Furthermore, although title VII does not preclude an independent action under state law or other federal statutes, *Johnson v Railway Express Agency,* 421 US 454, 459; 95 S Ct 1716; 44 L Ed 2d 295 (1975), the extremely limited scope of federal common law following *Erie R Co v Tomkins,* 304 US 64, 78; 58 S Ct 817; 82 L Ed 1188 (1937), does not extend to

[8] As one federal court has explained, the back pay authorized under title VII is properly understood as restitution and not damages. *Torres v Claytor,* 25 FEP Cases 998, 1000 (SD Cal, 1978).

title VII. *Northwest Airlines, Inc v Transport Workers Union, AFL-CIO,* 451 US 77; 101 S Ct 1571; 67 L Ed 2d 750 (1981).[9] See, generally, 19 Wright, Miller & Cooper, Federal Practice and Procedure, § 4514 *et seq.,* pp 217 ff. Indeed, it is doubtful that even a pendent state claim for loss of consortium could be maintained in a title VII action because of stringent jurisdictional limitations over pendent parties. *Fritts v Niehouse,* 604 F Supp 823 (WD Mo, 1984).

Michigan law is not bound by these statutory and jurisdictional restraints. The Michigan Civil Rights Act now contains its own civil enforcement provision, allowing both legal and equitable remedies without qualification. Michigan common law is not limited by the *Erie* doctrine and has in fact long recognized the right of each spouse to an independent action for loss of consortium. *Boscaglia* simply provides no authority in this case. As explained by Justice SMITH in *Montgomery, supra* at 38, "Our oath is to do justice, not to perpetuate error." Finding no other principled basis either within or without the opinion of the partial dissent for this restriction of the civil rights of Michigan citizens, we conclude that Craig Eide has properly stated a claim for loss of consortium under Michigan law.

As we have previously noted, we agree with the conclusion of the partial dissent that the award of exemplary damage to Mrs. Eide was in error. The judgment of the circuit court is, therefore, affirmed in part and reversed in part. This matter is remanded to the circuit court for entry of judgment in accordance with this opinion.

[9] It is interesting to note that when federal common law *is* available, the United States Supreme Court has recognized a cause of action for loss of consortium. See *American Export Lines, Inc v Alvez,* 446 US 274; 100 S Ct 1673; 64 L Ed 2d 284 (1980) (recognizing a cause of action for loss of consortium under general federal maritime law).

BRICKLEY, CAVANAGH, and ARCHER, JJ., concurred with BOYLE, J.

GRIFFIN, J. (*concurring in part and dissenting in part*). We granted leave to appeal in this case to decide whether the Civil Rights Act[1] provides the spouse of a person subjected to discrimination with a remedy for loss of consortium, and to decide whether that act allows recovery of exemplary damages.[2] We would answer both questions in the negative.

I

Plaintiff Valerie Eide was employed as an inspector in the Milford, Michigan, plant of the defendant, Kelsey-Hayes Company, from January, 1972, until April 10, 1980, when she walked out of the plant. Thereafter, she and her husband, Craig Eide, filed this employment discrimination suit, alleging that she had been sexually harassed during the course of her employment in violation of the Civil Rights Act. The amended complaint alleged that Mrs. Eide suffered severe physical and mental injuries as well as economic losses as a result of sexual harassment.[3]

[1] 1976 PA 453, as amended by 1977 PA 162, 1979 PA 91, and 1982 PA 45, MCL 37.2101 *et seq.*; MSA 3.548(101) *et seq.*

[2] This Court's order granting leave to appeal specifically limited our review to the following issues:

> (1) whether the Civil Rights Act provides a remedy based on loss of consortium, and (2) whether the Civil Rights Act allows recovery of exemplary damages. [428 Mich 873 (1987).]

[3] The Civil Rights Act provides that an employer shall not:

> Fail or refuse to hire, or recruit, or discharge, or otherwise discriminate against an individual with respect to employment,

In the same complaint, Mr. Eide set forth a derivative claim alleging that

> [a]s a direct and proximate result of Defendant's unlawful employment practices causing the resulting injuries to Plaintiff, Valerie A. Eide, her husband, Plaintiff, Craig A. Eide, has suffered a loss of consortium since the beginning of the sexual harassment and discriminatory practices against his wife . . . .

At trial, over objection by defendant, the court instructed the jury regarding the availability to Mr. Eide of damages for loss of consortium.[4] The court also instructed the jury on the availability to Mrs. Eide of both (1) compensatory damages for "mental anguish, fright and shock, . . . embarrassment, humiliation or mortification . . . the increase in her physical and emotional distress . . ." and (2) exemplary damages for "added injury to her feelings" resulting from alleged egregious conduct on the part of the defendant.

The jury awarded Mrs. Eide $240,000 in compen-

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> compensation or a term, condition, or privilege of employment, because of . . . sex . . . . [MCL 37.2202(1)(a); MSA 3.548(202)(1)(a).]

The act further provides:

> Discrimination because of sex includes sexual harassment which means unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct or communication of a sexual nature when:
>
> * * *
>
> (iii) Such conduct or communication has the purpose or effect of substantially interfering with an individual's employment . . . or creating an intimidating, hostile, or offensive employment . . . environment. [MCL 37.2103(h); MSA 3.548(103)(h).]

[4] For a definition of "consortium," see *Montgomery v Stephan*, 359 Mich 33, 35-36; 101 NW2d 227 (1960).

satory damages and $32,000 in exemplary damages. Mr. Eide was awarded $28,000 for loss of consortium. Thereafter, the trial court's judgment on the verdict was affirmed by the Court of Appeals. 154 Mich App 142; 397 NW2d 532 (1986).

II

We first address the issue whether a cause of action for loss of consortium is available under the Civil Rights Act to the spouse of a person subjected to discrimination.

A similar question was before this Court in *Boscaglia v Michigan Bell Telephone Co,* 420 Mich 308; 362 NW2d 642 (1984). In that case, an employee complained of employment discrimination in violation of the Fair Employment Practices Act (FEPA),[5] and his wife joined in the action seeking damages for loss of consortium. This Court determined that although the FEPA made available, for the first time, a remedy to an employee claiming employment discrimination, "[t]he statute did not . . . provide a remedy to the employee's spouse for loss of consortium or injury to the marital relationship." *Id.,* p 322.

Undergirding the Court's reasoning in *Boscaglia* was recognition that

> "prior to the passing of [the FEPA] in 1955, there was in Michigan no recognized legal remedy for acts of discrimination . . . in private employment." *Pompey v General Motors Corp,* [385 Mich 537, 552; 189 NW2d 243 (1971)]. The common law did not provide a remedy either to an employee who claimed to be a victim of employment discrimination or to an employee's spouse who claimed to have suffered injury to the marital relationship as

[5] 1955 PA 251, MCL 423.301 *et seq.;* MSA 17.458(1) *et seq.*

a result of the discrimination against the employee. [*Boscaglia, supra,* p 321.][6]

This Court observed that

"the question whether a statute creates a private right of action is ultimately 'one of [legislative] intent, not one of whether this Court thinks that it can improve upon the statutory scheme that [the Legislature] enacted into law . . . .' " [*Universities Research Ass'n, Inc v Coutu,* 450 US 754, 770; 101 S Ct 1451; 67 L Ed 2d 662 (1981) (quoting *Touche Ross & Co v Redington,* 442 US 560, 578; 99 S Ct 2479; 61 L Ed 2d 82 [1979]). *Boscaglia, supra,* pp 317-318.]

After examining the language and history of the FEPA, the unanimous *Boscaglia* Court concluded that the FEPA did not provide a derivative cause of action for an employee's spouse.[7] The Court said:

[6] In *St John v General Motors Corp,* 308 Mich 333; 13 NW2d 840 (1944), this Court did allow recovery of damages in a civil action on the basis of a violation of a penal statute which prohibited discrimination as between the sexes in the payment of wages.

[7] Declining to expand the common law to create a parent's action in tort for loss of a child's society and companionship, this Court, in an opinion by Chief Justice RILEY, recently said:

> The consortium action is somewhat of an anomaly in the law of tort in that it is generally the rule that a negligent tortfeasor's liability only extends to an obligation to compensate the person directly injured. Although it is eminently foreseeable that a negligent injury to one party will result in adverse consequences that affect others to one degree or another, the law cannot redress every injury, and the determination of where to draw the line of liability is essentially a question of policy.
>
> * * *
>
> Foreseeability of injury alone does not mandate recognition of a cause of action. Social policy must intervene at some point to limit the extent of one's liability.
>
> * * *
>
> [T]he determination of whether this state should further extend a negligent tortfeasor's liability for consortium damages

> The question once again is one of legislative intent. Absent a legislative intent to provide such a derivative cause of action, the spouse of a person subjected to discrimination does not have a right of recovery. [*Id.*, p 324.]

This Court's holding in *Boscaglia* was limited to the provisions of the FEPA, and we expressly reserved judgment as to whether an employee's spouse might maintain an action for loss of consortium under the Civil Rights Act. *Id.*, p 324, n 23. Accordingly, we look now to the language and history of the Civil Rights Act to see how it differs from the FEPA.

Enacted by the Michigan Legislature in 1976, the Civil Rights Act prohibits discrimination on the basis of sex, race, national origin, religion, height, weight, or marital status in employment, housing, use of public accommodations, public service, and educational facilities. Broader in scope, it repealed and replaced the FEPA, which was limited in its application to discrimination in private employment.[8]

In reaching the conclusion that an employee's spouse could not maintain an action under the FEPA for loss of consortium, the *Boscaglia* Court focused on the remedies section of the FEPA which in relevant part provided:

> *Any individual claiming to be aggrieved* by an alleged unlawful employment practice may . . . make, sign and file with the board . . . a verified complaint in writing . . . . [MCL 423.307(b);

should be deferred to legislative action rather than being resolved by judicial fiat. [*Sizemore v Smock*, 430 Mich 283, 292-293, 299; 422 NW2d 666 (1988).]

[8] In 1965, the FEPA was amended to prohibit discrimination in employment on account of age, 1965 PA 344, and, in 1966, to prohibit discrimination on account of sex, 1966 PA 349.

MSA 17.458(7)(b). Emphasis supplied.]

This Court held that an employee's spouse was not a person "aggrieved" within the meaning of the statute. *Boscaglia, supra,* p 322.

Corresponding language in the remedies section of the Civil Rights Act provides:

> *A person alleging a violation of this act* may bring a civil action for appropriate injunctive relief or damages, or both. [MCL 37.2801(1); MSA 3.548(801)(1). Emphasis supplied.]

As this Court has said, "[s]tatutory analysis necessarily begins with the wording of the statute itself." *Carr v General Motors Corp,* 425 Mich 313, 317; 389 NW2d 686 (1986). The phrase "a violation of this act" plainly refers to a violation of an individual's civil rights as defined in the Civil Rights Act. Insofar as employment discrimination is concerned, the act makes clear that

> [t]he opportunity to obtain employment . . . without discrimination because of religion, race, color, national origin, age, *sex,* height, weight, or marital status as prohibited by this act, is recognized and *declared to be a civil right.*[9] [MCL 37.2102(1); MSA 3.548(102)(1). Emphasis supplied.]

As we read the act, this civil right is conferred upon two groups of individuals: (1) employees, and (2) applicants for employment:

> (1) An employer shall not:
> (a) Fail or refuse to hire, or recruit, or discharge,

[9] By definition the term "discrimination because of sex" includes sexual harassment. See n 3.

or otherwise discriminate against *an individual with respect to employment, compensation, or a term, condition, or privilege of employment,* because of religion, race, color, national origin, age, sex, height, weight, or marital status.

(b) Limit, segregate, or classify *an employee or applicant for employment* in a way which deprives or tends to deprive *employee or applicant* of an employment opportunity, or otherwise adversely affects the status of an *employee or applicant* because of religion, race, color, national origin, age, sex, height, weight, or marital status.

(c) Segregate, classify, or otherwise discriminate against *a person* on the basis of sex *with respect to a term, condition, or privilege of employment, including a benefit plan or system.* [MCL 37.2202; MSA 3.548(202). Emphasis supplied.]

Significantly, the only conduct addressed by this controlling portion of the act is conduct "with respect to employment, compensation, or a term, condition, or privilege of employment," which directly affects employees or applicants for employment. This Court has stated that "[w]here a statute creates and regulates, . . . and names the parties granted [the] right to invoke its provisions . . ., such parties only may act." *Taylor v Public Utilities Comm,* 217 Mich 400, 403; 186 NW 485 (1922).

Further, our review of the legislative history of the Civil Rights Act indicates that there were two principal purposes behind its enactment, neither of which lends support to plaintiffs' contention that the Legislature intended to create a new derivative cause of action for the spouse of an employee who complains of employment discrimination. First, the history makes plain that it was the Legislature's purpose to "*codify* protection against discrimination in the areas of employment,

housing, education and public accommodations."[10] (Emphasis supplied.) Prior to enactment of the Civil Rights Act, there were four separate statutes which dealt with civil rights protection in the several areas mentioned.

The codification purpose was served by a change in the wording of the remedies section from the phrase "[a]ny individual claiming to be aggrieved *by an alleged unlawful employment practice*" (emphasis supplied) in the FEPA to "[a] person alleging a violation of this act" in the Civil Rights Act. Thus, the remedies section of the act was not limited to employment discrimination actions. We do not read this change as creating a new cause of action for Mr. Eide. The act requires that the person filing a complaint must be the "person alleging a violation of this act." MCL 37.2801(1); MSA 3.548(801)(1). There is no indication in the act that a person alleging a violation of the act

[10] Department of Labor Analysis, HB 4055, April 5, 1976:

> 1. What is the purpose of the bill?
>
> The *purpose of the bill is to codify* protection against discrimination in the areas of employment, housing, education and public accommodations.
>
> * * *
>
> 6. What are the arguments for and against the bill?
>
> *The bill would pull together the separate public acts* that the Department of Civil Rights is currently operating under into one comprehensive act *for administrative and management purposes.*
>
> The bill would clarify and coördinate remedies for proven violations.
>
> The bill would provide consistent jurisdictional coverages. Currently different categories have either partial or total protection within the four areas of employment, housing, education and public accommodations. The proposed legislation would provide for uniform jurisdiction for all categories. [Emphasis supplied.]

See also Department of Education Analysis, HB 4055, February 18, 1975, and Department of Labor Analysis, HB 4055, January 21, 1976.

might be anyone other than a person whose rights have been violated.

Mr. Eide does not claim that he is the victim of discrimination. His civil rights were not violated, and, since he makes no such claim, we conclude that he is not "a person alleging a violation" within the meaning of the Civil Rights Act.

A second purpose behind the Civil Rights Act, as revealed by its legislative history, was to provide by statute for an alternate, equal forum in the circuit courts for individuals otherwise entitled to file a complaint with the Civil Rights Commission.[11] Contrary to the position urged by plaintiffs, the legislative history reflects no intention on the part of the Legislature to expand the class of protected persons. An analysis provided by the House Legislative Analysis Section explained the purpose of the "direct access" provision:

> The bill would also outline more specifically the legal action a person could take *if that person feels that he or she has been unfairly discriminated against,* and would provide stricter penalties for violation of the Act. [House Legislative Analysis, First Analysis, HB 4055, April 9, 1976, p 1; House Legislative Analysis, Second Analysis, HB 4055 (as enrolled), December 30, 1976, p 1. Emphasis added.]

Obviously, the focus of the act plainly rests on persons who bring discrimination actions in their own right.

It is argued on behalf of plaintiffs that a statutory basis is not required to bring a derivative action for loss of consortium because this claim

[11] The provision of direct access to the courts for a civil rights violation could also be viewed as codification since this Court had already recognized the right of direct access as a cumulative judicial remedy for an employer's violation of the FEPA. See *Pompey v General Motors,* 385 Mich 537; 189 NW2d 243 (1971).

existed at common law and continues to be available unless abrogated by the constitution or statute.

However, plaintiffs rely on cases where the action for loss of consortium was derivative to recognized common-law claims. As discussed in *Pompey v General Motors Corp, supra,* 385 Mich 552, prior to the enactment of the FEPA, employment discrimination was not a recognized common-law tort in Michigan.[12] The common law did not provide a remedy either to an employee who claimed to be a victim of discrimination or to an employee's spouse for loss of consortium as a result of the discrimination. *Boscaglia v Michigan Bell, supra,* 420 Mich 321.

We therefore find inapposite plaintiffs' citation of *Rusinek v Schultz, Snyder & Steele Lumber Co,* 411 Mich 502, 507; 309 NW2d 163 (1981), for the proposition that "statutes which abolish the common law should be construed narrowly." *Rusinek* involved the recovery of damages for personal injuries and loss of consortium as a result of an automobile accident. Such actions were recognized under Michigan tort law prior to the enactment of the no-fault statute. Cf. *Cotton v Minter,* 469 F Supp 199 (ED Mich, 1979); *Warner v Brigham,* 90 Mich App 640; 282 NW2d 428 (1979) (involving claims under the no-fault statute). Here, by recognizing only those actions allowed under the Civil Rights Act, this Court would not abolish any loss of consortium claim as it existed at common law.[13]

[12] There were early civil rights penal statutes which were interpreted to allow a cumulative civil rights action for an individual who suffered discrimination. See *Pompey, supra,* 385 Mich 556.

[13] The Kansas Court of Appeals has taken the same approach we do here: In *Albertson v Travis,* 2 Kan App 2d 153; 576 P2d 1090 (1978), the court held that since there was no common-law claim for loss of

While it is true that a derivative[14] claim for loss of consortium has been recognized in connection with various other common-law causes of action, *Montgomery v Stephan,* 359 Mich 33, 49; 101 NW2d 227 (1960), we do not regard that to be a basis for judicial expansion of the terms of the Civil Rights Act, which is wholly a creature of the Legislature. Such expansion would ignore the reasoning of *Boscaglia* and its holding that

> [a]bsent a legislative intent to provide such a derivative cause of action, the spouse of a person subjected to discrimination does not have a right of recovery. [*Boscaglia, supra,* p 324.]

Having declined in *Boscaglia* to go beyond the terms of the FEPA, we would take the same approach with respect to the Civil Rights Act.[15]

Accordingly, we conclude that the Civil Rights

consortium and one was not created by the applicable state statute, the consortium action could not be recognized.

For other court decisions which have not allowed derivative loss of consortium claims in discrimination actions, see: *Hart v Sullivan,* 84 AD2d 865; 445 NYS2d 40 (1981), aff'd 55 NY2d 1011; 449 NYS2d 481; 434 NE2d 717 (1982); *Long v American Int'l Adjustment Co,* 40 EPD ¶ 36,289 (D Mass, 1986).

[14] Although Michigan has treated loss of consortium claims as derivative, *Rusinek, supra,* other jurisdictions have taken the view that loss of consortium is an independent right belonging solely to the injured spouse. See Dickson, *Loss of consortium: An independent or derivative cause of action?,* 22 Trial 53 (Aug, 1986). 2 Speiser, Krause & Gans, The American Law of Torts, Damages, § 8:22, pp 581-582, discusses the view that the claim is derivative:

> A claim of a deprived spouse for loss of consortium is usually considered to be derivative—but only in the sense that it does not arise at all unless the other—the impaired spouse—has sustained some kind of harm or injury that is legally compensable and is a valid main claim.

[15] In interpreting title VII of the federal Civil Rights Act, 42 USC 2000e-5(g), many federal courts have held that an employee's spouse is not entitled to recover for loss of consortium. As the federal district court said in *United States v Biloxi Municipal School Dist,* 219 F Supp 691, 694 (SD Miss, 1963), aff'd 326 F2d 237 (CA 5, 1964), "[o]nly

Act does not provide a remedy on the basis of loss of consortium for the spouse of an individual who claims to be the subject of discrimination.[16]

III

Next, we turn to the question whether exemplary damages were properly awarded to Mrs. Eide. As already noted, in addition to $240,000 in compensatory damages, the jury's verdict included an award to Mrs. Eide of $32,000 in exemplary damages.[17]

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persons actually deprived of their individual civil rights can redress such rights." See also *Torres v Claytor,* 25 FEP Cases 998 (SD Cal, 1978); *Asklar v Honeywell, Inc,* 95 FRD 419; 29 FEP Cases 1596 (D Conn, 1982). We recognize, however, that the title VII remedy has been construed by a number of courts as equitable in nature only.

[16] In view of our holding, it is unnecessary to address the claim of amicus curiae that Mr. Eide lacks standing to sue under the act.

[17] The trial court instructed the jury regarding actual or compensatory damages, including damages for "mental anguish," as follows:

> If you decide that the plaintiff, Valerie Eide is entitled to damages . . . .
>
> include each of the following elements of damages which you decide has been sustained by the plaintiff to the present time. Physical pain and suffering, *mental anguish, fright and shock,* denial of social pleasure and enjoyment, *embarrassment, humiliation or mortification . . . the increase in her physical and emotional distress* . . . . You should also include each of the following elements of damages which you decide plaintiff Valerie Eide is reasonably certain to sustain in the future:
>
> Physical pain and suffering, *mental anguish,* denial of social pleasure and enjoyment, *embarrassment, humiliation or mortification, the increase in her physical and emotional distress* . . . . [Emphasis supplied.]

Concerning exemplary damages, the court instructed the jury:

> If you find that the conduct of the defendant Kelsey-Hayes Company was malicious and reckless [sic] disregard of Mrs. Eide's rights, then you may award exemplary damages. *Such damages represent the amount by which you may increase or augment any award of compensatory damages to Mrs. Eide.* Amount of such damages if you find them, may be determined

In the early Michigan decisions, there was authority for assessing exemplary or punitive damages in a civil proceeding for the purpose of punishing a defendant for egregious conduct. However, in 1884 Justice COOLEY wrote two opinions which sharply altered the course of Michigan jurisprudence in this area.[18] Since then, Michigan has been among a minority of jurisdictions which adhere to the rule that exemplary damages may not be awarded to punish. They are available, if at all, only as an element of compensatory damages.

In *Stilson v Gibbs,* 53 Mich 280, 284; 18 NW 815 (1884), Justice COOLEY wrote:

> [I]t is manifestly proper that the jury should estimate the damages with the aggravating circumstances in mind, and that they should endeavor fairly to compensate the plaintiff for the wrong he has suffered. But in all cases it is to be distinctly borne in mind that *compensation to the plaintiff is the purpose in view,* and any instruction which is calculated to lead them to suppose that besides compensating the plaintiff they may punish the defendant is erroneous. [Emphasis supplied.]

The continuing viability of this principle was recognized in *Kewin v Massachusetts Mutual Ins Co,* 409 Mich 401, 419; 295 NW2d 50 (1980):

> In Michigan, exemplary damages are recoverable as *compensation* to the plaintiff, *not as punishment* of the defendant. [Citations omitted.] Our

in accordance with the degree of wantonness or recklessness in the defendant's misconduct or in accordance with the defendant's motivation and/or to compensate the plaintiff for the *added injury to her feelings* as a result from egregious conduct of the defendant. [Emphasis supplied.]

[18] *Stilson v Gibbs,* 53 Mich 280; 18 NW 815 (1884), and *Watson v Watson,* 53 Mich 168; 18 NW 605 (1884).

> review of the precedent indicates that those cases which permit recovery of exemplary damages as an element of damages involve tortious conduct on the part of the defendant. [Citations omitted.] An award of exemplary damages is considered proper if it compensates a plaintiff for the "humiliation, sense of outrage, and indignity" resulting from injuries "maliciously, wilfully and wantonly" inflicted by the defendant. *McFadden* [*v Tate,* 350 Mich 84, 89; 85 NW2d 181 (1957)]. The theory of these cases is that the reprehensibility of the defendant's conduct both intensifies the injury and justifies the award of exemplary damages as compensation for the harm done the plaintiff's feelings. [Emphasis supplied.][19]

However, in 1982, this Court ruled that exemplary damages for mental distress are not separately recoverable as "exemplary" damages where a plaintiff is fully compensated for mental distress through the award of actual or "compensatory" damages. In *Veselenak v Smith,* 414 Mich 567, 573-574; 327 NW2d 261 (1982), this Court concluded that an earlier justification for separately awarding exemplary damages for mental distress no longer exists:

> A close reading of the early exemplary damages cases also suggests that these unusual damages may have been used to supply a remedy for mental injury not otherwise recognized. Actual damages compensated for economic loss, but not for non-economic loss. In addition, the award of actual damages seemed to preclude the award of additional compensation for non-economic loss. *Warren*

[19] The rule in Michigan that exemplary damages must be an element of compensation, not punishment, has been criticized. See, e.g., Shecter, *Exemplary damages—A new exemplar,* 60 Mich B J 654 (1981), 2 Speiser, Krause & Gans, The American Law of Torts, § 8:45, p 801, and Wade, The Michigan Law of Damages, p 27-1.

*v Cole,* 15 Mich 265 (1867); *Hyatt v Adams,* 16 Mich 180 (1867). Assuming actual damages were not provable but mental injury certain, exemplary damages became available to compensate the injured party. *Fay v Swan,* 44 Mich 544; 7 NW 215 (1880).

As proof of actual damages is no longer a bar to the award of exemplary damages, so too *actual damages, where properly pled, now include compensation for shame, mortification, mental pain and anxiety, Beath v Rapid R Co,* 119 Mich 512; 78 NW 537 (1899), and for annoyance, discomfiture, and humiliation, *Grenawalt v Nyhuis,* 335 Mich 76; 55 NW2d 736 (1952). In short, *actual damages now include compensation for mental distress and anguish.* [Emphasis supplied.]

In *Veselenak, supra,* p 576, we also said:

Amicus curiae . . . contends that ordinary damages and exemplary damages are not redundant. It maintains that a distinction may be drawn between "mental distress intrinsic to the injury itself (no matter how it occurred) and mental distress emanating from the manner in which the injury occurred." In addition, it claims that ordinary damages for shame and mortification and exemplary damages for humiliation and indignity are compensating "distinct wrongs."

These distinctions are, at least, legally unsound. Semantic niceties aside, juries are not asked to differentiate between mental states, such as shame, mortification, humiliation and indignity. Juries are asked to compensate mental distress and anguish, which flows naturally from the alleged misconduct and may be described in such terms as shame, mortification, humiliation and indignity. In addition, *if the plaintiff is being compensated for all mental distress and anguish, it matters not whether the source of the mental distress and anguish is the injury itself or the way*

*in which the injury occurred.* [Emphasis supplied.][20]

Following *Veselenak,* this Court has further stated:

> When compensatory damages can make the injured party whole, this Court has denied exemplary damages. [*Hayes-Albion Corp v Kuberski,* 421 Mich 170, 187; 364 NW2d 609 (1984).]

Notwithstanding the reasoning in *Veselenak,* we have recognized a distinction where the cause of action is statutorily based and where the statute expressly provides for exemplary damages. In *Peisner v Detroit Free Press,* 421 Mich 125, 135, n 10; 364 NW2d 600 (1984), a libel case, this Court said:

> *In the absence of a legislative prescription for exemplary damages,* we held in *Veselenak* that compensatory-type exemplary damages are merely a component of actual damages attributable to defendant's conduct and hence should not be separately awarded.
>
> *In the libel context, by contrast, the Legislature has provided separately for actual damages for injury to feelings and "exemplary and punitive" damages.* In keeping with the reasoning applied in *Veselenak,* we define exemplary and punitive damages in this context to be a component of compensatory damages awardable only where defendant's conduct amounts to common-law malice. [Emphasis supplied.]

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20 Plaintiffs contend that *Veselenak* is inapplicable because it was limited to the negligence or malpractice context. On the contrary, the Court in *Veselenak* expressly stated it did not reach the issue stated in the grant of leave to appeal, which was "whether exemplary damages should be recoverable in a malpractice or negligence action." *Id.,* p 571. The Court noted that there was no dispute that exemplary damages, if available, would have to be based on intentional, malicious acts, rather than negligence. *Id.,* p 575.

Unlike § 2911(2) of the libel statute, MCL 600.2911(2); MSA 27A.2911(2), the Civil Rights Act includes no express "legislative prescription" for exemplary damages. The remedies section of the Civil Rights Act in relevant part provides:

> A person alleging a violation of this act may bring a civil action for appropriate injunctive relief or damages, or both.
>
> * * *
>
> As used in subsection (1), "damages" means damages for injury or loss caused by each violation of this act, including reasonable attorney's fees. [MCL 37.2801; MSA 3.548(801).]

Clearly, there is no express provision in the Civil Rights Act for exemplary damages. Further, our review of its legislative history reveals no basis for inferring a legislative intent to provide such an unusual remedy.

It is noteworthy that the Legislature in fashioning other statutes has not hesitated, where it intended such a result, to include words expressly providing for exemplary damages. For example, exemplary damages are expressly made available in the following statutes: MCL 295.127; MSA 12.1377 (Weather Modification Control Act); MCL 408.488; MSA 17.277(18) (wage violation); MCL 600.2911; MSA 27A.2911 (libel or slander); MCL 750.539h; MSA 28.807(8) (eavesdropping, allowing for punitive damages).[21]

A comparison of the language used in the Civil Rights Act with the language employed in the remedies section for the Weather Modification

[21] See 2A Sands, Sutherland Statutory Construction (4th ed), ch 53, pp 549-560, on the use of statutes on other subjects for interpretation. Cf. *Citizens for Pretrial Justice v Goldfarb*, 415 Mich 255; 327 NW2d 910 (1982).

Control Act, MCL 295.127; MSA 12.1377, is revealing. The latter statute provides in pertinent part:

> (1) A person alleging a violation of this act or a rule promulgated pursuant to this act, may bring a civil action for appropriate injunctive relief or damages, *and may bring an action for exemplary damages of not more than $500.00.*
>
> * * *
>
> (3) As used in subsection (1), "damages" means damages for injury or loss caused by each violation of this act, including reasonable attorney's fees. [Emphasis supplied.]

The specific provision for exemplary damages in the language of the Weather Modification Control Act stands in sharp contrast with § 801 of the Civil Rights Act, particularly in light of the fact that the definition of "damages" is identical in both statutes. Obviously if the Legislature had determined that exemplary damages should be available in civil rights actions, it could easily have found the words to say so.[22]

Having found no basis in the statute for a separate award of exemplary damages,[23] we would follow this Court's decision in *Veselenak, supra,* and would hold that the jury was erroneously instructed in the instant case to award Mrs. Eide

[22] We note that the Handicappers' Civil Rights Act, MCL 37.1101; MSA 3.550(101), has been held to permit recovery of exemplary damages. *Wardlow v Great Lakes Express Co,* 128 Mich App 54, 70; 339 NW2d 670 (1983). The holding in *Wardlow,* however, was based on cases which held that the Civil Rights Act provides for exemplary damages. *Ledsinger v Burmeister,* 114 Mich App 12; 318 NW2d 558 (1982); *Moll v Parkside Livonia Credit Union,* 525 F Supp 786 (ED Mich, 1981); *Freeman v Kelvinator, Inc,* 469 F Supp 999 (ED Mich, 1979). Our holding in the instant case therefore disapproves of the reasoning in the cases relied on in *Wardlow.* Although this Court denied leave to appeal in *Wardlow,* 419 Mich 871 (1984), such a denial is "not to be regarded as precedent." See MCR 7.321(4).

[23] Cf. *Freeman v Kelvinator, Inc,* n 22 *supra,* 1004.

damages on the basis of mental distress as *both* actual and exemplary damages.

We are not unmindful that good reasons can be summoned to justify recovery of exemplary damages by victims of sexual discrimination or harassment. Judge Feikens made a valid point in *Freeman v Kelvinator, Inc,* 469 F Supp 999, 1004 (ED Mich, 1979), when he wrote that "[a]s anyone who has been the victim of discrimination can attest, the wounds run deeper than the pocketbook." Nevertheless, we are mindful also that the Legislature may have good reasons for omitting from the statute any specific reference to exemplary damages. In the final analysis, whether exemplary damages should be allowed is essentially a policy question, and particularly where, as in this case, the underlying cause of action is a legislative product, we deem it appropriate to leave such a policy determination to the Legislature. See *Davidson v Secretary of State,* 351 Mich 4, 8; 87 NW2d 131 (1957); *French v Ingham Co,* 342 Mich 690, 700; 71 NW2d 244 (1955).

IV

The decision of the Court of Appeals should be reversed with respect to the award to Mr. Eide of damages for loss of consortium and with respect to the award to Mrs. Eide of exemplary damages.

RILEY, C.J., and LEVIN, J., concurred with GRIFFIN, J.

PEOPLE v DYE

Docket No. 77166. Argued April 8, 1987 (Calendar No. 11). Decided August 2, 1988. Certiorari denied by the Supreme Court of the United States on December 5, 1988, 488 US —.

Paul A. Dye was convicted on retrial by a jury in the Detroit Recorder's Court, Michael F. Sapala, J., of two counts of first-degree murder and two counts of possession of a firearm during the commission of a felony after a mistrial had been declared in his first trial. During the first trial, evidence that the defendant had committed the killings was provided by the testimony of three fellow members of a motorcycle club. During the second trial the witnesses were declared unavailable, and the court permitted their testimony at the first trial to be read to the jury after finding due diligence on the part of the prosecution to locate and produce the witnesses. The Court of Appeals, BRONSON, P.J., and J. H. GILLIS and ALLEN, JJ., affirmed in an unpublished opinion per curiam (Docket No. 74931). The defendant appeals.

In opinions by Justice LEVIN, joined by Justices CAVANAGH and ARCHER, and by Justice BRICKLEY, the Supreme Court *held:*

The prosecutor did not exercise due diligence in attempting to produce the three witnesses at the defendant's retrial, requiring reversal and remand for a new trial.

And in opinions by Justice BOYLE, joined by Chief Justice RILEY and Justice GRIFFIN, and by Justice BRICKLEY, the Supreme Court further *held:*

The evidentiary errors alleged by the defendant did not result in a miscarriage of justice.

Justice LEVIN, joined by Justice CAVANAGH, stated that the prosecution did not exercise due diligence in attempting to produce the three witnesses at the defendant's retrial, requiring reversal and remand for a new trial. In addition, because it would not have been natural for the defendant to have made an incriminating statement to the police prior to his arrest, or to have accused anyone else of the killings in the presence of the police or a fellow club member, questions regarding the defendant's statements or silence should not be asked on retrial during the prosecution's case in chief.

1. In all criminal proceedings, an accused has the right to

confront witnesses. The confrontation is important because it enables the trier of fact to judge the witnesses' demeanors. However, where a witness is not present at trial, the witness' testimony bears satisfactory indicia of reliability, and the prosecutor establishes that a diligent, good-faith effort to obtain the witness' presence at trial was made, a transcript of prior testimony may be offered in evidence. In this case, the record indicates that the prosecutor failed to make a diligent, good-faith effort to produce the witnesses in question at the defendant's retrial, and that any attempts at cure were tardy and incomplete.

2. Questioning by the prosecution in its case in chief of the three witnesses who, with the defendant, cleaned up the clubhouse after the killings and disposed of the victims' bodies, regarding whether he had made a statement to the police was improper. Because the defendant claimed he was an accomplice after the fact, any statement would have incriminated him, and it would not have been natural for the defendant to have made such a statement. However, the questioning of the three witnesses with regard to whether the defendant had accused anyone else of the killings was not improper, but was merely a restatement in different form of the witnesses' properly admitted testimony regarding the defendant's alleged confession. By contrast, questions by the prosecution of a witness not involved in the cleanup or disposal regarding whether the defendant had accused anyone else of the killings were improper because such an accusation would have incriminated the defendant. On remand, the questions should not be permitted.

Justice ARCHER, concurring, stated that the prosecution failed to exercise due diligence in attempting to produce the principal res gestae witnesses, and the trial court abused its discretion in finding due diligence and in allowing use of the witnesses' testimony from the previous trial, requiring reversal and remand for a new trial.

Use of prior recorded testimony in place of live testimony of endorsed res gestae witnesses is subject to the defendant's fundamental right to confront witnesses under the Michigan and United States Constitutions. Before such testimony is admitted, the prosecution must show due diligence under the circumstances in its effort to produce the witnesses.

In this case, the defendant's right to a fair trial was greatly hampered, violating his right of due process. The first mistrial resulted from the jury's inability to give credence to the testimony of the witnesses. The inability of the jury at the second trial to view the demeanor of the res gestae witnesses greatly

reduced the validity and reliability of its evaluation of the witnesses' credibility. The efforts of the police and the prosecutor to locate the witnesses fell short of due diligence, and the prosecutor's delay in informing defense counsel of the absence of the witnesses resulted in unfair surprise.

Justice BRICKLEY concurred with Justice LEVIN on the issue of due diligence and the result required by its resolution, and with Justice BOYLE on the allegations of evidentiary errors.

Justice BOYLE, joined by Chief Justice RILEY and Justice GRIFFIN, stated that on the basis of the facts of the case, the trial court did not abuse its discretion in finding due diligence on the part of the prosecution in attempting to locate the missing witnesses. The evidentiary errors alleged by the defendant did not result in a miscarriage of justice.

1. Testimony taken at an examination, a preliminary hearing, or a former trial of a case, or taken by deposition at the insistence of a defendant, may be used by the prosecution whenever the witness giving such testimony cannot be produced at the trial or has become insane or otherwise mentally incapacitated. Before the testimony may be admitted, the prosecutor must exercise due diligence in attempting to produce the witness. The determination of due diligence is a matter for the trial court, and the determination will not be overturned on appeal unless a clear abuse of discretion is shown. The test is whether the proponent of the evidence made good-faith efforts to procure the testimony, not whether more stringent efforts would have produced it. On the facts of this case, it cannot be said that the trial court abused its discretion.

2. Whether prearrest silence is to be admitted for purposes of impeachment is an evidentiary question to be resolved by reference to its relevancy and in light of its probativeness as opposed to its potential for prejudice. In this case, questioning regarding the defendant's postarrest silence was initiated by defense counsel on direct examination of the defendant, permitting questioning by the prosecutor during cross-examination regarding postarrest conduct inconsistent with the defendant's postarrest statement. The impeaching inquiry did not concern the defendant's silence, but his postarrest statement. The prosecutor did not allude to the defendant's postarrest conduct in his case in chief, but rather to the defendant's prearrest conduct. The inquiries of witnesses regarding whether the defendant had said anything inconsistent with his admission of guilt cannot be considered to be comment on prearrest silence or irrelevant. Assuming, arguendo, that questions regarding the defendant's failure to deny guilt, put to witnesses to whom the

defendant did not admit guilt, were error, the defendant offered no timely objection, and, on the basis of the record, it cannot be concluded that admission of the testimony would result in a miscarriage of justice.

Reversed and remanded.

*Frank J. Kelley,* Attorney General, *Louis J. Caruso,* Solicitor General, *John D. O'Hair,* Prosecuting Attorney, *Timothy A. Baughman,* Chief, Criminal Division, Research, Training and Appeals, and *Andrea L. Solak,* Principal Attorney, Appeals, for the people.

State Appellate Defender (by *Mardi Crawford*) for the defendant.

LEVIN, J. Paul Dye was convicted on retrial of two counts of first-degree murder[1] and two counts of possession of a firearm during commission of a felony.[2] Dye's first trial was declared a mistrial, with the jury voting eleven to one to acquit him on the first-degree murder charges.[3] At the first trial the testimony of three witnesses—fellow members of a motorcycle club—provided the only evidence that Dye was the killer. At Dye's retrial the prosecution did not produce these three witnesses. The trial court allowed assistant prosecutors to read the witnesses' earlier testimony to the jury.

This appeal presents two questions. The first is whether the prosecution showed due diligence in attempting to produce the three witnesses for the second trial. The three witnesses were in protective custody immediately preceding and until they completed their testimony at the first trial, and were then released. Subsequent efforts to locate

[1] MCL 750.316; MSA 28.548.

[2] MCL 750.227b; MSA 28.424(2).

[3] In the retrial, the jury twice asked the trial judge to declare a hung jury. Each time the judge told the jury to continue their deliberations.

the witnesses for the second trial were tardy and incomplete. We reverse and remand for a new trial.

The second question concerns evidentiary issues. The prosecution in its case in chief elicited testimony from the three witnesses and Richard Troher that Dye had not accused anyone else of committing the killings and had failed to make a statement to the police. On retrial the prosecution may not in its case in chief ask Troher whether Dye accused another of the killings, or inquire on direct examination whether Dye made a statement to the police.

I

Early in the morning of August 29, 1982, two women were killed in the clubhouse of the Forbidden Wheels Motorcycle Club. They had each been shot through the head. Their bodies were dumped on the curb of a residential street and discovered there by early morning commuters.

Four club members were in the clubhouse at the time of the murders. Dye, Bruce Seidel, James Dawson, and Steve Stever all admitted to helping clean up the clubhouse after the killings. Seidel, the prosecution's chief witness, accused Dye of killing the women. Dye accused Seidel of being the killer.[4] Dawson and Stever, who had been in an

[4] Dye and Seidel spent the evening together in a bar and then came to the clubhouse. Shortly after they arrived, the two victims rang the doorbell and were admitted. Dye, Seidel, and the two women drank and played pool for some time. Neither Dye nor Seidel had previously known either woman.

According to Seidel, after some time Dye began betting one of the victims that before the night was over she would perform oral sex upon him. At this point, Dye and Seidel were on the service side of the club's bar, and the two women were seated on the customers' side. Seidel said that when this "betting" began, he withdrew from the conversation and went to the other end of the bar. According to

upstairs apartment apparently asleep at the time of the killings, testified that Seidel walked upstairs, awakened them, and told them that Dye had just killed two women. Seidel, Dawson, and Stever further testified that after Seidel and Dye dumped the bodies, all four met in Stever's garage, where Dye admitted to the killings.[5]

Seidel, Dawson, and Stever testified under a limited grant of immunity.[6] All three left the state after the killings, and returned to Michigan to testify at the first trial. Upon their return they were kept in protective custody until after they completed their testimony to prevent other "bikers" from harming them. The prosecution failed to produce any of the three to testify at the second trial.

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Seidel the "betting" talk became increasingly heated, with Dye finally exclaiming that she would perform oral sex. According to Seidel, Dye then pulled a revolver from the waistband at the small of his back, racked a shell into the chamber, placed the muzzle against her forehead, and pulled the trigger. According to Seidel, the back of her head exploded and she fell off the barstool and onto the floor. Seidel said that he then turned away. He said that he heard the second victim say that she did not believe what was happening, heard Dye say "I do," and then heard a second shot. When he turned back the second victim lay dead on the floor.

According to Dye, Seidel was serving the women drinks and Dye was observing when Dawson and Stever burst in out of breath and exclaimed that they had just firebombed the house of the mother of a former president of the Forbidden Wheels Club. (The house had in fact been firebombed and a police dog tracked a scent to within 100 feet of the clubhouse.) Dawson and Stever approached Dye, Seidel, and the two women and began relating their story. Seidel objected, indicating that they should not discuss this in front of the two women. Dawson and Stever then went upstairs to "watch the smoke" and see if they could see some flames. Dye then decided to go home. He called his wife, who after learning that Dye had been drinking told him to stay at the club. (Dye's wife corroborated receipt of the phone call and the substance of the conversation.) Dye then lay down on a couch and asked Seidel to wake him at about 6:00 A.M. Dye was awakened by a loud noise, and then heard another loud noise and a thump. Dye then stood, approached the bar, and saw Seidel standing over the two bodies.

[5] Dye denied confessing.

[6] Their own testimony could not be used in any prosecution against them.

II

A

The Sixth Amendment of the United States Constitution, and art 1, § 20 of the Michigan Constitution of 1963, provide in part that in all criminal prosecutions the accused shall "be confronted with the witnesses against him . . . ."[7] The United States Supreme Court has emphasized that the purpose of the Confrontation Clause is to provide for a face-to-face confrontation between a defendant and his accusers at trial.[8] This confrontation is an important right of the defendant because it enables the trier of fact to judge the witnesses' demeanors. The Court in *Ohio v Roberts,* 448 US 56, 63-64; 100 S Ct 2531; 65 L Ed 2d 597 (1980), declared:

> [T]he Clause envisions "a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief."[9]

Demeanor evidence is important. As the Third

[7] The Sixth Amendment applies to the states through the Fourteenth Amendment. *Pointer v Texas,* 380 US 400; 85 S Ct 1065; 13 L Ed 2d 923 (1965).

[8] See, e.g., *Ohio v Roberts,* 448 US 56; 100 S Ct 2531; 65 L Ed 2d 597 (1980); *Mattox v United States,* 156 US 237; 15 S Ct 337; 39 L Ed 409 (1895).

[9] Quoting *Mattox v United States,* n 8 *supra,* pp 242-243. See also *Pointer v Texas,* n 7 *supra,* p 405. ("There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal.")

Circuit Court of Appeals noted in *Virgin Islands v Aquino,* 378 F2d 540, 548 (CA 3, 1967):

> Demeanor is of the utmost importance in the determination of the credibility of a witness. The innumerable telltale indications which fall from a witness during the course of his examination are often much more of an indication to judge or jury of his credibility and the reliability of his evidence than is the literal meaning of his words. Even beyond the precise words themselves lies the unexpressed indication of his alignment with one side or the other in the trial. It is indeed rarely that a cross-examiner succeeds in compelling a witness to retract testimony which is harmful to his client, but it is not infrequently that he leads a hostile witness to reveal by his demeanor—his tone of voice, the evidence of fear which grips him at the height of cross-examination, or even his defiance—that his evidence is not to be accepted as true, either because of partiality or overzealousness or inaccuracy, as well as outright untruthfulness. The demeanor of a witness, as Judge Frank said, is "wordless language." *Broadcast Music, Inc v Havana Madrid Restaurant Corp,* 175 F2d 77, 80 (CA 2, 1949).

A transcript of prior testimony may nevertheless be offered in evidence upon a showing that the witness is unavailable and that the testimony bears satisfactory indicia of reliability.[10]

[10] See *Ohio v Roberts,* n 8 *supra; People v Schepps,* 217 Mich 406; 186 NW 508 (1922). MCL 768.26; MSA 28.1049 provides:

> Testimony taken at an examination, preliminary hearing, or at a former trial of the case, or taken by deposition at the instance of the defendant, may be used by the prosecution whenever the witness giving such testimony can not, for any reason, be produced at the trial, or whenever the witness has, since giving such testimony become insane or otherwise mentally incapacitated to testify.

This Court noted in *People v McIntosh,* 389 Mich 82, 87; 204 NW2d

To establish the witness' unavailability, the proponent[11] must establish that he has made a diligent, good-faith effort to obtain the witness' presence at trial.[12] This is a substantial requirement. "[I]f there is a possibility, albeit remote, that affirmative measures might produce the declarant, the obligation of good faith *may* demand their effectuation."[13]

In *Motes v United States*, 178 US 458; 20 S Ct 993; 44 L Ed 1150 (1900), the United States Supreme Court held that police negligence barred a finding of good-faith diligent effort. A codefendant in a murder prosecution had provided the primary evidence against the other defendants in testimony at a preliminary examination. Prior to trial he escaped due to the negligence of the police. At trial the judge admitted the preliminary examination testimony as substantive evidence against the remaining defendants. The United States Supreme Court reversed, stating:

> We are unwilling to hold it to be consistent with the constitutional requirement that an accused shall be confronted with the witnesses against him, to permit the deposition or statement of an absent witness (taken at an examining trial) to be read at the final trial when it does not appear that the witness was absent by the suggestion, connivance or procurement of the accused, but does

135 (1973), that the statute must be construed in a manner consistent with prevailing constitutional authority.

[11] The level of diligence required may vary depending upon the nature of the action and the proponent's identity. It has been said that the prosecutor is held to a higher standard as the proponent than is a criminal defendant or parties in a civil action. McCormick, Evidence (3d ed), § 253, pp 756-757.

[12] *Ohio v Roberts*, n 8 *supra*, p 60, quoting *Barber v Page*, 390 US 719, 724-725; 88 S Ct 1318; 20 L Ed 2d 255 (1968); *People v McIntosh*, n 10 *supra*, p 86. ("[T]he prosecution must show due diligence in their efforts to produce such [allegedly unavailable] witnesses.")

[13] *Ohio v Roberts*, n 8 *supra*, p 74 (emphasis in original).

appear that his absence was due to the negligence of the prosecution. [178 US 474.]

B

Whether the prosecution made a diligent, good-faith effort to produce missing witnesses is an evaluation that depends on the particular facts of each case. The record in the instant case indicates that, in the circumstances of this case, the prosecution failed to make such a diligent, good-faith effort to produce Seidel, Dawson, and Stever.

Seidel, Dawson, and Stever had been difficult to locate for the first trial. The officer in charge, Kuhnlein, testified that when the three were released, he knew that each was going out of state. All three had an incentive to go into hiding. They were in protective custody during the first trial to prevent other "bikers" from harming them for testifying against Dye. This threat remained after their release. Additionally, the witnesses may have feared prosecution; they had been given only limited immunity. All three were admitted accomplices after the fact in the murders. Stever and Dawson were suspects in a related firebombing.[14]

The mistrial was declared on March 17, 1983. On May 13, 1983, the court set Dye's retrial for August 22, 1983. As of May 13, the witnesses had been released for approximately two months. During this two-month period, the prosecution had made no effort to relocate Seidel, Dawson,[15] or Stever even though the prosecution knew that the witnesses were needed, they had expressed an

[14] See n 4.

[15] The assistant prosecutor testified that during this period Dawson repeatedly telephoned him to learn whether and when Dye would be released on bond. All these contacts appear to have been initiated by Dawson, not the prosecution.

intention to leave the state, and had incentives to go into hiding. And once the prosecution learned of the retrial date, its efforts to produce the witnesses were, in the circumstances of this case, tardy and incomplete. These efforts are detailed below.

1

An assistant prosecutor testified that during March, April, and early May of 1983, Dawson repeatedly telephoned to ask whether and when Dye was going to be released on bond. Because Dawson had testified against Dye, he may have feared Dye would seek revenge. Dye was released on June 17, 1983. The prosecution did not attempt to communicate with Dawson until four weeks after Dye's release. The prosecution telephoned Dawson on July 12 and learned that his telephone line had been disconnected. No investigation into Dawson's whereabouts, however, was conducted until August 5—three weeks later, and just seventeen days before the retrial date—when the prosecution attempted to serve a subpoena on Dawson at a Detroit address.

The woman answering the door reported that she had purchased the house from Dawson three weeks before and that she had no idea where he was. It does not appear that any effort was made to communicate with the lawyer, real estate agent, or bank involved in the house sale. Had the prosecution investigated immediately upon learning on July 12 that Dawson's phone had been disconnected, they would—according to the date given by the woman who purchased the house—have arrived at the house before the sale was completed

and while Dawson might have still been in the area.

Dawson's wife was a postal employee.[16] Through her employer the prosecution obtained a forwarding address in Cucamonga, California. On August 5, 1983—just seventeen days before Dye's retrial—the prosecution mailed to the California district attorney for Cucamonga a certificate under the uniform act to secure the attendance of witnesses from without a state in criminal proceedings,[17] requesting that the prosecutor serve and arrest Dawson. The assistant prosecutor did not communicate with the California district attorney again until August 16—less than a week before Dye's retrial—when he learned that the California district attorney had received the certificate but had not yet served Dawson. The record does not indicate that the California district attorney had even begun looking for Dawson. Also on August 16, the assistant prosecutor mailed a photograph of Dawson to the California district attorney. On August 18, four days before Dye's retrial, the California district attorney telephoned and said that while Dawson had apparently been living at the Cucamonga address, he was not there at the time the investigators visited. They thought that Dawson had a job lead in the area and said they were going to continue trying to locate him. There is no evidence of any further efforts by the California authorities or of further communication between the prosecution and the California district attorney after the August 18 phone call.[18]

It thus appears that although both Dawson and

[16] It does not appear that the prosecution made any efforts to communicate with the wife's relatives or friends.

[17] MCL 767.91 *et seq.*; MSA 28.1023(191) *et seq.*

[18] Officer Kuhnlein telephoned the jails, hospitals, and morgues in Oakland, Macomb, and Wayne counties. He also checked with the Department of Social Services. The record does not indicate when these inquiries were made.

his wife were living at an identified address in California, the only effort of record to locate him was a single visit by California investigators to that address. The record does not indicate on what day or at what time that visit occurred. There is no reason to conclude that further efforts to locate Dawson or his wife at that address would have been of no avail.

2

The prosecution did not attempt to communicate with Seidel, the sole eyewitness, until June 2—almost three months after Seidel's release and almost a month after the date for Dye's retrial had been set—when it sent a request for information to the police department of Mason City, Iowa, where Seidel had previously lived with his mother.

The Mason City police telephoned Seidel's mother and reported that, according to his mother, Seidel was working out of town and that when he returned his mother would give him the message to call the assistant prosecutor. This request was apparently repeated on June 22, and the assistant prosecutor apparently received the same response. On July 7, the prosecution telephoned Mrs. Seidel directly. She made the same response she had made to the Mason City police.

Although it had clearly been established by July 7 that Seidel was missing, there was no further communication with his mother or any visit to his mother's home until approximately six weeks later —about August 16, less than one week before Dye's retrial—when the prosecution apparently called the district attorney for Mason City and learned that he had received a certificate forwarded by the prosecution on August 5 under the

uniform act for Seidel.[19] Some time after receipt of the certificate members of the Mason City police visited the house, and it appears that they believed that Seidel was living there.

Also on August 16, the prosecution mailed a photograph of Seidel to the local district attorney. There is no evidence of any further communication between the prosecution and the local district attorney.

It does not appear that the Mason City police made more than one visit to the Seidel home. Seidel was the prosecution's most important witness. Yet the prosecution did not send an investigator to Mason City or ask the Mason City police to exert further efforts to locate him.

The prosecution did not suggest checking, nor did the local police—as to Seidel, Dawson, or Stever—check, locales frequented by bikers. Seidel was in fact arrested by Iowa police on another charge one week after Dye's retrial ended.

3

Stever apparently left the state several days after being released.[20] The prosecution did not attempt to locate Stever until August 1—four and a half months after the mistrial was declared and just three weeks before Dye's retrial was scheduled to begin—when Officer Kuhnlein attempted to serve Stever with a subpoena at a local home address. The man who answered the door was renting the house, said that he had not seen Stever for some time, and thought that he had gone either to Wisconsin, Tennessee, or California. The tenant was about to leave because he had learned that the house was to be repossessed.

[19] See n 17.

[20] According to Dawson's mother.

On August 5, seventeen days before Dye's retrial, the prosecution mailed to the Livingston, Tennessee, district attorney a certificate under the uniform act for Stever. Stever had traveled from Livingston to Detroit to testify at the first trial, but there was little or no reason to believe that he had returned to Livingston. Dawson's mother told Kuhnlein that Stever almost certainly had not returned to Tennessee.

On August 16 the assistant prosecutor telephoned the Livingston district attorney and learned that he had received the certificate, but had not yet served Stever. The record does not indicate that the Livingston district attorney had begun looking for Stever. There is no evidence of any further communication between the prosecution and the local district attorney.

On August 22, during the afternoon session of the due diligence hearing, Officer Kuhnlein testified that after his direct testimony that morning, he telephoned Detroit Edison and learned that Stever had been receiving electrical service at his Michigan address under the name of "Donald" Stever. There is no evidence that the prosecution relayed this information to the Livingston district attorney or followed up on it in any other way.

There is no evidence that the prosecution communicated with the repossessing bank to determine if it had any forwarding addresses or could provide other leads to persons who may have known Stever's whereabouts. The tenant said that his previous month's rent was collected by a person who he thought was a member of Stever's family. There is no evidence of an effort to locate this person.

The prosecution had not obtained the names or addresses of any of Stever's relatives other than the address of his mother. And, although it had

Stever's mother's address, it did not attempt to communicate with her. The prosecution had the name of Stever's girl friend—who had reportedly left with him—but there is no evidence of any attempt to communicate with her friends and relatives.

C

The Illinois Court of Appeals in *People v Payne,* 30 Ill App 3d 624; 332 NE2d 745 (1975), determined that the prosecution had failed to exercise good-faith diligence in attempting to locate a missing witness. Jerome Payne was tried for robbing Oscar Fallin. A mistrial was declared because the jury was unable to agree. On retrial, Payne was convicted. Fallin testified at the first trial, but did not appear at the retrial. The transcript of his previous testimony was read to the jury.[21]

The prosecution made numerous attempts to locate Fallin. The chief investigator noted that he made "20 to 25 attempts" to locate him before Payne's retrial. After detailing the prosecution's substantial efforts, the court declared that they were insufficient. Not only had the prosecution been tardy and incomplete in its efforts to find Fallin after the first trial, it had known that Fallin had been difficult to find for the first trial and yet had taken no measures to assure his return for the retrial. "The State was aware that Fallin had been a difficult witness to locate for the first trial, but took no steps to insure his appearance later even though it knew that his testimony was essential to a conviction and that the case would be tried again." *Payne, supra,* p 629. The prosecution's failure to take adequate measures to assure that a vital witness against the defendant

[21] The opinion does not indicate whether there were any other witnesses or other evidence implicating Payne.

would appear at a retrial barred a finding of good-faith due diligence.[22]

[22] This Court's most recent opinions on the prosecution's duty to produce witnesses at trial indicate that the prosecution's efforts in this case failed to rise to the level of good-faith due diligence. In *People v Pearson,* 404 Mich 698; 273 NW2d 856 (1979), this Court evaluated the prosecution's efforts to produce res gestae witnesses in four consolidated cases. In *Willie Pearson* and *Lindsay Pearson,* this Court held that the alleged res gestae witness was not in fact a res gestae witness. In *Schwartz* and *Wynn,* this Court held that the prosecution's efforts to produce the missing res gestae witness did not rise to the level of due diligence.

We note first that the prosecution's duty to produce res gestae witnesses might be less strict than its duty under the Confrontation Clause to produce witnesses whose testimony is offered against the defendant.

Schwartz was convicted of delivery of heroin. The police officer making the arrest was introduced to Schwartz by one Don Cager, an informant who was present during the sale. Cager was endorsed on the information but was not produced at trial.

The last time that the prosecution had seen Cager was six months before Schwartz' trial. In the five weeks before Schwartz' trial, the prosecution made several attempts to find Cager, including going to his home and speaking to a local police officer. During trial the prosecution again checked his residence, a boathouse, a firehouse, a pool hall, two bars, and two restaurants.

This Court held that the appropriate standard was due diligence, not just good faith. Even though "[i]t was clear that [the witness] was a res gestae witness who would have to be produced," the prosecution made only belated attempts to find Cager. As in the present case, "[o]f particular concern to this Court, however, is that no serious effort was made sufficiently in advance of trial to allow for the difficulties which occurred." *Pearson, supra,* p 717.

Willie Wynn was convicted of assault with intent to do great bodily harm less than murder. James Moore was one of a number of witnesses to the assault. Moore, a friend of Wynn's, was not endorsed prior to trial, but in response to a defense motion the trial court ordered Moore endorsed and produced at trial. The prosecution did not attempt to serve Moore with a subpoena and made no other efforts to find him. Moore did not appear at Wynn's trial. The trial court found that this lack of effort did not meet the due diligence requirement. This Court affirmed.

In *People v McIntosh,* 389 Mich 82; 204 NW2d 135 (1973), this Court applied the due diligence standard to the prosecution's efforts to locate a witness whose preliminary examination testimony was used against the defendants at trial. Franklin McIntosh was prosecuted for burglarizing a gas station. At McIntosh's preliminary examination, Jerry Wrenn, an employee at the station, testified that he found McIntosh inside the office. McIntosh told Wrenn that he was returning the washroom key and left, driving off with a companion. Wrenn subsequently discovered that the bag containing the day's

*People v Schepps,* 217 Mich 406; 186 NW 508 (1922), describes the sort of thorough efforts that constitute due diligence. The issue at trial was whether Schepps was one of a group of robbers. The preliminary examination testimony of Florence Earl, although neither conclusive nor the sole evidence identifying Schepps as one of the robbers, was highly convincing. Earl was subpoenaed but did not appear at trial. The court continued Schepps' trial a number of times (for an unknown number of weeks) while the prosecution attempted to find her. Officers searched Detroit and followed up rumors that she had moved to Canada, searching Windsor and interviewing her parents in Ontario, and her two sisters "found living elsewhere."

This Court held that these efforts were sufficient to enable the prosecution to use Earl's preliminary examination testimony at trial. In contrast with the instant case, the trial was continued a number

receipts was missing and telephoned the state police, who found the bag under the front seat of McIntosh's automobile. Wrenn also testified that when he entered the office he noticed that the back of McIntosh's sweater "was bunched as if something bulky was being carried underneath it," and that McIntosh, upon leaving the station, leaned into the front-seat area of his car where the money was found.

Wrenn was apparently the only witness who testified that McIntosh, and not his companion, was the thief. The prosecution learned after the preliminary examination that Wrenn had left the state and was either in a North Carolina prison, or living on Webb Avenue in Burlington, North Carolina, possibly under the alias "Danny Hill." The prosecution took the following steps to locate Wrenn: It checked his local home and employer. It telephoned information for Burlington and learned that no Wrenn or Hill was listed on Webb Avenue. It communicated with Burlington police and asked them to check on Wrenn's whereabouts. No reply was ever received. The prosecution did not communicate with North Carolina prison authorities.

Applying the decision of the United States Supreme Court in *Barber v Page,* n 12 *supra,* which this Court read as establishing a due diligence standard, this Court held that the prosecution's efforts failed to rise to the level of due diligence. The prosecution should have sought to locate Wrenn in Burlington and should have communicated with North Carolina prison authorities. "The fact that an attempt may prove unsuccessful does not justify the prosecution's failure to make that attempt, *Barber, supra.*" *McIntosh, supra,* p 87.

of times and the prosecution promptly followed all leads, traveling *itself* to a foreign jurisdiction to look for the witness.

D

Here, as in *Payne,* the prosecution knew that Seidel, Dawson, and Stever had been difficult to locate for the first trial, that they had left the state and had an incentive to go into hiding.

Subsequent belated and incomplete efforts did not rise to the level of good-faith due diligence. The efforts to locate each should have begun earlier. The prosecution knew on May 13 that Dye's retrial was set for August 22, but did not attempt to locate Seidel until one month later, did not attempt to locate Dawson until two months later, and did not attempt to locate Stever until almost three months later. The initial attempts all failed, yet the prosecution did not increase its efforts.

The prosecution relied on the local Cucamonga, Mason City, and Livingston police to do the investigatory work, but was tardy in providing the local police with sufficient information and did not follow up and press the local police to act. Photographs of the witnesses were mailed less than a week before the retrial.

Certificates were sent under the uniform act, but in themselves these did not obligate the local police to undertake a diligent search. The uniform act is a mechanism for the production of witnesses; it does not oblige local police to search for a missing witness. Invocation of the uniform act's mechanism would have become important had Dawson, Seidel, or Stever been found out of state. The act would then have enabled the local police to *produce* the witness for the prosecutor in Michigan. Invocation of the uniform act's production

mechanism, however, is not a substitute in itself for a diligent effort to *find* the witnesses.[23]

The prosecution's obligation to make a diligent good-faith effort is nondelegable. If the prosecution relies on out-of-state police to follow particular leads, and they make a diligent good-faith effort to find and produce the witness, then their efforts may discharge the prosecution's obligation. In the instant case, however, there is no evidence that the out-of-state police made diligent good-faith efforts. The Mason City police believed Seidel was living at home with his mother, but apparently only visited the home once. The Cucamonga police believed Dawson was living and working in the

[23] Where a witness is beyond a court's jurisdiction, use of the uniform act may be required in all cases. See *Barber v Page,* n 12 *supra,* p 723 (while the fact that the witness was outside the court's jurisdiction may at one time have excused the prosecution from producing him, because of developments like the uniform act, "it is clear that at the present time increased coöperation between the States themselves and between the States and the Federal Government" now requires the prosecution to engage in diligent efforts to produce witnesses who may be beyond the court's jurisdiction); *People v Gaffney,* 51 Mich App 526; 215 NW2d 587 (1974) (distinguishing *People v Serra,* 301 Mich 124; 3 NW2d 35 [1942], and holding that the prosecution's failure to utilize the uniform act barred a finding of good-faith diligence).

Other states that have considered the matter agree that use of the uniform act is required in at least some circumstances. See *State v Kaufman,* 304 So 2d 300, 303 (La, 1974); *State v Kirk,* 211 Kan 165, 170-171; 505 P2d 619 (1973).

In *People v Serra, supra,* this Court said that the prosecution's failure to produce at trial an indorsed res gestae witness who had moved to Buffalo, New York, did not bar a finding of due diligence. There was no question of using any prior testimony against the defendant.

In *People v Hunley,* 313 Mich 688; 21 NW2d 923 (1946), the prosecution offered the preliminary examination testimony of a witness who had subsequently been inducted into the Army and sent to Kentucky. The witness was not vital to the prosecution's case. This Court emphasized that the witness' "testimony was corroborated in almost every detail by other witnesses." *Hunley, supra,* p 692. This Court also observed that the defendant did not in her brief assert that the prosecution should have utilized the uniform act, and that no showing had been made that Kentucky had enacted a reciprocal provision, which the act requires before it can be utilized.

area, yet apparently made only one visit to his suspected residence and did not attempt to find where his employment lead may have led. The efforts did not constitute good-faith due diligence.

The prosecution should have begun the searches earlier, pressed local officers to engage in the searches, and perhaps, as in *Schepps*—in light of the inadequate efforts of the local police—sent its own investigator. The prosecution undertook none of these steps. Such "affirmative measures" may well have produced the witnesses.

III

Dye asserts that two lines of inquiry by the prosecution in its case in chief were improper. The first was questions put to Seidel, Dawson, Stever, and Richard Troher[24] whether Dye had in their presence accused anyone else of committing the killings. The second was questions put to these four witnesses whether Dye had accompanied them to make a statement to the police.

We agree with Dye that questioning Troher whether Dye had accused anyone else of the killings, and questioning all four witnesses whether Dye had made a statement to the police, was improper. It would not have been "natural," within the meaning of *People v Collier,* 426 Mich 23; 393 NW2d 346 (1986), for Dye to have made such accusation in Troher's presence or to have made a statement to the police. On remand, these questions should not be asked during the prosecution's case in chief.

Questioning Seidel, Dawson, and Stever whether

[24] Troher was a member of the Forbidden Wheels, but was not in the clubhouse at the time of the killings.

Wilfred David's testimony, adverted to in the opinion to affirm, was not adverted to in Dye's brief in this Court.

Dye accused anyone else of the killings, however, was not improper. Their testimony that Dye failed to accuse anyone else of the killings correlated with their testimony that Dye had confessed the killings to them. This questioning may be allowed on remand.

A

Dye testified that he did not kill the two women. He said that Seidel killed the women, and that he had been sleeping and was awakened by the shots.[25] By his own admission, however, Dye was an accessory after the fact. He participated with Seidel, Dawson, and Stever in cleaning up the clubhouse and joined Seidel in disposing of the bodies.

Prior to his arrest, Dye did not speak with the police of his involvement in the killings. Dye did not tell police that Seidel was the killer.

B

In *People v Collier, supra,* this Court adopted the evidentiary standard set forth in *Commonwealth v Nickerson,* 386 Mass 54; 434 NE2d 992; 35 ALR4th 722 (1982). As a general rule, the prosecution cannot impeach a defendant on the basis of his prearrest silence. "Allowing impeachment with prearrest silence suggests that a defendant has a duty to incriminate himself and burdens his right to testify on his own behalf." *Collier, supra,* p 34. This is inappropriate because " 'it is a generally held notion that one does not have to say anything to the police and that what one does say may be used against him.' " *Id.*[26]

[25] For a more complete factual summary, see n 4.

[26] Quoting *Nickerson, supra,* 386 Mass 61.

In *Collier,* this Court held that the prosecution's impeachment of defendant Collier's prearrest silence was proper. Collier, according to his testimony, had acted in self-defense. He "testified that he was in fact the victim of an armed robbery rather than a perpetrator of an assault." *Id.,* p 34. The Court concluded that it would have been natural for Collier to contact the police:

> [W]e believe it is entirely natural and expected that one who has been robbed under the circumstances related by the defendant would report the crime to the police. Defendant knew the identity of the robber and the location of the robbery. It would have been natural for him to report the crime to the police, to have the assailant arrested, and to retrieve his property. [*Id.,* pp 34-35.]

Where it would not have been natural for the defendant to contact the police—where doing so may have resulted in the defendant incriminating himself—the prosecution cannot properly comment on the defendant's failure to contact the police.[27]

We conclude that it would not have been natural for Dye to have made a statement to the police because if he had done so such a statement would have tended to incriminate him as an accessory after the fact.

C

Nor would it have been natural for Dye to have

[27] See also *Farley v State,* 717 P2d 111 (Okla Crim App, 1986) (evidence of prearrest silence is more prejudicial than probative of a defendant's guilt); *State v Sabbah,* 13 Ohio App 3d 124, 136; 468 NE2d 718 (1982) ("Persuasively reasoned authority supports the proposition that *all* pretrial silence is usually so prejudicial in disproportion to its probative worth that exclusion is warranted in all but exceptional cases" [emphasis in original]); *People v Conyers,* 52 NY2d 454; 420 NE2d 933 (1981) (state rules of evidence generally preclude the use of a defendant's pretrial silence to impeach his trial testimony).

accused someone else in Troher's presence. According to Dye, he was an accomplice after the fact; hence an accusation of Seidel would also have incriminated Dye. Further, there was no apparent incentive for Dye to have, in Troher's presence, accused Seidel. An accusation of Seidel by Dye in Troher's presence would not have aided Dye.

Questioning Seidel, Dawson, and Stever concerning Dye's failure to accuse anyone else of the killings, however, was not improper. In contrast to Troher, Seidel, Dawson, and Stever testified that Dye had confessed to them that he had committed the killings. Their further testimony that Dye had not accused anyone else of the killings correlated with their testimony concerning his confession. If Dye had in fact confessed to Seidel, Dawson, and Stever that he was the killer, he would not have accused anyone else of the offenses. This questioning merely restated in a different form the properly admitted testimony concerning Dye's confession.

D

Questioning the three witnesses concerning Dye's failure to make a statement to the police,[28] however, did not reciprocate their testimony that Dye had confessed. Applying the *Collier* analysis, it would not have been natural for Dye to have made a statement to the police for the reasons set forth above: Dye, according to his own testimony, was an accomplice after the fact, and any statement that he made would have incriminated him.

Because it would not have been "natural" for Dye to have made a statement to the police, on remand the prosecution should not in its case in

[28] See n 29.

chief ask questions concerning or adverting to Dye's failure to make a statement to the police.

E

Dye on direct examination testified that he did not make a statement to the police because his attorney advised him not to do so.[29] The prosecution asserts that because Dye offered this testimony, the prosecution could have subsequently offered impeaching testimony, and therefore—even if the prosecution improperly included the testimony in its case in chief—any error was harmless. On these facts, the prosecution's argument is circular.

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[29] The opinion to affirm states:

> The prosecution did not make any inquiry in its case in chief regarding Dye's prearrest failure to make a statement, Dye's failure to make a postarrest statement to the homicide investigator, or his postarrest statement to the arson investigators. [*Post,* p 112.]

During the prosecution's case in chief, the following questions were put to and responses elicited from Troher:

> *Q.* To your knowledge, did there come a time when Mr. Dye was arrested?
> *A.* Yes.
> *Q.* Before that arrest, had you turned yourself in, so to speak, or had you gone down to the police, let me use it that way.
> *A.* I believe so.
> *Q.* Mr. Dye did not go down with you to the police?
> *A.* No.

The prosecution, during its case in chief, also elicited testimony from Seidel, Dawson, and Stever that although Dye did not want them to consult an attorney, they did so and made statements to the police. The purpose of this testimony was to emphasize Dye's prearrest failure to make a statement to the police even though he knew that others were making such statements: "In effect, the prosecutor asked the question 'Is it natural to expect the defendant to go to the police and report his version of the offense knowing of the similar inclination of the other witnesses?' "

In all events, on remand Dye should be able to avoid misunderstanding concerning his intentions by an affirmative statement in limine whether he intends, absent inquiry by the prosecution in its case in chief, either to claim that his prearrest conduct tended to indicate his innocence, or to explain why he did not make a statement to the police, or to refer to his statement to the arson investigators.[30]

We reverse the decision of the Court of Appeals and remand for a new trial.

CAVANAGH and ARCHER, JJ., concurred with LEVIN, J.

ARCHER, J. (*concurring*). The prosecution failed to show due diligence in producing the principal res gestae witnesses. The trial court abused its discretion in its finding of due diligence and in allowing the prosecution to use the previous trial testimony of the principal witnesses. The defendant was denied the opportunity to confront and cross-examine the witnesses. I would, therefore, reverse the decisions of the Court of Appeals and

[30] The opinion to affirm would "hold that the evidentiary errors alleged by the defendant did not result in a miscarriage of justice." *Post,* pp 116-117.

The opinion refers to *Doyle v Ohio,* 426 US 610; 96 S Ct 2240; 49 L Ed 2d 91 (1976), and states that the United States Supreme Court there "held that use of postarrest, post-*Miranda* warning silence for impeachment was 'fundamentally unfair and a deprivation of due process . . . .' *Id.* at 618." *Post,* p 107.

The opinion further states:

> For the purpose of deciding the remaining claims of error concerning the testimony of David and Troher, we assume arguendo under *People v Collier,* 426 Mich 23; 393 NW2d 346 (1986), that the trial judge erred in permitting the prosecutor to question these witnesses concerning defendant's prearrest conduct. [*Post,* p 114.]

The opinion to affirm does not state that Dye's prearrest silence was admissible under *Collier.*

the trial court and remand the case for a new trial.

I

The defendant, Paul Dye, was charged with a double murder committed in August, 1982, at the headquarters of the Forbidden Wheels Motorcycle Club. Evidence adduced at trial established that four members of the Forbidden Wheels, Bruce Seidel, Stephen Stever, James Dawson, and the defendant, were in the building at the time two women were killed inside the club.

It was established that when the murders occurred, the defendant and Seidel were in the room with the victims while Dawson and Stever were in an upstairs room. During the trial, the defendant and Seidel each accused the other of shooting and killing the victims. Seidel testified that after witnessing the shootings, he went upstairs and informed Stever and Dawson. Stever and Dawson testified that Seidel did tell them that the defendant had shot two people but, because they were not eyewitnesses, they could not verify either version of the shooting itself.

All four testified that they assisted in cleaning up the room where the shooting occurred. Seidel testified that he and the defendant disposed of the bodies by dumping them in a vacant lot. Although it was undisputed that all four had participated in covering up the crime, only the defendant was charged with murder. Seidel, Stever, and Dawson were not charged in exchange for their testimony.

The jury was required to evaluate the credibility of the witnesses on the basis of their demeanor and the factual and logical consistency of their testimony. The jury failed to reach a unanimous verdict. A mistrial was declared. It was later

learned that the jury voted eleven to one in favor of acquittal.

The prosecution requested a second trial of the defendant. Unlike the first trial, the three principal witnesses were not housed in a secure place at a hidden location. No material witness bonds were requested, nor were addresses required from Stever, Dawson, or Seidel, although it was known that all three of the men planned to leave the state. On May 13, 1983, a new trial date of August 22, 1983, was set.

Several weeks later, in June, 1983, the police began sporadic, unsuccessful attempts to locate Seidel. No attempt was made to locate Dawson until July, and it was not until August, approximately three weeks before trial, that attempts were made to serve Stever with a subpoena.

In attempting to locate Seidel, the police contacted his mother in Mason City, Iowa, who said he was working out of town. There is no indication in the record that they asked her to specify where he was. In the case of Dawson, the prosecutor had learned earlier that he might seek to avoid further involvement with the trial. Yet he waited until after he got further confirmation that Dawson was going to avoid the second trial and subsequently found Dawson's phone disconnected when he contacted the police for assistance in locating Dawson. The attempt to locate Stever was even less diligent. The first attempt was an inquiry of Dawson's mother. Dawson's mother could not tell the police where her son was, so it was highly unlikely that she could help the police locate Stever.

The prosecutor waited until seventeen days before the trial to attempt to locate the witnesses using the uniform act to secure the attendance of witnesses from without a state in criminal proceedings, MCL 767.91 *et seq.;* MSA 28.1023(191) *et*

*seq.*[1] The first time that the prosecutor indicated that there were some witnesses that had yet to be served with subpoenas was at a hearing on the defense counsel's motion to adjourn. The defense counsel was newly engaged, however, and therefore unfamiliar with the importance of the missing

[1] The relevant sections of the uniform act, MCL 767.91 *et seq.*; MSA 28.1023(191) *et seq.*, read as follows:

> (a) "Witness" includes a person whose testimony is desired in any proceeding or investigation by a grand jury or in a criminal action, prosecution or proceeding. [MCL 767.91(a); MSA 28.1023(191)(a).]
>
> (1) If a person in a state, which by law provides for commanding persons within its borders to attend and testify in criminal prosecutions, or grand jury investigations commenced or about to commence, in this state, is a material witness in a prosecution pending in a court of record in this state, or in a grand jury investigation which has commenced or is about to commence, a judge of the court may issue a certificate under the seal of the court stating these facts and specifying the number of days the witness will be required. The certificate may include a recommendation that the witness be taken into immediate custody and delivered to an officer of this state to assure his attendance in this state. This certificate shall be presented to a judge of a court of record in the county in which the witness is found.
>
> (2) If the witness is summoned to attend and testify in this state he shall be tendered the sum of 10 cents for each mile of the ordinary traveled route to and from the court where the prosecution or investigation is being held and $5.00 for each day that he is required to travel and attend as a witness. A witness who has appeared in accordance with the provisions of the summons shall not be required to remain within this state longer than the period stated in the certificate, unless otherwise ordered by the court. If the witness, after coming into this state, fails without good cause to attend and testify as directed in the summons, he shall be punished in the manner provided for the punishment of any witness who disobeys a summons issued from a court of record in this state. [MCL 767.93; MSA 28.1023(193).]
>
> Sections 91 to 95 constitute the uniform act to secure the attendance of witnesses from without a state in criminal proceedings and shall be so interpreted and construed as to effectuate their general purposes to make uniform the law of the states which enact them. [MCL 767.95; MSA 28.1023(195).]

witnesses. It was not until August 16, 1983, six days before the trial, that the prosecutor sent pictures of the three men to the respective states in which they were being sought. *The prosecutor did not inform the defense counsel which witnesses were unavailable until the day the trial was to begin.* The prosecution sought to introduce transcripts of their prior testimony to be read into evidence under MCL 768.26; MSA 28.1049 and MRE 804(b)(1).[2]

A hearing was conducted to determine whether due diligence was exercised in attempts to locate these crucial witnesses for the second trial. The trial court ruled that the prosecution exercised due diligence and permitted the use of the trial transcript from the first trial.

The defendant was found guilty as charged. He appealed in the Court of Appeals, which affirmed on the basis of defense counsel's failure to seek an adjournment.

II

The statute under which the prior testimony was admitted into evidence, MCL 768.26; MSA 28.1049, states:

> Testimony taken at an examination, preliminary

[2] MRE 804(b)(1) states:

> (b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> (1) Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

> hearing, or at a former trial of the case, or taken by deposition at the instance of the defendant, may be used by the prosecution whenever the witness giving such testimony can not, for any reason, be produced at the trial, or whenever the witness has, since giving such testimony become insane or otherwise mentally incapacitated to testify.

Use of prior recorded testimony in place of live testimony of endorsed res gestae witnesses is subject to the defendant's fundamental right to confront witnesses under the Michigan Constitution as well as the Constitution of the United States. *Barber v Page,* 390 US 719; 88 S Ct 1318; 20 L Ed 2d 255 (1968); *People v McIntosh,* 389 Mich 82; 204 NW2d 135 (1973). In *Barber,* the United States Supreme Court held that this confrontation right requires the prosecution to produce such endorsed witnesses and that an exception to this requirement is not available "unless the prosecutorial authorities have made a good-faith effort to obtain [the witness'] presence at trial." *Barber, supra* at 725.

Justice Marshall, writing for the majority in *Barber* at 721, stated:

> Many years ago this [United States Supreme] Court stated that "[t]he primary object of the [Confrontation Clause of the Sixth Amendment] . . . was to prevent depositions or *ex parte* affidavits . . . being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy

> of belief." *Mattox v United States,* 156 US 237, 242-243 [15 S Ct 337; 39 L Ed 409] (1895). More recently, in holding the Sixth Amendment right of confrontation applicable to the States through the Fourteenth Amendment, this Court said, "There are few subjects, perhaps, upon which this [United States Supreme] Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal." *Pointer v Texas,* 380 US 400, 405 [85 S Ct 1065; 13 L Ed 2d 923] (1965).

Michigan courts have, until now, fully embraced this doctrine and have therefore required that prosecutors exercise "due diligence" in attempts to secure the presence of witnesses before prior testimony is admissible. In *People v McIntosh, supra* at 86, this Court cited *Barber,* stating that "the prosecution must show due diligence in their efforts to produce [endorsed res gestae] witnesses." Indeed, even prior to its recognition that the Sixth Amendment was incorporated into the Fourteenth Amendment and thus applicable to the states, this Court had held that the prosecution was required to exercise due diligence to produce material witnesses at trial. See, e.g., *People v Zabijak,* 285 Mich 164; 280 NW 149 (1938); *People v Vick,* 235 Mich 475; 209 NW 584 (1926).

III

The diligence due in a given case necessarily varies with the circumstances. Law enforcement authorities must not be unduly burdened with a duty to locate witnesses whose testimony would merely relate to preliminary or unimportant matters. At the other extreme, however, are cases

where eyewitness testimony relating to an ultimate fact such as the identity of the perpetrator of a felony must be tested *in the presence of the jury* for credibility and consistency in order to satisfy the requirements of due process.

In the instant matter, it is obvious that the first mistrial resulted from the jury's inability to give credence to the testimony of Seidel, Stever, and Dawson. The inability of the jury at the second trial to view the demeanor of these witnesses therefore greatly reduced the validity and reliability of its evaluation of the witnesses' credibility. In fact, over the objection of the defense counsel, the individuals reading the prior testimony in the second trial were allowed to embellish the written words with dramatic effects.[3] As a result, the

[3] The following colloquy took place between the defense counsel and the court:

> *Mr. Morrow:* Just one thing I'd like to put on the record. As the witness was testifying, I noticed that there were certain hand motions or whatever and I don't know, necessarily, if they were appropriate or if they had any prejudicial effect on the jury. Making those—I don't think he was present at the first trial—so I don't know if they could actually be deemed accurate. I'd just like to put that on the evidence for possible prejudice.
>
> [*The Court*] See you at 3 o'clock.
>
> (Whereupon this case was in recess at 12:44 P.M.)
>
> * * *
>
> (Whereupon at 4:45 P.M., the jury was excused and the following proceedings held outside the presence of the jury.)
>
> *The Court:* Per discussion in chambers, I think there is an objection or two, if not more, to what the jury just heard or did not hear, Mr. Morrow?
>
> *Mr. Morrow:* Thank you, your Honor. In terms—let me just talk generally about the reading of witness of Steve Stevers. It was my impression this was going to be a neutral reading. I'd just have to put on the record that the witness that read the part of Stephen Stevers was into dramatic art. I mean, certainly his facial expressions, his attempts to add inflections when there might have not been any, I just don't think it was any way neutral, and as a result, I think it was very prejudicial to Mr. Dye. I would ask that the . . .

defendant's right to a fair trial was greatly hampered, thus violating his right to due process of law.

This due process violation cannot be excused on the basis of any exception to the defendant's right to confront witnesses. Although the defense counsel apparently conceded the good faith of the prosecutor, it is clear that the efforts of the police and the prosecutor to locate the witnesses fell short of the due diligence requirement recognized in *People v McIntosh, supra.*

The failure to inquire as to the specific whereabouts of Seidel precludes reliance on contacts with Seidel's mother as evidence of due diligence. Similarly, the sporadic attempts to locate Dawson and Stever were clearly less than adequate. This would seem to be the "cursory or pretextual investigation" referred to by the opinion for affirmance, *post,* p 101, n 6, as inadequate evidence of due diligence. The uniform act to secure the attendance of witnesses from without a state in criminal proceedings may not be relied on to establish due diligence. This statute, originally promulgated by

*The Court:* The record is also clear there was no objection during the reading.

*Mr. Morrow:* It was my understanding that we were going to add the objections later. I don't know if I should.

*The Court:* I think that's [sic] if that's a valid objections [sic]. That's certainly the kind of objection you would clearly bring up while it was going on.

*Mr. Morrow:* I'd like to ask the Court, then, for the next person that is going to be the reader of Bruce Seidel, that if there's any way possible that the voice just be heard by the jury, as opposed to facial expressions, because I'm sure that that's going to have me jumping up, now that I know that that's the way the Court wishes it. It would have me jumping up all the time.

*The Court:* No. I would state that Mr. Bernacki read with perhaps more inflection in his voice than did Mr. Hutting, and if counsel had approached the bench we would have informed Mr. Bernacki to simply read it in a natural manner. Counsel did not choose to do so and, thus, the Court was not going to take it upon itself to tell Mr. Bernacki how to read.

the National Conference of Commissioners on Uniform State Laws, was designed merely to codify a procedure whereby each state would have a standard for honoring a request by another state for assistance in securing a witness for a criminal trial. There is no indication that this statute was intended to set a standard for due diligence. Such an intent would surely mandate the inclusion of a time frame for use of the statute to ensure that authorities in a state receiving a request would have adequate time to locate the witness sought. In the instant case, the prosecutor waited until seventeen days before trial to invoke the act. It was not until August 16, six days before the trial, that the prosecutor sent pictures of the three men to the respective states in which they were being sought.

Finally, the prosecutor's delay in informing the defense counsel of the absence of the witnesses resulted in an unfair eleventh-hour surprise. As early as March, 1983, there were indications that the witnesses might be unavailable for a second trial. Surely it was clear by August 5, when the uniform witness act packets were sent, that the witnesses would be difficult to locate. The Court of Appeals affirmance was based in part on defense counsel's failure to seek an adjournment. However, the newly engaged defense counsel's unfamiliarity with the case precluded him from recognizing the importance of the missing witnesses. In any event, it may have appeared to be futile to request an adjournment in that the trial judge had refused an earlier request to adjourn so that the new defense counsel could adequately prepare for trial.

IV

*Barber v Page* and *People v McIntosh, supra,*

recognized that a defendant's Sixth Amendment confrontation right cannot be overcome without a clear showing that good-faith, diligent efforts were made to produce material witnesses. In this case, due diligence has not been shown by the prosecution; therefore, the trial court abused its discretion. I would reverse the decisions of the Court of Appeals and the trial court and remand the case for a new trial.

V

I do not agree with the analysis of the opinion for affirmance and the result in the second issue. I disagree with the application of *Jenkins v Anderson,* 447 US 231; 100 S Ct 2124; 65 L Ed 2d 86 (1980), and the extension of *People v Collier,* 426 Mich 23; 393 NW2d 346 (1986). See *Collier,* pp 40-45. I do not address this disagreement with specificity because of my finding of a lack of due diligence which would reverse the decisions of the Court of Appeals and trial court resulting in a remand for a new trial.

CONCLUSION

I would reverse the decisions of the Court of Appeals and the trial court and remand the case for a new trial.

BRICKLEY, J. (*concurring*). I concur in parts I and II of Justice LEVIN's opinion and in part III of Justice BOYLE's opinion. Accordingly, because of the violation of the due diligence standard, I concur with the result of Justice LEVIN's opinion reversing the conviction.

BOYLE, J. (*dissenting*). We are asked in this case to consider two issues: Whether the trial court

abused its discretion in finding that the Wayne County Prosecutor exercised due diligence in attempting to locate three witnesses for the defendant's retrial, and whether evidence regarding the defendant's prearrest silence was properly admitted. We would affirm the decision of the Court of Appeals.

## I. FACTS

Defendant, Paul Dye, was charged with two counts of first-degree murder in the killing of two women whose bodies, with gunshot wounds to the head, were found by police officers in a vacant lot. Evidence indicated that the women had been killed at the headquarters of the Forbidden Wheels Motorcycle Club and that they had been shot at close range.

At trial, three members of the motorcycle club testified that the defendant, who at that time was president of the Forbidden Wheels, had murdered the women and had then enlisted their help in cleaning up after the killings and in covering up the crime. One of the witnesses, Bruce Seidel, asserted that he had been present at the time of the murder and had watched Dye shoot the women. Seidel testified that the women entered the motorcycle club headquarters at approximately 2:30 A.M. and began drinking. Some time later, according to Seidel, one of the women and Dye began discussing whether the woman would perform oral sex on Dye. Seidel further testified that after some minutes of discussion and argument, the defendant stated, "why bitch you will," and, pulling a gun from his waistband, held it against her forehead and fired, at which point "[h]er head exploded." Additionally, Seidel asserted that a few seconds later, when the other

woman cried, "I don't believe what's happening," the defendant responded, "I do," and also shot her through the head. At that point, according to Seidel, Dye turned and stared at him for a short time, and then Seidel indicated that he would let two other members, Stephen Stever and James Dawson, who were sleeping upstairs, know what had happened.

Stever and Dawson also testified, corroborating Seidel's story from the point that he appeared upstairs to announce that "Rocky[1] just shot two women downstairs and he believed they were dead." All agreed that they went downstairs and helped to clean up. Seidel testified that he helped Dye dispose of the bodies, which were dumped in a vacant lot, and that he had secreted the murder weapon in the clubhouse. Afterwards, the four gathered at Stever's house. Dawson testified that Dye indicated to him that he shot the women because they were "a couple of fat cunts" and "they were fucking with me." Stever indicated that he saw Dye holding the gun when he came downstairs and that later Dye "mentioned the fact that after he took out the first one, he had to take the second one and he looked over at Bruce and thought about shooting him too. Then, he would have to come upstairs and shoot both of us." All three testified that Dye initially urged everyone to keep quiet and stick to their alibis. Dawson and Seidel also testified that on the day after the shootings they had another conversation in which they told the defendant they should seek the advice of an attorney, and defendant told them not to talk to a lawyer. It was claimed by defendant in his direct testimony at trial, however, that he, himself, had contacted a lawyer the day after the homicides and that he had arranged for a meeting

[1] "Rocky" was Dye's club nickname.

of the club members with the attorney, and he and the attorney had agreed that "he was going to set up a meeting between the homicide detectives, in charge of the case and each and each [sic] and every club member to make a statement to the homicide detectives." Dawson, Stever, Seidel, and two other witnesses, Richard Troher and Wilfred David, did arrange through an attorney to give statements to the police. A decision was made not to charge Seidel, Dawson, or Stever, who were kept in "protective custody"[2] for four days before trial.[3]

At trial, the defendant took the stand and testified that it was Seidel who committed the killings. According to the defendant, he, Seidel, Dawson, and Stever had "agreed to conceal the whole incident." The defendant had not previously made any statement to this effect.

The jury was unable to reach a verdict at the first trial, and the judge declared a mistrial. On May 13, 1983, a new trial date of August 22, 1983, was set. On June 2, 1983, according to the police sergeant in charge of the case, the police and assistant prosecutor began efforts to locate Seidel, Stever, and Dawson. By the time of trial, these efforts had proven fruitless and a motion was made to allow the first trial testimony of the three witnesses to be read into evidence under MCL 768.26; MSA 28.1049 and MRE 804(b)(1).

The trial judge conducted a hearing to determine whether the prosecutor had exercised "due diligence" in attempting to locate and produce the witnesses as required for the admission of the

[2] They were kept at a Detroit area motel under assumed names where their meals and room receipts were paid by the prosecution. While they were not allowed to leave until after they testified, they were not under arrest as material witnesses pursuant to MCL 767.35; MSA 28.975.

[3] Upon the conclusion of their testimony, they were given airfare to their previous places of residence outside Michigan.

prior testimony. The trial court found in the prosecutor's favor and allowed the testimony of Seidel, Dawson, and Stever to be read at trial. The jury convicted Dye of two counts of first-degree murder and two counts of possession of a firearm during the commission of a felony. Dye was sentenced to life imprisonment. The Court of Appeals affirmed the conviction, and we granted leave to appeal.

## II. DUE DILIGENCE

The Supreme Court of the United States in *Barber v Page,* 390 US 719, 725; 88 S Ct 1318; 20 L Ed 2d 255 (1968), held that a witness is "unavailable" for the purpose of an exception to the confrontation requirement if "the prosecutorial authorities have made a good-faith effort to obtain his presence at trial."[4] In Michigan, MCL 768.26; MSA 28.1049 provides:

[4] Justice LEVIN relies upon that Court's earlier decision in *Motes v United States,* 178 US 458, 471, 473-474; 20 S Ct 993; 44 L Ed 1150 (1900), which held that the defendant was denied his right of confrontation under the Sixth Amendment when the failure to produce a key witness for the prosecution was due to the negligence of a governmental agent. The Court opined:

> [T]he admission in evidence of Taylor's statement or deposition taken at the examining trial was in violation of the constitutional right of the defendants to be confronted with the witnesses against them. It did not appear that Taylor was absent from the trial by the suggestion, procurement or act of the accused. On the contrary, his absence was manifestly due to the negligence of the officers of the Government. Taylor was a witness for the prosecution. He had been committed to jail without bail. We have seen that the official agent of the United States in violation of law took him from jail after the trial of this case commenced, and, strangely enough, placed him in charge not of an officer but of another witness for the Government with instructions to the latter to allow him to stay at a hotel at night with his family. And on the very day when Taylor was called as a witness, and within an hour of being called, he was in the corridor of the court house. When called to testify he did not appear.
>
> * * *

> Testimony taken at an examination, preliminary hearing, or at a former trial of the case, or taken by deposition at the instance of the defendant, may be used by the prosecution whenever the witness giving such testimony, can not, for any reason, be produced at the trial, or whenever the witness has, since giving such testimony become insane or otherwise mentally incapacitated to testify.

This Court in *People v McIntosh,* 389 Mich 82, 87; 204 NW2d 135 (1973), noted that "the statute must be interpreted in a manner consistent with prevailing constitutional authority." The "good faith" requirement of *Barber* has consistently been viewed in Michigan as mandating that prosecutors exercise "due diligence" in their attempts to produce witnesses before prior testimony is admissible. *McIntosh, supra; People v Starr,* 89 Mich App 342; 280 NW2d 519 (1979).[5]

As Judge RILEY noted in *Starr,* p 345, case law in this state makes it clear that

> In the present case there was not the slightest ground in the evidence to suppose that Taylor had absented himself from the trial at the instance, by the procurement or with the assent of either of the accused. Nor (if that were material) did his disappearance occur so long prior to his being called as a witness as to justify the conclusion that he had gone out of the State and was permanently beyond the jurisdiction of the court. His absence, as already said, was plainly to be attributed to the negligence of the prosecution.

In this case the facts do not suggest governmental conduct even approaching that of *Motes.* There is nothing of record to demonstrate that the absence of Dawson, Stever, and Seidel subsequent to the first trial was the result of any illegal police activity, or of the prosecutor's negligence, unless it is suggested that the prosecutor had an obligation to detain these witnesses in the state until completion of the second trial. Consequently, *Motes* is distinguishable and the inquiry remains whether the reviewing court can find a "good faith" effort on the part of the state to produce the witnesses at trial.

[5] The majority relies exclusively on the "good faith" standard of *Barber,* and does not find an independent basis for their conclusion under Michigan law. *Michigan v Long,* 463 US 1032; 103 S Ct 3469; 77 L Ed 2d 1201 (1983).

> [t]he determination of due diligence is a matter for the trial court, and that determination will not be overturned on appeal unless a clear abuse of discretion is shown.

It is also clear, as defendant points out in his brief to this Court, that "[w]hat efforts will actually constitute due diligence cannot be set out in a hard and fast list, given the many variables possible in a given case."

The opinion for reversal characterizes the prosecutor's efforts as tardy and incomplete. This conclusion is based in part on the observation "that [the witnesses] had been difficult to locate for the first trial," and that during the two-month period *between the mistrial and setting of the trial date* "the prosecution made no effort to *relocate* [them] even though [he] knew [they] were needed, and they had expressed an intention to leave the state . . . ."

In point of fact, there is no record basis for the statement that the witnesses had been difficult to find for the first trial. The record does establish that the prosecution knew for over a year that Seidel resided in Mason City, Iowa, with his mother, that the prosecutor had actually had contact with Dawson "a number" of times between the first trial and the setting of the second trial, and that the prosecutor had addresses for all three that had presumably led to their production at the first trial. Thus there is no basis for the suggestion that the prosecutor had a reason to try to locate these witnesses during the two-month period prior to the setting of the trial date, much less a reason to *"relocate"* them before he knew when they would be needed for retrial.

Indeed, what the record suggests is that it was Seidel's failure to respond to messages left with his

mother at his known residence prior to July 7 and the prosecutor's learning on July 12 that Dawson's local number was disconnected, that triggered the suspicion that the witnesses might be difficult to locate. Thus, contrary to the suggestion that the two-month delay in prosecution efforts (from March 17 to May 13) is somehow related to the good-faith efforts of the prosecutor, the relevant inquiry is the prosecutor's efforts made during the period between the setting of the trial date and the date of trial. I can find no basis in this record for concluding that the trial judge abused his discretion in finding that these efforts were neither "tardy" nor "incomplete."

The majority's conclusion that the effort was "tardy" is further refuted by the fact that efforts to locate Seidel began within three weeks of the setting of a new trial date and more than two and one-half months before that date. Moreover, the conclusion that the efforts were "incomplete" misfocuses the constitutional test of whether evidence that otherwise satisfies the Confrontation Clause is admissible in a subsequent proceeding. The constitution does not require that the prosecutor undertake every conceivable " 'affirmative measure[ ];' [that] may well have produced the witnesses" in order to satisfy constitutional scrutiny. The Supreme Court has made clear that the "law does not require the doing of a futile act" when testing the diligence of the state's effort to secure a missing witness. *Ohio v Roberts,* 448 US 56, 74; 100 S Ct 2531; 65 L Ed 2d 597 (1980). The test is whether the proponent of the evidence made good-faith efforts to procure the testimony, not whether more stringent efforts would have produced it. *Barber v Page, supra.* "The lengths to which the prosecution must go to produce a witness . . . is a question of reasonableness." *California v Green,* 399 US 149,

189, n 22; 90 S Ct 1930; 26 L Ed 2d 489 (1970) (citing *Barber*).

Thus, we must view this case on its own merits to determine if the finding of "due diligence" by the trial court " 'evidences . . . not the exercise of judgment but defiance thereof . . . .' " *People v Talley,* 410 Mich 378, 387; 301 NW2d 809 (1981). On the facts of this case, we cannot so find.

The evidence of "due diligence" presented to the trial court details the prosecutor's efforts to produce Stever, Dawson, and Seidel. According to Sergeant Kuhnlein, who was in charge of the case, the attempt to locate Bruce Seidel began on June 2, 1983,[6] when an LEIN message was sent to a police officer in Mason City, Iowa, where Seidel was known to frequently stay with his mother and where he was living during the first trial. This officer went to the home and talked to Seidel's mother who told him that her son was working out of town, but that she would give him the message to call Sergeant Kuhnlein. After several unsuccessful attempts to reach Mrs. Seidel by phone, on June 22, 1983, another Detroit police officer completed a call to Mrs. Seidel at 3:00 A.M. She again informed the officer that her son was out of town working, but that she would tell Seidel

[6] Defendant claims that a finding of due diligence is precluded in this case because the prosecutor's office did not begin its efforts to locate the three witnesses in adequate time to assure their production at trial. The timing of the efforts is only one of the factors which should be considered in the totality of the circumstances of each case. It is conceivable, for example, that a search begun six months before trial, if nothing other than a cursory or pretextual investigation is done, could be inadequate, while a thorough search, commenced a few weeks before trial, could adequately evidence due diligence. In this instance the record indicates that the new trial date of August 22, 1983, was set on May 13, 1983, and the prosecution began efforts to reach Seidel, the only eyewitness, and therefore the most crucial witness for the state, on June 2, 1983. There is, moreover, no basis for the conclusion that it had clearly been established by July 7 that Seidel was missing. His mother's responses indicated only that he was working midnights out of town.

when he returned. When Seidel did not call, the prosecuting attorney in Mason City, Iowa, was called and a subpoena sent to enlist his help in locating the witness. On August 5, pursuant to the interstate witness act, MCL 767.91 *et seq.;* MSA 28.1023(191) *et seq.,* the Wayne County Prosecutor's Office sent a package containing the following information to the Mason City County Attorney's office: a certificate to secure the attendance of a witness from without the State of Michigan in a criminal proceeding, an affidavit for certificate, a certificate of the judge of the Recorder's Court, and a certificate of the clerk of the court for attendance. On August 11, an arrest warrant was issued for Seidel. His girlfriend and his mother were again contacted, as was a biker's establishment. A picture was sent on August 16. Follow-up calls were made to determine if the packets had been received and to check on the progress.

With regard to James Dawson, the assistant prosecutor testified that he had been in telephone contact with the witness until late June or early July. Dawson, in communication with the prosecutor's office because of reports that the defendant was being allowed out on bail between the first and second trials, had been informed of the trial date.[7] Sergeant Kuhnlein reported that on July 6, 1983, he contacted Dawson's mother who stated that she did not know where her son was. On July 12, 1983, the prosecutor attempted to call Dawson, but found that the telephone service had been disconnected. On August 1, 1983, Sergeant Kuhnlein went to Dawson's last known local address, but found that the home had been sold and that the new owner did not know of the witness' whereabouts. Sergeant Kuhnlein then contacted the post office and received a tentative new address in San

[7] Defendant was released on bond on June 17, 1983.

Bernadino County, California. On August 5, 1983, an out-of-state witness packet was mailed to the San Bernadino Prosecutor's Office, followed by a picture on August 16, 1983. In the meantime, follow-up calls determined that at least two attempts had been made to serve Dawson at the address, but the San Bernadino Prosecutor's Office had been informed that he was not there at that time. The assistant prosecutor indicated that he would appreciate any further investigation they could do and that any information obtained before August 26, 1983 (the trial was expected to last at least four days) should be passed on.

Sergeant Kuhnlein, in his attempt to locate Stever, first asked Dawson's mother for information and then attempted to serve a subpoena at his local address on August 1, 1983. A tenant who was living at the address informed him that the house was in foreclosure and he had no idea as to the whereabouts of Stephen Stever. The tenant did not pay rent to Stever, but had previously given it to someone who came by to pick it up. Attempts were made to find a forwarding address for Stever at the post office, but none was on file. On August 5, 1983, a packet of materials in conformity with the interstate witness act was sent to Overton County, Tennessee, where Stever was known to occasionally stay, although no street address was known. A picture was sent on August 16, 1983. Follow-up calls determined that the Overton County officials had been unable to locate Stever.

In addition to these efforts, Sergeant Kuhnlein checked all of the jails, morgues, and hospitals in Wayne, Oakland, and Macomb counties and contacted the Michigan Employment Security Commission and the Department of Social Services. The utility companies were also called for any forwarding addresses, but none were known.

The lead opinion suggests that the prosecution should have taken further efforts to secure the missing witnesses such as sending its own investigator out of state to seek them out, urging the out-of-state authorities to exert further efforts, or suggesting that locales frequented by bikers be checked. This observation ignores the fact that the test for admissibility under the Confrontation Clause is the good-faith effort of the prosecution, not whether extraordinary efforts might have been made.[8] Local police obviously have no authority to direct the efforts of the foreign jurisdiction in locating a missing witness, and local resources would just as obviously not permit sending local police out of state in every similar instance. It is clear that what *Barber v Page* requires is a good-faith effort to notify witnesses and secure their attendance, not an all-out manhunt. Thus, as the Court observed in finding compliance with the duty of good faith in *Ohio v Roberts, supra,* p 75 "[t]o be sure, the prosecutor might have tried to locate by telephone the San Francisco social worker . . . and might have undertaken other steps in an effort to find [the witness]. One, in hindsight, may always think of other things."

It is only in hindsight, and by the suggestion of "other things," that the majority concludes that the trial court abused its discretion in finding due diligence on the part of the prosecution.[9] It is

[8] It also ignores the fact that a biker's locale was checked in Mason City and that the prosecutor testified that he spoke with the state's attorneys in all three jurisdictions and asked them "to make whatever efforts they could."

[9] Justice LEVIN relies upon the decision of the Illinois Court of Appeals in *People v Payne,* 30 Ill App 3d 624; 332 NE2d 745 (1975), for the proposition that good faith was lacking in this instance. The basis of the Court's decision in *Payne* was:

> The responsibility for the conduct of the People's case rests with the State's Attorney, and not with the police. It is his duty

obvious in retrospect that the witnesses were avoiding appearance. The prosecutor attempted to locate Seidel, Stever, and Dawson through their known local addresses, and sent packets in conformity with the interstate witness act for all three witnesses to the only other locations at which the evidence indicated they might be found. Follow-up calls were also made to try and secure the coöperation of the out-of-state prosecutors. Under these circumstances, "due diligence" could reasonably be found in this case, and we would affirm the decision of the trial court in this regard.[10]

### III. PREARREST SILENCE

Defendant also contends that several questions regarding his prearrest conduct denied him his rights under the Fifth Amendment of the United States Constitution and article 1, § 17 of the Michi-

> to supervise and coördinate the efforts to locate the witness known to be missing. This record discloses an absence of any such supervision or coördination. [*Id.*, 628.]

The record in *Payne* indicated that the prosecutor had done nothing to assist in locating the missing witness and had left that task to the indiscriminate efforts of a single police officer.

Unlike the circumstances in the instant case, the prosecutor had made no effort to locate this witness, and it was this fact, the complete failure of the prosecutor to supervise and coördinate the search effort, which lead the Illinois Court of Appeals to conclude that "good faith" on the part of the state was lacking in that instance.

[10] Defendant asserts, without presentation of any factual evidence, that the assistant prosecutor should not be found to have exercised due diligence in this case because, "the prosecution had contributed to the absence of at least one or more of the witnesses." "[A]ppellant [may not] simply . . . announce a position or assert an error and then leave it up to the [appellate] Court to discover and rationalize the basis for [appellant's] claims . . . ." *Mitcham v Detroit,* 355 Mich 182, 203; 94 NW2d 388 (1959). In this regard, we also note that the appellee contends that it was the release of the defendant on bail pending the second trial which caused the witnesses to disappear. All three had previously expressed fear of defendant.

gan Constitution. Specifically, defendant contends that prosecutorial questioning of witnesses Richard Troher and Wilfred David concerning the fact that Mr. Dye had not told them anything about the incident, and testimony from witnesses Dawson, Stever, Seidel, and Troher that defendant had not accused someone else of the crime was an erroneous comment on defendant's silence.[11] Defendant also contends that testimony of Seidel, David, and Troher that defendant did not go with them to see an attorney and a statement by Troher that Mr. Dye did not go with them when he and David gave a statement to the police were improperly admitted.

To properly understand defendant's claim of error it is helpful to distinguish between prearrest and postarrest conduct. At both trials the defendant suggested that he had intended to contact the police prior to his arrest. He also testified on direct examination by his own counsel that after his arrest he had given a statement to the arson investigator that Stever and Dawson had committed the fire bombing. He added in response to a further question by his counsel in direct examina-

[11] After *People v Collier,* 426 Mich 23; 393 NW2d 346 (1986), it is apparently incorrect to phrase the alleged error as comment on silence. Rather, the inquiry is evidentiary and asks whether the evidence sought to be introduced is relevant, that is whether it makes "the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. See *Collier, supra,* p 36.

Thus, prearrest silence is not to be presumed an exercise of the Fifth Amendment. Where prearrest silence is relevant, as for example where a defendant has made an admission by adoption or manifestation of belief in the statements of others, MRE 801(d)(2)(B), admission of the evidence places no more burden on the defendant's decision to testify than does any other part of the prosecution's proofs. In this case, the defendant, having taken the stand in the first trial and testified concerning his pre- and postarrest conduct, waived any Fifth Amendment claim with regard to use of his prior testimony at the second trial. Absent a showing that prearrest silence constituted an exercise of his constitutional rights, the preliminary admissibility of this evidence is to be resolved at trial by use of the evidentiary rules adopted in *Collier.*

tion, that he had not made a post-arrest statement regarding the homicides on the advice of his attorney. Over counsel's objection, on cross-examination the defendant was asked why, if he was only a material witness in a homicide, he had given a statement accusing Stever and Dawson, but had declined to give a statement regarding the homicide. He indicated that on the advice of counsel he declined to discuss the events surrounding the homicide, but though his counsel had advised against it, he had decided to give the statement to the arson investigator.

Thus, analysis of defendant's argument must begin by identifying two discrete categories of claims, questioning by the prosecution regarding prearrest conduct and questions regarding postarrest silence which were initially brought out by defendant himself.

Error in the context of defendant's prearrest conduct could, under *People v Collier,* 426 Mich 23; 393 NW2d 346 (1986), only be predicated on the basis of relevancy. By contrast, error in the prosecutor's examination regarding postarrest silence, if any, would be predicated upon the rule of *Doyle v Ohio,* 426 US 610; 96 S Ct 2240; 49 L Ed 2d 91 (1976), where the Court held that use of postarrest, post-*Miranda* warning silence for impeachment was "fundamentally unfair and a deprivation of due process . . . ." *Id.* at 618.

A

As to defendant's postarrest silence, that line of questioning was initiated by defense counsel on direct examination of the defendant. As noted by the trial court and the Court of Appeals, once the defendant had testified regarding his decision to speak with the arson investigators, the door had been opened to further inquiry on cross-examina-

tion as to postarrest conduct inconsistent with defendant's other postarrest statement. *People v Gibson,* 71 Mich App 543, 547-548; 248 NW2d 613 (1976). Once defendant raises the issue of postarrest conduct during his direct testimony, he cannot then complain that the prosecutor's cross-examination on this subject was error. In such a context, the impeachment does not amount to use of the defendant's silence in violation of the implied promise of *Miranda* warnings because defendant has not remained silent, but has chosen to speak after having received the warnings. The impeaching inquiry is not an inquiry concerning silence, but an inquiry concerning a postarrest statement.[12]

B

The line of inquiry regarding the facts of defen-

[12] This point was illustrated by the United States Supreme Court in *Anderson v Charles,* 447 US 404; 100 S Ct 2180; 65 L Ed 2d 227 (1980). In that case the defendant was charged with first-degree murder after having been arrested while driving the decedent's automobile and possessing some of his clothes. After receiving *Miranda* warnings, the defendant told the police that he had stolen the car in Ann Arbor near Washtenaw and Hill Streets approximately two miles from the bus station. At trial he testified on direct examination that he had taken the car from the parking lot of the Kelly Tire Company which is next to the bus station and directly across the street from defendant's jail cell window. On cross-examination, the prosecutor asked defendant if he had in fact stolen the car from the Kelly Tire Company parking lot why did he not tell this story to the police at the time of his arrest.

The Court determined that the state's questioning of the defendant concerning this inconsistency did not amount to error under *Doyle v Ohio* because the alleged error was simply inquiry into a prior inconsistent statement. "Such questioning makes no unfair use of silence, because a defendant who voluntarily speaks after receiving *Miranda* warnings has not been induced to remain silent. As to the subject matter of his statements, the defendant has not remained silent at all." 447 US 408. Concluding that *Doyle* did not apply in that instance the Court stated that "[e]ach of two inconsistent descriptions of events may be said to involve 'silence' insofar as it omits facts included in the other version. But *Doyle* does not require any such formalistic understanding of 'silence,' and we find no reason to adopt such a view in this case." *Id.,* p 409. See also 3 Weinstein, Evidence, ¶ 607[06], p 607-98, n 28.

dant's prearrest conduct was initiated by the prosecution in its case in chief. However, testimony from Seidel, Dawson, and Stever concerning the fact that defendant had not accused someone else of the crime can neither be considered comment on defendant's prearrest silence nor irrelevant under the *Collier* analysis. While in the presence of Seidel, Dawson, and Stever, the defendant had admitted to the killings in response to a question by Dawson. In this context, a failure to deny guilt is not an inquiry concerning silence, but an inquiry concerning a prearrest statement. Properly characterized, the inquiry is understood as asking whether defendant had said anything inconsistent with his admission of guilt, see *United States v Samples,* 713 F2d 298 (CA 7, 1983).[13]

Likewise questions concerning defendant's failure to accompany Seidel, Dawson, Stever, Troher and David when they went to see the lawyer was not comment on his silence. Defendant testified at both trials that he had in fact been in contact with an attorney and that it was he who had set up a meeting between the attorney and the club membership:

> It was arranged between me and him [sic], he was going to set up a meeting between the homicide detectives in charge of the case and each and each [sic] and every club member to make a statement to the homicide detectives.

The thrust of defendant's testimony was that his

[13] We note that the federal courts hold that the defendant bears the burden of proving an intent to comment or, alternatively, that the jury would naturally so construe the prosecutor's inquiry or argument, *United States v Blankenship,* 746 F2d 233 (CA 5, 1984); *United States v Riola,* 694 F2d 670 (CA 11, 1983); *Spalla v Foltz,* 788 F2d 400 (CA 6, 1986). Nor can it be said that questions pertaining to defendant's failure to go to the hearing may be characterized as comment on defendant's silence.

failure to go with his attorney to the police was only due to the fact that he had been arrested before such a meeting took place. He further explained that he had maintained his silence in an effort to protect Dawson, Stever, Seidel and himself.

Significantly, no objection was made by defense to either line of inquiry, presumably because the only objection that could have been interposed was relevancy[14] and defense counsel anticipated that, as in the first trial, defendant's prearrest contact with the attorneys would be used affirmatively in his own defense to buttress his claims that he was attempting to protect his more culpable friends.

A review of the trial transcript covering the testimony of Dawson and Seidel clearly indicates that the defendant intended to use his prearrest conduct with the attorney to support his claim that he was not the shooter. Defense counsel did not object to questions put to Dawson, Seidel, and Stever. On cross-examination of Dawson and Seidel counsel questioned their knowledge of the defendant's independent contact with the lawyer on the day after the shootings.[15] This point had *not*

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[14] Having taken the stand in the first trial and testified to his prearrest contacts with the attorney, defendant had waived his Fifth Amendment privilege with regard to such testimony in the second trial. *Harrison v United States,* 392 US 219; 88 S Ct 2008; 20 L Ed 2d 1047 (1968).

[15] While Seidel indicated that he had no recollection of the defendant having visited the attorney with Stever on Sunday, Dawson, when questioned by defense counsel stated:

> *Q.* Okay. When you were at Mr. Dye's house for this corn roast, you recall a time when he made a phone call to an attorney?
>
> *A.* Yes.
>
> *Q.* You recall that same night he and Mr. Stever went to meet the attorney?
>
> *A.* Yes.
>
> *Q.* Okay. Well, now, I thought I understood your direct

been brought out on direct examination and clearly was an attempt to buttress defendant's theory before he took the stand to testify. Defense counsel having developed the theme that it was defendant who had initiated the contact with counsel, it would have been reasonable to expect that if defendant were merely an accessory to the crime, he would have come forward with his version of the incidents, as the others did. Thus, the prosecutor's inquiry to Troher as to whether defendant ever went down to the police station was a question asked to make "less probable," *Collier, supra,* the inference that the defense sought to draw, that prearrest conduct indicated his innocence of the homicides.

C

The opinion for reversal fails to distinguish between the relevancy issue presented by defen-

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testimony this morning to indicate that you had to keep pushing Mr. Dye, even into Monday night to call an attorney?

*A.* He went to the attorney's house to pick up some club property that had been taken from there.

*Q.* My point, sir, is you just now told us that he called the attorney on Sunday while you were there and he and Mr. Stever went to see the attorney, you were not present?

*A.* No, I wasn't.

*Q.* Okay. I am asking how you kind of reconciled that with your earlier testimony that as late as Monday night you were pushing him to call an attorney?

*A.* To go explain what had happened.

*Q.* But he had already seen the attorney?

*A.* But didn't explain what had happened, to my knowledge.

*Q.* You didn't know?

*A.* To my knowledge.

*Q.* So you really don't know whether that attorney was already working on it?

*A.* No, there is no way I could.

*Q.* Of course not. I am not blaming you for that, but I do think we ought to clear it up.

*A.* Yes.

dant's prearrest conduct and the constitutional question presented by defendant's postarrest silence. The opinion, thus legally and factually confuses the defendant's prearrest failure to accompany Dawson, Stever, and Seidel when they went with their attorneys to the police, with his postarrest refusal to give a statement regarding the homicide. It states:

> Dye on direct examination testified that he did not make a statement to the police because his attorney advised him not to do so. The prosecution asserts that because Dye offered this testimony, the prosecution could have subsequently offered impeaching testimony, and therefore—even if the prosecution improperly included the testimony in its case in chief—any error was harmless. [*Ante,* p 82.]

This statement is incorrect. The prosecution did not make any inquiry in its case in chief regarding Dye's prearrest failure to make a statement, Dye's failure to make a postarrest statement to the homicide investigator, or his postarrest statement to the arson investigators.

When Dye testified on direct examination that he had made a statement to the arson investigators, there may have been an incidental rebuttal effect to any negative inference from his failure to pursue his contact with his attorneys, but its principal purpose was clearly to establish that the firebombing committed by Dawson and Stever was the motivation for the homicides. If the reason for this offering was to rebut evidence that Dye had not gone with the others to make a statement, rebuttal could have been confined to the fact of making a postarrest statement. Instead, for sound strategic reasons, defendant Dye recited the details of his postarrest statement to the arson investiga-

tors, details that served not to explain his silence, but to accuse his accusers.

The defendant's explanation regarding his failure to make a statement concerning the homicides when asked by the arson investigator pertained solely to his postarrest conduct. The prosecutor did not allude to defendant's postarrest conduct at any point in his case in chief.[16] Defendant's failure to make a statement to the homicide investigator was brought out by defense counsel in anticipation of the fact that the prosecutor would, as he did, allude to it during cross-examination.

In sum, defendant's statement that he did not make a statement regarding the homicides was not offered to rebut testimony from Dawson, Stever, and Seidel concerning his prearrest conduct. It was elicited by defense counsel after defendant had testified that he gave a statement incriminating the others in the firebombing in an attempt by

[16] In fact the prosecutor does not argue that because Dye offered this testimony, the prosecution could subsequently have offered impeaching testimony and therefore, even if the prosecution improperly included the testimony in its direct case, because the prosecution could have held the testimony to impeach, any error was harmless.

Rather, the prosecution argues as to prearrest conduct that "the prosecutor did inquire of witness Troher if the defendant ever went down to the police station or if the defendant spoke with the witness about the incident [but that] it was the defense who elicited the fact that Dye did not make any statements to the police," appellee's brief, p 21.

Nor does the prosecutor argue that response to post-arrest silence by the prosecution could be justified as anticipatory impeachment. Rather the prosecution asserts that which the record establishes, viz.,

> that the prosecutor did not elicit any testimony concerning the defendant's post-arrest silence following the giving of *Miranda* rights and the invocation of the right to remain silent . . . . It was the defense who elicited the fact that the defendant was given *Miranda* warnings and that he asserted the right to remain silent upon the advice of counsel . . . the defendant elected to place such evidence before the jury by way of an explanation and cannot now complain if the results were miscalculated. [*Id.*, pp 20-21.]

his own counsel to explain omissions in his postarrest behavior in order to buttress the defendant's testimony that the others were guilty.

D

Finally, with regard to Troher and David, who were not present at the time of the shootings and possessed firsthand knowledge only concerning the murder weapon, defendant argues that questions of these two witnesses regarding whether defendant denied his guilt were irrelevant in that he possessed no duty to disclose to them his knowledge of the crimes, and, given his part in the coverup, it would not have been natural for him to do so. Silence in this instance, the defendant claims, is inherently ambiguous and of little probative value.

For the purpose of deciding the remaining claims of error concerning the testimony of David and Troher, we assume arguendo under *People v Collier, supra,* that the trial judge erred in permitting the prosecutor to question these witnesses concerning defendant's prearrest conduct. We note, however, that defendant did not object to the disputed testimony at trial. In the absence of a timely objection, the issue is deemed waived, and "appellate review is foreclosed unless our failure to consider the issue would result in a miscarriage of justice." *People v Duncan,* 402 Mich 1, 16; 260 NW2d 58 (1977); MCL 769.26; MSA 28.1096. After thorough review of the record, we cannot conclude that a miscarriage of justice would result in this instance.

In *People v Collier,* we held that *People v Bobo,* 390 Mich 355; 212 NW2d 190 (1973), was not applicable to impeachment by silence which occurred before any contact with police officers. We held that, consistent with the Supreme Court's ruling in *Jenkins v Anderson,* 447 US 231; 100 S

Ct 2124; 65 L Ed 2d 86 (1980),[17] the decision to admit prearrest silence is evidentiary, to be resolved by reference to its relevancy and in light of its probativeness as opposed to its potential for prejudice, MRE 403.[18] Assuming arguendo that defendant's failure to deny guilt was not relevant

[17] In *Jenkins,* the Court held that a defendant may be impeached with silence where the silence preceded the arrest and the *Miranda* warnings. The Court engaged in a two-step analysis, finding, first, no impermissible burden on a constitutional right, and, second, that the prearrest silence was probative.

The Court concluded that the Fifth Amendment was not burdened by such impeachment of a testifying defendant because the defendant had waived the privilege against self-incrimination by taking the stand. The Court also found that since no governmental action had induced the defendant to remain silent before arrest, the fundamental fairness guarantee of the Fourteenth Amendment was not violated. See also *Fletcher v Weir,* 455 US 603; 102 S Ct 1309; 71 L Ed 2d 490 (1982), and *Anderson v Charles,* 447 US 404; 100 S Ct 2180; 65 L Ed 2d 222 (1980) (due process not violated by impeachment with postarrest, pre-*Miranda* silence).

In this instance, we are not here confronted with a situation in which silence was offered against a nontestifying defendant. Defendant took the stand and waived his Fifth Amendment privilege with respect to the crime charged, anno: *Use in subsequent prosecution of self-incriminating testimony given without invoking privilege,* 5 ALR2d 1404. Once the defendant testified that he had initiated the contact with the attorney and that he would have been willing to make a statement, questions regarding his failure to go to the attorney or to the police would clearly have been permissible on cross-examination under *Jenkins. Jenkins* clearly established that the use of prearrest silence for impeachment purposes does not, in and of itself, violate the federal constitution. See, generally, 1 LaFave & Israel, Criminal Procedure, § 9.6(a), pp 774-775.

As the Court observed in *Fletcher v Weir, supra,* 455 US 604, n 1:

> During cross-examination, the prosecutor also questioned respondent concerning his failure *prior to his arrest* to report the incident to the police and offer his exculpatory story. Relying on our decision in *Jenkins v Anderson* [*supra*], the Court of Appeals correctly held that there was no constitutional impropriety in the prosecutor's use of respondent's prearrest silence for impeachment purposes. [Emphasis in original.]

[18] Our decision in *Collier,* however, dealt only with the use of prearrest silence for impeachment; it was not extended to cover substantive use of such evidence.

evidence, we nevertheless conclude that two references to this fact did not result in a miscarriage of justice. We note that the defendant's silence was consistent with the defense theory of a conspiracy to withhold information from the police. We also note that an eyewitness testified regarding defendant's commission of the murders, that two other witnesses testified that defendant had admitted the killings, and that these comments constituted only two brief references in the course of a trial stretching nearly two weeks and filling over 1300 pages of recorded transcript.[19]

Finally, the lead opinion has concluded that defendant is entitled to a new trial. On retrial, regardless of whether defendant states in limine his intention to testify, two points should be noted. First, as to the retrial the defendant has not yet waived his Fifth Amendment right to remain silent. However, with regard to his prior testimony, having voluntarily chosen to testify at the former trial defendant has waived his Fifth Amendment rights as to such proceeding and objection to use of his former testimony will not lie on that ground.[20]

## CONCLUSION

We would hold that, on the facts of this case, the trial court did not abuse its discretion in finding due diligence in the prosecution's efforts to locate the missing witnesses. We would further hold that

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[19] Nor can we consider defense counsel's failure to object to this line of questioning tantamount to ineffectiveness of counsel given that the first trial ended with a hung jury. We are convinced that sufficient evidence of record exists apart from the alleged "errors" to support the finding of defendant's guilt beyond a reasonable doubt.

[20] See anno: *Use in subsequent prosecution of self-incriminating testimony given without invoking privilege,* 5 ALR2d 1404. See also *Harrison v United States,* 392 US 219; 88 S Ct 2008; 20 L Ed 2d 1047 (1968).

the evidentiary errors alleged by the defendant did not result in a miscarriage of justice. The decision of the Court of Appeals should be affirmed.

RILEY, C.J., and GRIFFIN, J., concurred with BOYLE, J.

## HAGEN v DEPARTMENT OF EDUCATION
## (BEDFORD PUBLIC SCHOOLS v DEPARTMENT OF EDUCATION)

Docket Nos. 79524, 79525. Argued December 8, 1987 (Calendar No. 1). Decided August 23, 1988.

George L. Hagen, as superintendent of the Bedford Public Schools, requested a copy of a certain State Tenure Commission decision under the Michigan Freedom of Information Act for the purpose of determining whether the commission's decision would affect a separate matter pending before the commission involving the Bedford Schools. The request was denied by the Superintendent of Public Instruction on the ground that, because the teacher in the case had requested a private rather than a public hearing, the decision rendered following the private hearing was part of the hearing and did not have to be released until the teacher exhausted all appeals. Thereafter, the district requested unredacted copies of all tenure commission decisions issued during the previous year in which a closed hearing had been demanded, but expressly stated that copies with identifying information deleted would be satisfactory. Unredacted copies of three decisions in which appeals were exhausted were released; however, in eight cases in which appeals were not exhausted, the request was denied. The district then brought an action for declaratory judgment and a writ of mandamus in the Ingham Circuit Court, seeking release of unredacted copies of the decisions. The Michigan Education Association was permitted to intervene as a plaintiff. The court, Carolyn Stell, J., granted summary judgment for the plaintiffs and ordered the release of complete and unexpurgated copies of the requested documents. The Court of Appeals, BRENNAN, P.J., and BEASLEY and J. NOECKER, JJ., reversed (Docket Nos. 80887, 81024). The plaintiffs appeal.

In an opinion by Justice CAVANAGH, joined by Chief Justice

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REFERENCES

Am Jur 2d, Schools § 204.

What constitutes personal matters exempt from disclosure by invasion of privacy exemption under state freedom of information act. 26 ALR4th 666.

Sufficiency of teacher's request for hearing, under statute requiring hearing on request before discharge. 89 ALR2d 1018.

RILEY and Justices ARCHER and GRIFFIN, the Supreme Court *held:*

Decisions of the State Tenure Commission in cases in which a teacher requests a private hearing as provided under the teacher tenure act are exempt from disclosure under the Michigan Freedom of Information Act only during the administrative stage of the teacher's appeal; once a final decision has been rendered and the appeal period of the Administrative Procedures Act has run, the FOIA provides no basis for withholding a decision, and a request for disclosure must be honored.

1. The Michigan Freedom of Information Act requires a public body to disclose all public records which are not specifically exempt from disclosure under the act. The policy underlying the act is full and complete disclosure. There is a presumption of disclosability, and exemptions are narrowly construed. The State Tenure Commission, as part of the Department of Education, is a public body subject to the disclosure requirements of the act, and its written decisions are public records as defined by the act. In this case, the plaintiffs' requests were denied on the basis of the exception to disclosure in § 13(1)(d) for public records specifically exempted by another statute, viz., article IV, § 4 of the teacher tenure act, which permits a teacher facing discharge or demotion to choose a private hearing and review.

2. The spirit of the teacher tenure act to provide teachers with private hearings can only be maintained by also keeping decisions rendered following hearings private. Thus, when a private hearing has been requested, the decisions of the local board and the tenure commission are statutorily exempt from disclosure under the FOIA. However, nondisclosure is permitted only to the extent a private hearing is provided by statute. Under the teacher tenure act, a private hearing is provided only before the local board of education and the State Tenure Commission, i.e., at the administrative level. Once a final decision has been rendered and the appeal period of the Administrative Procedures Act has run, there is no basis under the FOIA for withholding a decision of the commission, and a subsequent request for disclosure of any commission decision must be honored. The requirement of disclosure applies to any decision of the tenure commission regardless of whether the teacher further seeks judicial review.

Reversed.

Justice BOYLE, joined by Justices LEVIN and BRICKLEY, concurring in part and dissenting in part, agreed that the teacher tenure act does not exempt from disclosure tenure commission

decisions that are judicially reviewed and that the purpose of the tenure act may only be achieved by keeping the decisions of the tenure commission and the hearings before it private. A decision of the tenure commission is only one aspect of the hearing procedure. The statutory right of tenured teachers to elect a private hearing is essential to the fulfillment of the broader objectives of the tenure act. The release of tenure decisions by the commission is inconsistent with both this right and the broader objectives of the act. Properly read, § 4 of the tenure act exempts from disclosure decisions of the tenure commission. In addition, the decisions of the commission need not be disclosed under the Michigan Freedom of Information Act or § 104 of the Administrative Procedures Act. Nothing in § 104 suggests that tenure proceedings automatically move beyond the administrative level at the expiration of the appeal period; rather, it suggests that movement beyond the administrative stage of proceedings is foreclosed upon expiration of the appeal period. Once proceedings have moved beyond the administrative stage, responsibility for the record shifts to the circuit court, and the FOIA is inapplicable.

154 Mich App 662; 398 NW2d 485 (1986) reversed.

SCHOOLS — FREEDOM OF INFORMATION ACT — STATE TENURE COMMISSION DECISIONS — EXEMPTIONS FROM DISCLOSURE.

Decisions of the State Tenure Commission in cases in which a teacher requests a private hearing as provided under the teacher tenure act are exempt from disclosure under the Michigan Freedom of Information Act only during the administrative stage of the teacher's appeal; once a final decision has been rendered and the appeal period of the Administrative Procedures Act has run, the FOIA provides no basis for withholding a decision, and a request for disclosure must be honored (MCL 15.243[1][d], 38.104, 38.121; MSA 4.1801[13][1][d], 15.2004, 15.2021).

*Thrun, Maatsch & Nordberg, P.C.* (by *Thomas J. Nordberg* and *Kenneth Harned*), for the plaintiffs.

*Foster, Swift, Collins & Coey, P.C.* (by *Lynwood E. Beekman* and *Kathryn A. VanDagens*), for the intervening plaintiff.

*Frank J. Kelley,* Attorney General, *Louis J. Caruso,* Solicitor General, and *Gerald F. Young*

and *Frank J. Monticello,* Assistant Attorneys General, for the defendants.

CAVANAGH, J. The sole issue presented here is the extent to which the Michigan Department of Education may suppress decisions of the State Tenure Commission under exemption (1)(d) of § 13 of the Michigan Freedom of Information Act. MCL 15.243(1)(d); MSA 4.1801(13)(1)(d). We hold that tenure commission decisions may only be withheld during the administrative stage of a teacher's appeal. After this point in the review process, the commission decisions may be released in their entirety. We reverse the decision of the Court of Appeals and reinstate the circuit court order requiring defendants to release the requested decisions to plaintiffs.

I

On November 3, 1982, plaintiff George Hagen, superintendent of the Bedford School District, on behalf of plaintiffs Bedford Public Schools and Bedford Board of Education, made a Michigan Freedom of Information Act request to the director of the State Tenure Commission for a copy of a certain commission decision. Plaintiffs had a matter pending before the tenure commission, and they wanted to determine if the commission had rendered a decision which would affect it. Mr. Hagen did not indicate in his request whether a redacted version of the decision would be satisfactory. Defendant Phillip Runkel, Superintendent of Public Instruction, denied the request, reasoning that the teacher in the case had opted for a private hearing, that the commission decision was part of the private hearing, and that it did not have to be released until the teacher exhausted the appellate process.

Plaintiffs made a subsequent FOIA request on December 6, 1982, for copies of all tenure commission decisions issued in the previous year in which a closed hearing had been demanded. Counsel for the plaintiffs expressly stated in the request that if the commission was not going to release unredacted copies of the decisions, it would be satisfactory if identifiable information were struck from them. Runkel responded that in the previous twelve months the commission had issued eleven decisions in which a private hearing had been requested. He released three of those decisions in their entirety because the appellate processes had already been exhausted. Runkel denied plaintiffs' request as to the remaining eight commission decisions because the appellate processes had not been exhausted.

Plaintiffs filed a complaint for declaratory judgment and writ of mandamus in the circuit court, naming Runkel, the Michigan Department of Education, and the State Board of Education as defendants. Plaintiffs sought release of the requested decisions either in their complete form, or with personally identifiable information deleted. Intervening plaintiff Michigan Education Association joined the litigation at that point.

On September 24, 1984, the circuit court granted plaintiffs' motion for summary judgment, and ordered defendants to release complete and unexpurgated copies of the documents sought by plaintiffs. The circuit court also granted a stay of its order pending defendants' appeal, directing defendants to provide plaintiffs with copies of the requested decisions with proper nouns stricken.

The Court of Appeals reversed the decision of the circuit court, using reasoning similar to defendant Runkel's. 154 Mich App 662; 398 NW2d 485

(1986). We granted leave to appeal, limited to the issue stated above. 428 Mich 909 (1987).

II

Plaintiffs made their requests for the tenure commission decisions pursuant to the Michigan Freedom of Information Act. MCL 15.231 *et seq.;* MSA 4.1801(1) *et seq.* The requests must therefore be granted or denied pursuant to that statute. The FOIA requires a public body to disclose all public records which are not specifically exempt from disclosure under the act:

> Upon an oral or written request which describes the public record sufficiently to enable the public body to find the public record, a person has a right to inspect, copy, or receive copies of a public record of a public body, except as otherwise expressly provided by section 13. [MCL 15.233(1); MSA 4.1801(3)(1).]

This Court has consistently recognized that the thrust of the FOIA is a policy of full and complete disclosure, as expressed in the act's statement of public policy:

> It is the public policy of this state that all persons are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and public employees, consistent with this act. The people shall be informed so that they may fully participate in the democratic process. [MCL 15.231(2); MSA 4.1801(1)(2).]

See, e.g., *Kestenbaum v Michigan State Univ,* 414 Mich 510, 521; 327 NW2d 783 (1982), reh den 417 Mich 1103 (1983); *State Employees Ass'n v Dep't of Management & Budget,* 428 Mich 104, 109; 404 NW2d 606 (1987).

The FOIA "presumes records are disclosable,"[1] and a public body may deny a request only upon a showing that the requested information falls within one of the exemptions in § 13 of the act. The exemptions must be narrowly construed. *State Employees Ass'n, supra,* p 110.

The State Tenure Commission, as part of the Michigan Department of Education, is a public body subject to the disclosure requirements of the FOIA. MCL 15.232(b)(i); MSA 4.1801(2)(b)(i). The tenure act itself acknowledges that the tenure commission is bound by the requirements of the FOIA:

> A writing prepared, owned, used in the possession of, or retained by the commission in the performance of an official function shall be made available to the public in compliance with Act No. 442 of the Public Acts of 1976, being sections 15.231 to 15.246 of the Michigan Compiled Laws. [MCL 38.139(2); MSA 15.2039(2).]

Further, there is no dispute that the tenure commission's written decisions are public records as defined in the FOIA. MCL 15.232(c); MSA 4.1801(2)(c).

Defendant Runkel denied both of plaintiffs' requests on the basis of exception (1)(d) of § 13 of the FOIA, which allows nondisclosure of public records which another statute specifically exempts from disclosure.[2]

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[1] *UPGWA v Dep't of State Police,* 422 Mich 432, 441; 373 NW2d 713 (1985) (opinion by LEVIN, J.).

[2] In his denial of plaintiffs' first request, defendant Runkel also mentioned the privacy exemption of the FOIA as a basis for nondisclosure. MCL 15.243(1)(a); MSA 4.1801(13)(1)(a). Defendants abandoned this defense in circuit court, and the Court of Appeals based its decision solely on exemption (1)(d) without discussing the privacy exemption.

> A public body may exempt from disclosure as a public record under this act:
>
> * * *
>
> (d) Records or information specifically described and exempted from disclosure by statute. [MCL 15.243(1)(d); MSA 4.1801(13)(1)(d).]

The statute which Runkel claimed exempted the tenure commission decisions from disclosure is art IV, § 4 of the teacher tenure act, which permits a teacher facing discharge or demotion to opt for a private, rather than a public, hearing before the local board of education. The relevant portions of § 4 provide:

> a. The hearing shall be public or private at the option of the teacher affected.
>
> * * *
>
> f. Any hearing held for the dismissal or demotion of a teacher, as provided in this act, must be concluded by a decision in writing, within 15 days after the termination of the hearing. A copy of such decision shall be furnished the teacher affected within 5 days after the decision is rendered. [MCL 38.104; MSA 15.2004.]

Article IV, § 4, while referring to a local school board's initial review, also applies to a subsequent review by the State Tenure Commission, pursuant to art VI, § 1 of the tenure act. MCL 38.121; MSA 15.2021.

Defendants and the Court of Appeals interpreted "hearing" as used in § 4(f) as encompassing the written decision, because the hearing must be "concluded by" the decision. According to that interpretation, a decision rendered following a private hearing is part of that hearing and is also private, pursuant to art IV, § 4 of the tenure act. That provision, in turn, qualifies it as a statutory

exemption from disclosure for purposes of the FOIA. The Court of Appeals thus held:

> If article IV, § 4, of the tenure act is to be interpreted as including within the meaning of the word "hearing" the rendering of a decision with the right to a private hearing, then the decision as a whole, and not just the personal identifying information in the decision, must be found to be exempt from disclosure. Consequently, no part of the decision of the commission, where a private hearing has been requested and the appellate process has not yet been exhausted, is subject to disclosure under the FOIA. [154 Mich App 673.]

Plaintiffs contend that the defendants and the Court of Appeals have misconstrued the plain meaning of art IV, § 4. Plaintiffs assert that while a hearing before the tenure commission may be private, the decision rendered after a private hearing is not part of it, and hence is not exempt from disclosure under the FOIA.

We find it unnecessary to answer the narrow question whether, in art IV, § 4(f), the Legislature intended to incorporate "decision" within the term "hearing." The correct reading of § 4(f) is not dispositive of the present issue. Rather, the spirit of art IV, § 4, to provide teachers with the option of a private hearing, can only be maintained by keeping the decisions private also. Thus, on the basis of art IV, § 4, when a private hearing has been requested, the decisions of the local board and the tenure commission are exempt from disclosure under the statutory exemption in the FOIA.

Such exemption, however, allows nondisclosure only to the extent that a private hearing is statutorily provided for. Under art IV, § 4 of the tenure act, a teacher is entitled to a private hearing only

before the local board of education and, pursuant to art VI, § 1, before the State Tenure Commission. There is no assertion, for example, that a teacher who exercises the right to circuit court review of a commission decision[3] has a statutory right to a closed proceeding at the circuit court level. Nor is there a suggestion that such a right exists if further review is granted by the Court of Appeals or this Court. The statutory right to a private hearing in tenure proceedings exists only at the administrative level. Therefore, beyond this phase of the review process, there is no basis under the statutory exemption in the FOIA for withholding a tenure commission decision, and a request for disclosure of a decision must be honored.[4] This holding applies to any commission decision, regardless of whether the teacher seeks judicial review of the commission ruling. Further, absent an exception to justify nondisclosure, the commission decisions are subject to "full and complete" disclosure under the FOIA. Hence, the circuit court in the present case properly ordered the release of unexpurgated copies of the decisions.

Finally, defendants' reliance on the FOIA to support the withholding of tenure commission decisions which are under judicial review is improper. The FOIA excludes the judiciary from the act's definition of a "public body." MCL 15.232(b)(v); MSA 4.1801(2)(b)(v).

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[3] *Nestell v Bridgeport-Spaulding Bd of Ed*, 138 Mich App 401, 404; 360 NW2d 200 (1984), clarified that judicial review of a tenure commission decision is properly sought under MCL 24.302; MSA 3.560(202), since the teacher tenure act does not specifically provide for judicial review.

[4] Specifically, a tenure commission decision following a private hearing is subject to disclosure after the expiration of the sixty-day limit established for filing a motion for rehearing before the commission. 1979 AC, R 38.158. Of course, if rehearing is granted, the administrative process is not complete and the decision is not yet subject to disclosure.

III

Defendant Runkel and the Court of Appeals relied on *Royal Oak School Dist v Schulman,* 68 Mich App 589; 243 NW2d 673 (1976), in finding that tenure commission decisions following a private hearing must be withheld throughout the administrative and judicial appeal process. In *Schulman,* the appellant tenured teacher, facing charges of unsatisfactory performance, exercised his right under the teacher tenure act and requested a private hearing before the appellee's school board. After the hearing, the board issued a decision dismissing the teacher. He appealed to the State Tenure Commission, alleging that the board erroneously failed to render its decision at a public meeting, as required under § 561 of the School Code of 1955, MCL 340.561; MSA 15.3561.[5] The tenure commission agreed that the decision did not satisfy the public notice requirements, but the circuit court reversed, finding that once the teacher elected a private hearing, that hearing encompassed the decision also, and it did not have to be rendered publicly. The Court of Appeals affirmed:

> We hold that where a teacher elects a private hearing the board of education's decision to dismiss or demote may be kept private until the teacher has exhausted the appellate processes. [68 Mich App 593.]

We find *Schulman*'s novel interpretation of art IV, § 4 unpersuasive for the reasons discussed in

[5] The School Code of 1955 has been replaced by the School Code of 1976, which contains a parallel "public meetings" section. MCL 380.1201; MSA 15.41201. Likewise, the public board meetings act, MCL 15.251 *et seq.;* MSA 4.1800(1) *et seq.,* which governed the boards' notice requirements for such meetings, was replaced in 1977 by the Open Meetings Act. MCL 15.261 *et seq.;* MSA 4.1800(11) *et seq.*

section II. In addition, there are several differences between *Schulman* and the present case which undermine *Schulman*'s relevance.

The *Schulman* plaintiff alleged error under the public board meetings act (repealed and replaced by the Open Meetings Act). Plaintiffs here allege error under the FOIA. The motive behind each plaintiff's case is different. Plaintiffs in the present case sought copies of decisions of the Teacher Tenure Commission. The plaintiff in *Schulman* was not concerned with obtaining a decision, but instead wanted to somehow attack the decision rendered. He did so by claiming it should have been released at a public meeting. Thus, the focus of the Court of Appeals analysis in each case was different.[6]

Significantly, *Schulman* predates the April, 1977, effective date of Michigan's FOIA. After the FOIA was enacted, the teacher tenure act was amended to include MCL 38.139(2); MSA 15.2039(2), which states that the tenure commission is subject to the disclosure requirements of the FOIA. It is unlikely the *Schulman* panel would have reached the same result in light of the FOIA, and the tenure act's statutory acknowledgment of it.

Other than the present Court of Appeals opinion, *Schulman* is the only Michigan case which deals with the present issue. An Attorney General opinion also addressed a similar question, however. In 1 OAG, 1959-1960, No 3296, p 177 (September 1,

[6] In fact, the *Schulman* Court may have used the wrong analysis in addressing the plaintiff's claim. The Court accepted the plaintiff's premise that the decision, which is required to be in writing, would normally have to be rendered at a public meeting. Since the plaintiff had opted for a private hearing, however, the Court deemed the requirement inapplicable. Instead, the logical approach would seem to have been to hold that the requirement of an open meeting does not apply to the release of a written decision, whether the teacher chose a public or private hearing.

1959), the Attorney General framed the issue as follows:

> When a teacher requests a private hearing under the Tenure of Teachers Act, what matters, if any, of the proceedings taken before either the school board or tenure commission can be revealed as public information?

The statement of the issue readily indicates that the case only involved part of the present issue: the extent of privacy at the administrative level, i.e., before the local school board and the tenure commission. The case did not pose the additional question presented here: whether the tenure commission decision in a private hearing remains confidential in the judicial stage of the appeal process.

The Attorney General's resolution of the more narrow question it addressed does not contradict the present holding:

> [I]t is clear that the legislature itself has continued the protection through the appeal process to include the hearing before the tenure commission, at the election of the teacher. It follows that if the teacher elects to have a private hearing on appeal, both procedures are in that event protected by the statute.
>
> Summing up, then, a private hearing remains private throughout the hearing and decision process, until a final decision is reached. The text of the decision becomes public when the decision becomes final, and no appeal lies. [*Id.*, pp 178-179.]

When read in isolation, the last sentence of the above quotation seems to support defendants' argument that the decision should remain confidential

throughout the judicial review process also. However, considered in the context of the entire quotation and the analysis which precedes it, it is clear that the Attorney General was not even addressing that broader question. When he referred to the "final decision," he was referring to the decision of the tenure commission, which he had previously discussed.

We reverse the decision of the Court of Appeals and reinstate the circuit court order granting summary judgment for plaintiffs. The order's requirement that defendants fully disclose the requested decisions is limited, for the reasons previously stated, to those final decisions of the tenure commission in which the appeal period of the Administrative Procedures Act has run.

RILEY, C.J., and ARCHER and GRIFFIN, JJ., concurred with CAVANAGH, J.

BOYLE, J. (*concurring in part and dissenting in part*). I agree with the majority's conclusion that art IV, § 4 of the teacher tenure act, MCL 38.104(a); MSA 15.2004(a), does not exempt from disclosure tenure commission decisions that are judicially reviewed.[1] I also agree that the purpose of art IV, § 4 may only be achieved by keeping the decisions of the Teacher Tenure Commission, as well as the hearings before the commission, private. Indeed, my reading of art IV, § 4 of the teacher tenure act indicates that the decision of

[1] Under § 104 of the Administrative Procedures Act, MCL 24.304(2); MSA 3.560(204)(2), the agency must transmit to the reviewing court the original or certified copy of the entire record. We are not apprised of the practice of the tenure commission in retaining the original, a copy, or any record of its proceedings in addition to the record transmitted to the circuit court. Presumably, since the agency does not argue otherwise, their record-keeping procedures are not a basis for withholding disclosure.

the commission is but one aspect of the hearing procedure.[2]

The statutory right of tenured teachers to elect a private hearing is essential to the fulfillment of the broader objectives of the tenure act. As we have noted in the past:

> [T]he primary purposes of the teacher tenure act are to maintain an adequate and competent teaching staff, free from political and personal interference, *Detroit Bd of Ed v Parks,* 417 Mich 268; 335 NW2d 641 (1983), and to protect teachers from arbitrary and capricious employment practices of school boards. See *Davis v Harrison Bd of Ed,* 126 Mich App 89; 342 NW2d 528 (1983). [*Tomiak v Hamtramck School Dist,* 426 Mich 678, 686-687; 397 NW2d 770 (1986).]

The tenure act achieves these objectives, in part, by removing from the political arena what is essentially and properly a personnel matter.

Our primary objective in construing statutory requirements is to discover and give effect to the legislative intent. *Williams v Hofley Mfg Co,* 430 Mich 603, 612; 424 NW2d 278 (1988); *State Treasurer v Wilson,* 423 Mich 138, 143; 377 NW2d 703 (1985); *Hiltz v Phil's Quality Market,* 417 Mich 335, 343; 337 NW2d 237 (1983). The release of tenure decisions by the commission is inconsistent

[2] MCL 38.104(f); MSA 15.2004(f) provides in part:

> Any hearing held for the dismissal or demotion of a teacher, as provided in this act, must be concluded by a decision in writing, within 15 days after the termination of the hearing.

While the third clause of this sentence suggests some ambiguity as to whether the decision is included within the word "hearing," any apparent ambiguity is resolved with an understanding that "paper hearings" are allowed under the Administrative Procedures Act, 1970 PA 40. See MCL 24.275; MSA 3.560(175). In its broad sense, the word would embrace adversary, ex parte, or paper hearings. See Black's Law Dictionary (5th ed), p 649.

with both the clear, statutory right of teachers to private tenure hearings and the broader objectives of the tenure act itself. No discernible purpose could be served by granting teachers the right to a private hearing, while requiring the commission to release evidence and rulings derived from the same hearings. Thus, in my view, § 4 of the tenure act, MCL 38.104; MSA 15.2004, is properly read as exempting the disclosure of the decisions of the tenure commission. These decisions need not be disclosed under § 13(1)(d) of the Michigan Freedom of Information Act, MCL 15.243(1)(d); MSA 4.1801(13)(1)(d).

I do not join that portion of the majority opinion which appears to hold that the FOIA requires disclosure of these decisions after the expiration of the appeal period from the agency decision under § 104 of the Administrative Procedures Act. MCL 24.304(1); MSA 3.560(204)(1). Nothing in § 104 of the APA suggests that tenure proceedings automatically move beyond the administrative level at the expiration of the appeal period. Indeed, my reading of § 104 of the APA suggests that movement beyond the administrative stage of proceedings is *foreclosed* upon expiration of the appeal period. Moreover, as the majority observes, once proceedings *have* moved beyond the administrative stage, responsibility for the record shifts to the circuit court and the FOIA is inapplicable. See MCL 15.232(b)(v); MSA 4.1801(2)(b)(v). See also MCR 8.116(D). I would, therefore, be inclined to question the Teacher Tenure Commission's practice of releasing copies of unappealed matters upon expiration of the appeal period from the final agency decision.

However, we need not reach this issue on these facts. No actual controversy exists between these parties regarding the release of final decisions of

the Teacher Tenure Commission that have not been appealed. See MCR 2.605(A)(1) and 3 Martin, Dean & Webster, Michigan Court Rules Practice (3d ed), Rule 2.605, comment 3, pp 423-425. As previously noted, it has been the practice of the commission to release its final decisions at the expiration of the sixty-day period when no appeal from the agency decision has been perfected. Neither the plaintiffs nor the intervening plaintiff have challenged this practice of the tenure commission, and no party has moved for, or in opposition to, the suppression of a circuit court record.

LEVIN and BRICKLEY, JJ., concurred with BOYLE, J.

## UNION CARBIDE CORPORATION v PUBLIC SERVICE COMMISSION

Docket Nos. 79148, 79150. Argued March 8, 1988 (Calendar No. 1). Decided August 23, 1988. Rehearing denied *post,* 1207.

In July, 1981, Consumers Power Company applied to the Public Service Commission to increase its electric rates and moved for partial and immediate interim rate relief. In its notice of hearing, the commission indicated that it had commenced an investigation on its own of the reasonableness and adequacy of Consumers' existing rates. Prior to hearings on Consumers' interim motion, the commission staff moved for an expedited partial final order to prevent Consumers from continuing to operate its Karn No. 3 and No. 4 oil-fired generating units out of economic order, i.e., operating units which are more expensive to run when a unit that can be operated at a more reasonable cost is available. The commission staff calculated that because of such operation, Consumers had overcharged ratepayers, and recommended the disallowance of expenses incurred by Consumers as a result of noneconomic operation and an order requiring Consumers to cease the noneconomic operation of the units. It additionally recommended that Consumers be ordered to attempt to terminate or renegotiate fuel oil contracts with Union Carbide Corp. A hearing referee denied the staff's motion. Thereafter the commission issued a partial final order granting Consumers' motion for interim relief, requiring Consumers to cease operation of its Karn No. 3 and No. 4 units out of economic order and to cease taking fuel deliveries from Union Carbide in excess of the amounts required for economic operation of the units, and disallowing fuel expenses incurred while operating the units out of economic order.

Union Carbide, which was not a party before the commission, then brought an action in the Ingham Circuit Court against the Public Service Commission, seeking a stay and vacation of the commission's partial final order, arguing that the commission

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REFERENCES

Am Jur 2d, Public Utilities § 240.

See the Index to Annotations under Utilities.

exceeded its statutory authority in issuing the partial final order. Consumers intervened as party plaintiff. The court, Carolyn Stell, J., granted summary judgment for Union Carbide, holding that the commission had shown no statutory basis for its order and that its order was an unauthorized interference with Consumers' management. The Court of Appeals, BEASLEY, P.J., and HOLBROOK, JR., and L. F. SIMMONS, JJ., reversed in an opinion per curiam, concluding that the commission had acted within its authority (Docket No. 84639). The plaintiffs appeal.

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

The Public Service Commission exceeded its statutory authority by ordering Consumers Power Company to stop operating its Karn units out of economic order and to limit its acceptance of oil deliveries from Union Carbide to those required for economic operation.

1. The Public Service Commission, among other powers granted by statute, has the power generally to regulate public utilities, including utility rates and charges. The power to fix and regulate rates, however, does not carry with it, explicitly or implicitly, the power to make management decisions.

2. In this case, the commission acted within its powers in preventing Consumers from passing on to ratepayers additional fuel expenses incurred in operating the Karn units out of economic order. However, in ordering Consumers to stop operating the units out of economic order and to limit acceptance of oil deliveries from Union Carbide, the commission exceeded its ratemaking authority. None of the statutory provisions offered by the commission supports its argument that it possessed such authority. The provisions cited either do not apply to the facts of the case or do not confer the power to make management decisions with the same degree of specificity that the Legislature used in conferring upon the commission the authority to set utility rates.

Reversed.

153 Mich App 217; 395 NW2d 292 (1986) reversed.

PUBLIC UTILITIES — PUBLIC SERVICE COMMISSION — JURISDICTION.

The Public Service Commission is vested with the power to regulate public utilities, including utility rates and charges; the power to fix just and reasonable rates, however, does not carry with it, explicitly or implicitly, the power to make management decisions (MCL 460.6[1]; MSA 22.13[6][1]).

*Bodman, Longley & Dahling* (by *Theodore*

*Souris, James A. Smith,* and *Kim Michael Lavalle*) and *Joseph E. Geoghan,* General Counsel, and *Robert L. Crawford,* Division Attorney, for the plaintiff.

*Loomis, Ewert, Ederer, Parsley, Davis & Gotting* (by *George W. Loomis, William D. Parsley,* and *Michael G. Oliva*) and *S. Kinnie Smith, David A. Mikelonis,* and *Allen B. Bass* for the intervening plaintiff-appellant.

*Frank J. Kelley,* Attorney General, *Louis J. Caruso,* Solicitor General, and *Don L. Keskey,* Assistant Attorney General, for the defendant.

Amici Curiae:

*Solomon Bienenfeld* and *A. Robert Pierce, Jr.,* for The Detroit Edison Company.

*Foster, Swift, Collins & Coey, P.C.* (by *David W. McKeague, Glen A. Schmiege,* and *Matthew F. Pausch*), for Michigan Oil and Gas Association.

*Robert G. Teeter* for Shell Western E & P, Inc.

*John P. Boerschig* for Amoco Production Company.

*George D. Bennett* for Union Oil Company of California.

BRICKLEY, J. This case presents two questions. First, did the Public Service Commission exceed its statutory authority in ordering Consumers Power Company to cease noneconomic operation of its Karn oil-fired generating plants and to limit acceptance of oil deliveries under its contract with Union Carbide? Second, did the commission's order

impair the contractual obligation of Union Carbide to provide oil to Consumers Power?

We hold that, in this case, the commission exceeded its statutory authority by ordering Consumers Power to stop operating its Karn units out of economic order and to limit its acceptance of oil deliveries from Union Carbide to those required for economic operation. Since we resolve this case on the basis of statutory authority, we need not reach the constitutional question of impairment of contractual obligation. Therefore, we reverse the judgment of the Court of Appeals and reinstate the judgment of the Ingham Circuit Court.

## I. FACTS

The controversy in this case originated in July of 1981 with Consumers Power Company's application to the Public Service Commission for an increase in Consumers' electric rates. Concurrent with its application, Consumers moved the commission for partial and immediate rate relief, seeking an increase of $339 million annually and a minimum interim increase of not less than $178.3 million. In its notice of hearing, issued on July 28, 1981, however, the commission noted that it had commenced, on its own motion,

> an investigation into the existing electric rates, charges, revenue deficiencies or excesses, services, practices, procedures and operations of Consumers Power Company, and the investigation will not necessarily be confined to matters contained in the application but will include all matters pertaining to the reasonableness and justness of Applicant's electric rates, charges, operations and practices as may be necessary to enable the Commission to determine whether the existing or proposed rates and charges are unreasonable and excessive or

inadequate and should therefore be increased, reduced or altered.

Hearings before hearing referee James Rigas began in September of 1981 and continued into 1982. On February 17, 1982, prior to the hearing on Consumers' motion for interim rate relief, the commission staff filed a motion for an expedited partial final order. The staff sought to prevent Consumers from continuing to operate the Karn No. 3 and No. 4 oil-fired generating units "out of economic order."[1] In its motion, the commission staff calculated that Consumers had overcharged its ratepayers approximately $84 million because of Consumers' uneconomic operation of the Karn No. 3 and No. 4 units. In addition, the commission staff projected that continued operation of the Karn No. 3 and No. 4 units in a noneconomic manner would cost Consumers' ratepayers an additional $86 million in 1982. Since a reconciliation of the added fuel expenses "passed through"[2] to rate-

[1] Operating a plant "out of economic order" means

> depart[ing] from the commonly accepted practice of placing on-line units with the cheapest fuel costs first and "building up" as the load increases, and then taking off the most expensive plants first when load decreases. Uneconomic operation thus occurs when an expensive unit is operated even though a more reasonable cost unit is available to the system at the same time.

[2] Under both the fuel cost adjustment clause and the purchased and net interchange adjustment clause, Consumers "passed through" to ratepayers ninety percent of its increased fuel and purchased and net interchange power expenses; Consumers bore ten percent of these increased costs.

> The commission was of the opinion that the [fuel cost adjustment clause] and the purchased power adjustment clause [would] work in tandem to give the utility incentive to resort to the least costly alternative of either purchasing additional fuel for its own power generation or buying already-generated power from the power pool. [*Attorney General v Public Service Comm,* 122 Mich App 777, 781; 333 NW2d 131 (1983).]

payers would not occur until after Consumers had incurred these expenses, and since the possibility of the commission entering a final order before the reconciliation hearing was remote, the staff concluded that a partial final order was necessary to prevent "irreparable harm" to the ratepayers and to Consumers.

> The uncontroverted competent material and substantial evidence on the record as described hereinafter establishes: 1) that Consumers will be forced to purchase oil under its contracts with Imperial Oil Company and Union Carbide Company for the Karn units; 2) that it will operate the Karn units in a noneconomic manner; and, 3) that its customers will be required to pay hundreds of millions of dollars for the uneconomic operation of the Karn units under its authorized fuel and purchased and net interchange power adjustment clauses, unless the Commission exercises its authority on an expeditious basis and orders Consumers to cease operating the Karn units in said fashion.

As a result, the commission staff recommended not only that the commission disallow any expenses Consumers incurred while operating Karn No. 3 and No. 4 in a noneconomic manner, but that the commission order Consumers to cease operating its Karn No. 3 and No. 4 units out of economic order.

> WHEREFORE, it is respectfully requested that the [hearing referee] recommend and the Commission enter an Order as follows:
>
> (a) That Consumers Power Company not operate

In 1982 PA 304, the Legislature amended the Public Service Commission act to disallow the use of fuel adjustment clauses. See MCL 460.6a; MSA 22.13(6a); see also *Detroit Edison v Public Service Comm*, 416 Mich 510, 525, n 1; 331 NW2d 159 (1982) (LEVIN, J., dissenting).

the Karn 3 and Karn 4 oil-fired generating facilities out of economic order;

(b) That any expenses incurred while operating Karn 3 and 4 out of economic order shall be disallowed and not passed through to the ratepayers;

(c) That Consumers Power Company immediately attempt to seek termination and/or renegotiation of its oil contracts with Imperial Oil Limited of Toronto and Union Carbide Company, and advise the Commission of said negotiations; and

(d) That Consumers Power Company not purchase any oil for the Karn 3 and 4 units, until a need for the same can be demonstrated to the Commission, and an appropriate order issues.

In response, Consumers filed procedural objections to the commission staff's motion for an expedited partial final order. Consumers argued, in part, that "the Staff's proposed procedure [was] entirely without precedent." On March 1, 1982,[3] the hearing referee denied the staff's motion for an expedited final order. The staff then filed an appeal with the commission of the hearing referee's denial of the motion.

On May 13, 1982, the commission issued a partial final order which granted both Consumers' motion for interim relief as well as the staff's application for leave to appeal.

The granting of Staff's Application for Leave to Appeal does not result in a delay of the hearing on Applicant's application for rate relief. There is no necessity for separating this matter into a separate docket, since all the necessary parties were present and the record has been made upon the uncontroverted evidence established by Applicant's

[3] The hearing referee denied the motion immediately following the hearing on Consumers' motion for interim rate relief, which took place between February 23 and March 1, 1982.

witnesses. Furthermore, the requisite exhibits have been marked and received into evidence.

Based on [sic] the preceding discussion, the Commission finds that the Staff's Application for Leave to Appeal should be granted and that Applicant shall cease taking deliveries under the aforementioned contracts in excess of quantities necessary for operating those units at levels required by economic dispatch of the system. Applicant shall also cease operation out of economic order. Any additional fuel expenses incurred while operating the Karn #3 and #4 oil-fired generating units out of economic order shall be disallowed and not passed on to ratepayers unless Applicant demonstrates the reasonableness of its actions from this date forward. The Staff's recommended adjustment to fuel and purchased and net interchange power expense to reflect economic operation of Karn #3 and #4 is reasonable for the purpose of determining partial and immediate relief.

Approximately two weeks later, on May 28, 1982, Union Carbide, which was not a party before the commission, filed a complaint and motion in the Ingham Circuit Court, asking the court to stay and vacate the commission's partial final order. Union Carbide argued, in part, that the commission exceeded its statutory authority in ordering Consumers to not operate its Karn No. 3 and No. 4 plants out of economic order and to cease taking deliveries of oil under its contract with Union Carbide. Union Carbide also claimed that the commission's order impaired its contractual obligation to supply oil to Consumers, in contravention of art I, § 10 of the United States Constitution and art 1, § 10 of the Michigan Constitution.

Subsequently, Consumers intervened as a party plaintiff in the Ingham Circuit Court action. On June 10, 1982, Ingham Circuit Court Judge Giddings entered a stay during the litigation, limited

to those portions of the commission's order which precluded noneconomic operation of the Karn units and acceptance of oil under the Union Carbide-Consumers Power contract.[4] Thereafter, both Union Carbide and the commission filed their respective motions for summary judgment, the commission claiming that Union Carbide's complaint failed to state a claim upon which to grant relief and Union Carbide arguing, in part, that the commission's order exceeded its statutory authority.

On August 16, 1984, the Ingham Circuit Court issued its opinion, denying the commission's motions, but granting Union Carbide's motion for summary judgment. The court explained that the commission had shown no statutory basis for ordering Consumers to discontinue the noneconomic operation of its Karn units and to cease taking delivery of oil under Consumers' contract with Union Carbide. As a result, the court concluded that the commission's order was an unauthorized interference with Consumers' management.

> The Court will grant Union Carbide's motion for summary judgment because she finds merit in its argument that the MPSC's order was, to the extent it forbade Consumers to honor the Union Carbide-Consumers contract or to burn fuel purchased in accordance therewith in the Karn #3 and Karn #4 plants, in excess of the MPSC's authority and jurisdiction.

[4] In July of 1982, while its case against the commission was pending in Ingham Circuit Court, Union Carbide filed suit against Consumers in federal district court, seeking $162 million in damages from Consumers for breach of contract. In September of 1986, United States District Judge Charles Joiner provisionally ruled in Consumers' favor. The court concluded that if the commission's partial final order stood after the conclusion of the appeals process in the Michigan courts, the order would constitute force majeure and relieve Consumers of liability for failure to take delivery of any oil subsequent to the commission's May 13 order. On April 9, 1987, the federal district court case was dismissed by stipulation of the parties.

* * *

The MPSC has not shown a basis for its actions in any statute. In oral argument, the MPSC seemed to have shifted ground and explained that because of an existing rate system which passed on certain costs automatically, the challenged provisions of the order were legitimated. Again, no statutory basis for this argument is provided. What was done by the MPSC in this case, with clearly the highest intentions, was an unauthorized and therefore impermissible intrusion into the management of Consumers Power. As suggested by Judge Giddings at the hearing prior to issuance of the injunction pendente lite, assuring that ratepayers not pay for the fuel oil purchases is one thing, but intruding into the management decision to buy and burn the fuel oil is quite another.

Having lost at the trial court level, the commission then filed an appeal in the Court of Appeals. In July of 1986, the Court of Appeals reversed the judgment of the Ingham Circuit Court and reinstated the decision of the commission, 153 Mich App 217; 395 NW2d 292 (1986).[5] The Court

[5] As appellant Union Carbide notes, the Court of Appeals erred in reinstating, *in full,* the commission's order.

The Circuit Court's opinion acknowledged all the issues raised by Union Carbide and noted that the summary judgment motion was based on only two of them, lack of statutory authority and unconstitutional impairment of contract. App 138a.[6] Because the Circuit Court granted Union Carbide summary judgment on the statutory authority issue, it never addressed the remaining issues.

. . . The Court of Appeals failed to recognize that additional issues were presented by Union Carbide's complaint and that those issues never had been ruled upon by the Circuit Court. Instead, the Court of Appeals simply restored the commission's order to full effect without remanding the case to the Circuit Court for further proceedings.

[6] As described by the Circuit Court's opinion, App 137a, Union Carbide's claims are:

"Count I—The MPSC exceeded its statutory authority and jurisdiction.

of Appeals concluded, without much analysis, that the commission had acted properly and within its authority in ordering Consumers to cease the non-economic operation of the Karn units and to limit acceptance of oil deliveries from Union Carbide to those necessary for economic operation. The Court also found "no merit" to the argument that the commission's order impaired the obligation of the contract between Consumers and Union Carbide.

Both Consumers and Union Carbide applied for leave to appeal in this Court; the commission filed a cross-application for leave to appeal. In February of 1987, the Court granted leave to appeal, limited to the question

> whether the Public Service Commission exceeded its authority in ordering intervening plaintiff [Consumers] not to operate certain oil-fired plants in other than economic order and to cease taking deliveries of oil under a contract with plaintiff [Union Carbide] except to the extent required by such economic operation. [428 Mich 857 (1987).]

The Court denied the commission's application for leave to appeal as cross-appellant.[6]

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"Count II—The MPSC order would impair the obligations of contracts in violation of US Const, art I, § 10 and Const 1963, art 1, § 10.

"Count III—The MPSC's action was arbitrary and capricious.

"Count IV—The MPSC's action violated procedural due process in violation of US Const, Am XIV and 1963 Const, art 1, § 17.

"Count V—The MPSC entered the order contrary to various legal requirements.

"Count VI—The MPSC's order was contrary to *Attorney General v Michigan Public Service Commission,* 412 Mich 385, 405, 416 [316 NW2d 187] (1982)."

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[6] In its application for leave to cross-appeal, the commission took issue with the Court of Appeals conclusion that Union Carbide had standing to file suit to challenge the commission's order to Consumers

## II. DISCUSSION

The Public Service Commission possesses no "common law" powers. See *Huron Portland Cement Co v Public Service Comm,* 351 Mich 255, 262; 88 NW2d 492 (1958). As a creature of the Legislature, the commission possesses only that authority bestowed upon it by statute.

> The Michigan public utilities commission[7] is an administrative body created by statute and the warrant for the exercise of all its power and authority must be found in statutory enactments. [*Sparta Foundry Co v Public Utilities Comm,* 275 Mich 562, 564; 267 NW 736 (1936).]

See also *G & A Truck Line, Inc v Public Service Comm,* 337 Mich 300, 305; 60 NW2d 285 (1953); *Kirkby v Public Service Comm,* 320 Mich 608, 612; 32 NW2d 1 (1948). Thus, a determination of the commission's powers requires an examination of the various statutory enactments pertaining to its authority.

### 1. THE PUBLIC SERVICE COMMISSION ACT

Section 6 of the Public Service Commission act, MCL 460.1 *et seq.;* MSA 22.13(1) *et seq.,* which

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and that Consumers could intervene as a party plaintiff in the lawsuit brought by Union Carbide against the commission. See *Union Carbide v Public Service Comm,* 153 Mich App 217, 223-228; 395 NW2d 292 (1986).

[7] The Public Service Commission was created by statutory enactment. Dissatisfied with the performance of the Public Utilities Commission, the Michigan Legislature enacted the Public Service Commission act, 1939 PA 3, MCL 460.1 *et seq.;* MSA 22.13(1) *et seq.,* abolishing the Public Utilities Commission and establishing the Public Service Commission. The Public Service Commission acquired all the rights, powers, and duties vested in its predecessor, the Public Utilities Commission. See *Detroit & T S L R Co v Public Service Comm,* 324 Mich 195, 199; 36 NW2d 896 (1949).

outlines the commission's power and jurisdiction, provides in pertinent part:

> The Public Service Commission is vested with complete power and jurisdiction to regulate all public utilities in the state except a municipally owned utility, the owner of a renewable resource power production facility as provided in section 6d, and except as otherwise restricted by law. *The Public Service Commission is vested with the power and jurisdiction to regulate all rates, fares, fees, charges, services, rules, conditions of service, and all other matters pertaining to the formation, operation, or direction of such public utilities.* The Public Service Commission is further granted the power and jurisdiction to hear and pass upon all matters pertaining to, necessary, or incident to the regulation of all public utilities, including electric light and power companies, whether private, corporate, or coöperative, gas companies, water, telephone, telegraph, oil, gas and pipeline companies, motor carriers, and all public transportation and communication agencies other than railroads and railroad companies. [MCL 460.6(1); MSA 22.13(6)(1). Emphasis added.]

Although its language is broad, § 6 merely serves as an outline of the commission's jurisdiction, not as a grant of specific authority or powers. As this Court concluded in *Huron Portland Cement, supra* at 263:

> The broad language [of § 6] furnishes no grant of specific powers. It is an outline of jurisdiction in the commission and does not purport to be more. If, indeed, the general language quoted had the effect of vesting particular, specific, powers in the commission, not only would a constitutional question be presented arising from an asserted lack of standards . . ., but there would have been no need whatever for the many statutes enacted (both before and after the effective date of PA 1939, No

3) vesting specific powers in the commission. [Citations omitted.]

See also *Detroit Edison Co v Richmond Twp,* 150 Mich App 40, 49; 388 NW2d 296 (1986). Since the commission's powers are limited by statute and § 6 furnishes no grant of specific powers, § 6 by itself offers little support for the commission's order in this case.

The commission's argument, however, does not rely solely on the broad statutory language of § 6. Instead, the commission contends that § 6 provides an outline of its permissible powers upon which various other statutory sections elaborate. Thus, the commission concludes that § 6, in conjunction with other statutory provisions, provides the authority for its order in this case.

For example, the commission argues that its authority to fix and regulate reasonable utility rates, of necessity, encompasses the power to prevent noneconomic management practices which threaten the integrity of the ratemaking process. As this Court asserted in *Detroit v Public Service Comm,* 308 Mich 706, 716; 14 NW2d 784 (1944), "[i]t is the duty of the commission, under its statutory power, to fix a just and reasonable rate." See also MCL 460.6a(1), (2); MSA 22.13(6a)(1), (2).

The commission's argument, though it may be economically supportable, is legally unsound. The commission is a creature of the Legislature and, as such, possesses only those powers conferred upon it by statute. See *G & A Truck Line, supra* at 305; *Kirkby, supra* at 612; *Sparta Foundry, supra* at 564. The power to fix and regulate rates, however, does not carry with it, either explicitly or by necessary implication, the power to make management decisions.

It must never be forgotten that while the State

> may regulate with a view to enforcing reasonable rates and charges, it is not the owner of the property of public utility companies and is not clothed with the general power of management incident to ownership. [*Missouri ex rel Southwestern Bell Telephone Co v Public Service Comm,* 262 US 276, 289; 43 S Ct 544; 67 L Ed 981 (1923).]

The commission acted properly in preventing Consumers from passing on to ratepayers any additional fuel expenses incurred while operating the Karn units out of economic order.[8] This portion of the commission's order related directly to its power to regulate rates and charges; Consumers was passing through to the consuming public increased charges due to its noneconomic operation.

By comparison, the connection between the commission's explicit statutory authority to set rates and its alleged authority to order the cessation of certain noneconomic management practices is much more attenuated. Furthermore, by its own admission, the commission excluded from Consumers' base rates the increased fuel costs stemming from noneconomic operation of the Karn units. Thus, the commission prevented Consumers' noneconomic operation of the Karn units from adversely affecting both the utility's base rates as well as the charges passed through to ratepayers in the fuel adjustment clauses.

Although Consumers' actions might make the ratemaking process lengthier and more difficult, this increased complexity alone does not justify the commission's action in this case. The commission possesses the authority to regulate a utility's rates and charges. It exercised that authority by precluding Consumers' recovery of those increased charges incurred as a result of the company's

[8] This portion of the commission's order is not at issue in this appeal.

noneconomic operation of the Karn units. However, by ordering Consumers to cease certain noneconomic management practices, the commission exceeded its ratemaking authority.[9]

2. THE PUBLIC UTILITIES COMMISSION ACT

Section 4 of the Public Service Commission act explicitly carried forward the rights, powers, and duties accorded the Public Utilities Commission.

> All the rights, powers, and duties vested by law in the Michigan public utilities commission shall be transferred to and vested in the Michigan public service commission created in section 1, and shall be exercised and performed by it. The Michigan public service commission shall have and exercise all rights, privileges and the jurisdiction in all respects as has been conferred by law and exercised by the Michigan public utilities commission. [MCL 460.4; MSA 22.13(4).]

Thus, a determination of the limits of the commission's power requires an examination of the provisions of the Public Utilities Commission act, 1919 PA 419, MCL 460.54; MSA 22.4.

Section 4 of the Public Utilities Commission act set forth, in general terms, the powers and duties

[9] Although 1982 PA 304, an amendment of the Public Service Commission act, was enacted subsequent to the commission's order in this case, § 6j of 1982 PA 304 provides an indication of the Legislature's intent with regard to the authority of the Public Service Commission. Section 6j(7) empowers the commission to indicate in its review of a utility's five-year plan, see MCL 460.6j(3), (4); MSA 22.13(6j)(3), (4), any cost items for which the utility likely would not recover. Thus, the Legislature specifically provided a review procedure by which the commission could indicate to utilities those costs the commission considered nonrecoverable. Had the Legislature wanted to give the commission the authority to order the cessation of noneconomic management practices, which resulted in nonrecoverable costs, the Legislature could have done so explicitly in the Public Service Commission act.

of the Public Utilities Commission. Section 4 provided, in pertinent part:

> [The Commission's] *jurisdiction* shall be deemed to extend to and include the control and regulation, including the fixing of rates and charges, of all public utilities within this state producing, transmitting, delivering or furnishing steam for heating or power, or gas for heating or lighting purposes for the public use. [MCL 460.54; MSA 22.4. Emphasis added.]

By itself, this language does little to resolve the question at issue in this case. As this Court noted in *Mason Co Civil Research Council v Mason Co,* 343 Mich 313, 326-327; 72 NW2d 292 (1955):

> "The power and authority to be exercised by boards or commissions must be conferred by clear and unmistakable language, since a doubtful power does not exist." [Citing 67 CJS, Officers, § 107, p 378.]

Yet, the only power granted with any specificity in § 4 is the power to fix utility rates and charges. The language of § 4 is no more specific than is the language of § 6 of the Public Service Commission act, which this Court, in *Huron Portland Cement, supra,* construed as merely an outline of the commission's jurisdiction, not a grant of specific powers.

Moreover, the mere recital of the power to control and regulate public utilities does not, of necessity, entail the power to order a utility to follow particular principles of economic management. In fact, the power to regulate does not convey with it the power to exercise general management powers. See *Southwestern Bell Telephone Co, supra* at 289; 73B CJS, Public Utilities, § 12b, p 153. Since § 4 of

the Public Utilities Commission act does not specifically confer upon the commission the power to make management decisions concerning the economic operations of a public utility, § 4 adds little to an appreciation of the limits of the commission's powers.

The commission also cites § 5 of the Public Utilities Commission act as support for its order in this case. Section 5 provides as follows:

> The commission shall also have authority to make and prescribe regulations for the conducting of the business of public utilities, subject to the jurisdiction thereof, and it shall be the duty of every corporation, joint stock company, association or individual owning, managing or operating any such utility to obey such rules and regulations. [MCL 460.55; MSA 22.5.]

But § 5 is not applicable to the facts of this case. The commission's order was not pursuant to a regulation empowering it to order a utility, under certain circumstances, to cease particular management practices. As appellant Consumers notes, this case "does not involve the promulgation of rules or regulations . . . ."

Finally, one of the more persuasive arguments advanced by the commission is that § 8 of the Public Utilities Commission act vested it with broad powers to investigate, coupled with extensive powers to act pursuant to its investigation. Section 8 provides:

> *Upon complaint in writing* that any rate, classification, regulation or practice charged, made or observed by any public utility is unjust, inaccurate, or improper, to the prejudice of the complainant, the commission shall proceed to investigate the matter. The procedure to be followed in all

> such cases shall be prescribed by rule of the commission: Provided, however, That in all cases reasonable notice shall be given to the parties concerned as to the time and place of hearing. . . . Upon the completion of any such hearing, the *commission shall have authority to make an order or decree dismissing the complaint or directing that the rate, charge, practice or other matter complained of, shall be removed, modified or altered,* as the commission deems just, equitable and in accordance with the rights of the parties concerned. [MCL 460.58; MSA 22.8. Emphasis added.]

However, MCL 460.58; MSA 22.8 also does not apply to the facts of this case because the commission did not satisfy the statutory prerequisite of a complaint in writing. While the commission may make a complaint on its own motion, see 1979 AC, R 460.31(1), it did not do so in this case. Consumers originally applied to the commission for an increase in its electric rates. In its notice of hearing on the application for rate relief, the commission noted that it had commenced, on its own motion, an investigation into Consumers' "existing rates, charges, revenue deficiencies or excesses, services, practices, procedures and operations . . . ." The commission's notice of hearing, however, was not a complaint. See, e.g., 1979 AC, R 460.31, 460.32. Moreover, even though the language of investigation in the commission's notice was broad, the language describing the commission's purpose in investigating was limited to corrective action taken only as to proposed rates and charges.

> [T]he investigation will not necessarily be confined to matters contained in the application but will include all matters pertaining to the reasonableness and justness of Applicant's electric rates,

> charges, operations and practices as *may be necessary to enable the commission to determine whether the existing or proposed rates and charges are unreasonable and excessive or inadequate and should therefore be increased, reduced or altered.* [Emphasis added.]

Moreover, despite the commission's argument to the contrary, dicta from this Court's decision in *Attorney General v Public Service Comm,* 412 Mich 385; 316 NW2d 187 (1982), does not support the commission's conclusion that MCL 460.58; MSA 22.8 gives it the authority to order Consumers to cease noneconomic management practices. In *Attorney General,* the Court held that the scope of the commission's inquiry in a securities issue proceeding "[did] not extend to the wisdom of the project which a utility [sought] to fund through the issuance of long-term securities." *Id.* at 391-392.[10] The commission had approved the issuance of securities to finance the construction of three different generating facilities. The Attorney General and the Michigan Citizens Lobby challenged the commission's decisions, arguing that the commission should have considered the need for the plants' construction in determining whether to approve an issuance of securities for continued construction. Although the Court rejected this argument, it did explain, in dicta, that the commission was not without the authority to conduct preconstruction review of potential generating facilities in order to determine whether to issue securities to finance construction. On the basis of this dicta, the commission argues that if it may "determine the *need* for plant construction, logic dictates that the Commission has the power under

[10] See the public securities act, MCL 460.301 *et seq.;* MSA 22.101 *et seq.*

the same grant of authority to require the halt to uneconomic dispatch . . . ."

The commission's analogy, however, is flawed. In *Attorney General,* the Court did not assert that the commission had the power to order a utility to cease construction of a generating plant. Rather, the Court stated that the commission could determine that construction of a generating plant was unreasonable or unnecessary and could refuse to allow an issuance of securities for its construction. By analogy to *Attorney General,* the commission could disallow the pass-through to consumers of increased fuel expenses incurred by Consumers because of its noneconomic operation of its Karn units. But the commission could not order Consumers to cease operating its Karn units out of economic order. This order was equivalent to ordering a utility to cease construction of a generating plant whose construction the commission found unreasonable. *Attorney General* did not go this far; thus, it does not stand for the proposition advanced by the commission.

### 3. THE RAILROAD ACT

One of the more interesting arguments advanced by the commission is that the authority vested in the Michigan Railroad Commission, which was transferred to the Michigan Public Utilities Commission and then to the Michigan Public Service Commission, empowers the commission to order a utility to cease certain noneconomic practices. The Public Utilities Commission act, 1919 PA 419, MCL 460.54; MSA 22.4, explicitly transferred to the Public Utilities Commission the same measure of authority over utilities that the Michigan Railroad Commission exercised over railroads. In turn, § 4 of the Public Service Commission act trans-

ferred to the Public Service Commission "[a]ll the rights, powers, and duties vested by law in the Michigan public utilities commission . . . ." MCL 460.4; MSA 22.13(4). Since the commission now possesses the same measure of authority over utilities as the Railroad Commission once did over railroads, an examination of the provisions of the railroad act, 1909 PA 300, MCL 462.2 *et seq.;* MSA 22.21 *et seq.,* is in order.

The Railroad Commission did not enjoy sweeping powers, rather, its authority was narrow and limited by statute.

> The Michigan Railroad Commission is a body possessing limited powers, to be ascertained by reference to the statute creating it. [*Grand Rapids & I R Co v Railroad Comm,* 183 Mich 383, 392; 150 NW 154 (1914).]

Nonetheless, the commission argues that several provisions of the railroad act, when read together, empower the commission to inquire into and rectify unreasonable or noneconomic management practices.

First, § 28 of the railroad act provided the Railroad Commission with the authority to inquire into the management of a railroad's business.

> The commission shall have authority to inquire into the management of the business of any common carrier and shall keep itself informed as to the manner and shall have the right to obtain from any common carrier all necessary information to enable the commission to perform the duties and carry out the objects for which it is created. [MCL 462.28(a); MSA 22.47(a).]

Second, § 22 of the act empowered the Railroad Commission to investigate unreasonable rates or inadequate service.

> Upon complaint in writing of any person, firm or corporation or association, or of any mercantile, agricultural or manufacturing society, or of any body politic or municipal organization, that any of the rates, fares, charges or classifications, or any joint rate or rates are in any respect unreasonable or unjustly discriminatory, or that any regulation or practice whatsoever affecting the transportation of persons or property or any service in connection therewith, is in any respect unreasonable or unjustly discriminatory, or that any service is inadequate, the commission shall notify the common carrier complained of that complaint has been made and shall furnish a copy of the said complaint with said notice, and twenty [20] days after such notice has been given the commission may proceed to investigate the same as hereinafter provided . . . . If, upon such investigation, the rate or rates, joint rate or rates, fares, charges or classifications, regulation, practice or service complained of shall be found to be unreasonable, inadequate or unjustly discriminatory, the commission shall have power to and it shall determine and by order fix and order substituted therefor, such rate or rates, joint rate or rates, fares and charges, as is or are just and reasonable, and which shall be the maximum to be charged in the future, and such classifications, regulation, practice or service as is or are just, reasonable and adequate, and which shall be imposed and followed or service rendered in future in lieu of that found to be unreasonable, inadequate or unjustly discriminatory, and in either case the commission shall make an order that the common carrier cease and desist from such violation, and shall conform to the regulation and practice so prescribed . . . . [MCL 462.22(a); MSA 22.41(a).]

Finally, § 32 of the railroad act empowered the commission, after hearing and investigation of any unreasonable charge, regulation, or practice to regulate such charge, regulation, or practice as provided by § 22 of the act.

> Whenever, after hearing and investigation as provided in this act, the commission shall find that any charge, regulation or practice affecting the transportation of passengers or property, or any service in connection therewith not herein specifically designated, is unreasonable or unjustly discriminatory, it shall have the power to regulate the same as provided in section 22 of this act. [MCL 462.32; MSA 22.51.]

The commission argues that these provisions of the railroad act, coupled with the transfer of power provisions in the Public Utilities Commission and Public Service Commission acts, support the commission's authority to inquire into a utility's management and order the cessation of non-economic management practices.

This argument, however, overlooks the fact that the commission initiated the investigation in this case without "[a] complaint in writing of any person [etc.] . . . ." Section 22(c) provides the authority for the commission to investigate on its own motion.

> Whenever the commission shall believe that any rate or rates or charge or charges may be unreasonable or unjustly discriminatory, or that any service is inadequate, and that any investigation relating thereto should be made, it may, upon its own motion, investigate the same. Before making such investigation, it shall present to the common carrier a statement in writing, *setting forth the rate or charge to be investigated.* Thereafter, on ten [10] days' notice to the common carrier of the time and place of such investigation, the *commission may proceed to investigate such rate or charge* in the same manner and *make like orders in respect thereto* as if such investigation had been made upon complaint. [MCL 462.22(c); MSA 22.41(c). Emphasis added.]

The language of § 22(c), unlike that of § 22(a), is

much more circumscribed. Although sentence one of § 22(c) refers to investigation of rates, charges, or inadequate service, sentence two indicates that the investigation of inadequate service relates to its effect upon rates or charges. After all, sentence two states that the commission must present in writing the rate or charge—not the service—to be investigated. Moreover, the final sentence of § 22(c) states that the commission may investigate the rate or charge complained of and make orders in respect to such rate or charge. Therefore we do not find that the railroad act supports the commission's authority to order Consumers to stop operating its Karn units out of economic order and to discontinue accepting oil under its contract with Union Carbide except as required for economic operation under the circumstances of this case.

The commission also argues that § 4 of the railroad act imposes on utilities a statutory duty to maintain just and reasonable rates.[11] While the commission has such a statutory duty, this duty does not necessarily imply the power to require utilities to undertake prudent management practices. The commission may disallow increased expenses incurred as a result of mismanagement, but it may not require a utility not to incur particular expenses. See discussion *ante,* pp 150-152.

Finally, the commission notes that § 44 of the railroad act vests the commission with police pow-

[11] Every common carrier is hereby required to furnish reasonably adequate service and facilities and shall provide and furnish transportation of passengers and property upon reasonable requests therefor, and all charges made for any service in connection therewith, or for the receiving, switching, delivering, storing, transporting or handling of such persons or property shall be reasonable and just, and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful. [MCL 462.4(a); MSA 22.23(a).]

ers.[12] Standing alone, however, this statutory provision offers little support for the commission's actions in this case. To begin with, § 44 does not delineate the commission's powers; thus, the specific powers of the commission are to be ascertained by reference to statute. See *Grand Rapids & I R Co, supra* at 392. In addition, a strict, as opposed to a liberal, construction of statutory provisions granting away the state's police power is preferable.

> The legislature is regarded as the guardian of society, and therefore is not presumed to disable itself or abandon the discharge of its duty. It follows that the courts are inclined towards a strict interpretation of statutes that tend to grant away the police power of the state. . . .
>
> The presumption in favor of the state's retention of its police power, as a factor in the interpretation of public grants, is influenced by constitutional considerations. Constitutions are widely understood to withhold from legislatures any authority to bargain away their police power and so the rule of statutory interpretation that every presumption will be indulged in to sustain the constitutionality of a statute is germane to the rule of strict construction for statutes purporting to grant such power. [3 Sands, Sutherland Statutory Construction (4th ed), § 63.07, p 151.]

Since no other provision of the railroad act em-

[12] The police powers of the state over railroads, street railways, interurban railways and suburban street railways, whether operated by steam, electricity or other motive power, organized or doing business in this state, shall be and the same are hereby vested in the railroad commission, and it is hereby made the duty of said railroad commission to exercise the same in accordance with the requirements of the law. [MCL 462.44; MSA 22.62.]

powered the commission in this case to order Consumers to cease certain noneconomic practices, it cannot be the authority for the commission's order.

4. THE ELECTRIC TRANSMISSION ACT

The commission argues that § 7 of the electric transmission act, 1909 PA 106, MCL 460.557; MSA 22.157, reinforces its position that it possesses the authority to order an electric utility, such as Consumers, to cease noneconomic operation.[13] Section 7 provided, in pertinent part:[14]

> *Upon complaint in writing by any consumer or city, village, or township, by its duly constituted common or village council or township board, or other duly constituted authority of such city, village or township,* relative to the price of the electricity sold and delivered in such municipality, or with reference to the service rendered or any other matter of complaint, the commission shall investigate such complaint and may by its agents, examiners, inspectors, engineers and accountants inspect the system and method used in transmitting and supplying electricity and examine or cause to be examined the books and papers of such person, firm or corporation pertaining thereto. The commission shall cause notices of such complaint with a copy thereof to be served on the person, firm or corporation complained of or affected thereby which shall have a right to be heard in respect to the matter complained of at a convenient time and place to be fixed in such notice. After such investigation and hearing, the commission within lawful limits may by order fix the price of electricity to be charged by such person,

[13] The power to regulate electric utilities was transferred to the Railroad Commission by the electric transmission act, 1909 PA 106, MCL 460.551 *et seq.;* MSA 22.151 *et seq.*

[14] MCL 460.557; MSA 22.157 was amended by 1987 PA 8.

> firm or corporation, and the price so fixed, of which such person, firm or corporation shall have notice, shall be the price to be charged until the commission shall again fix the price to be charged therefor. Said commission may also by order establish such rules and conditions of service as shall be just and reasonable. [MCL 460.557; MSA 22.157. Emphasis added.]

The commission's argument, however, is again flawed. The investigatory and remedial powers conferred upon the commission in § 7 are initiated by a written complaint. The statutory language limits the complainants to consumers and to cities, villages, townships, or their duly constituted authorities. Section 7 does not give the commission the authority to make, on its own motion, a complaint regarding a utility's prices or services. Moreover, since no written complaint with respect to Consumers, relative to its prices, services, or other matters was made, § 7 does not apply to the facts of this case.

### III. CONCLUSION

None of the statutory provisions offered by the commission supports its argument that it possessed the authority, in this case, to order Consumers Power Company to stop operating its Karn units out of economic order and to limit acceptance of oil deliveries from Union Carbide to those necessary for economic operation. The provisions offered by the commission either do not apply to the facts of this case or do not confer the power to make management decisions with the same degree of specificity that the Legislature used in conferring upon the commission the authority to set utility rates.[15] Since we resolve this case on the

[15] We emphasize that this holding is the product of thirty years of

basis of statutory authority, we need not reach appellants' second issue—the constitutional question of impairment of contractual obligation. We reverse the judgment of the Court of Appeals and reinstate the judgment of the Ingham Circuit Court.

RILEY, C.J., and LEVIN, CAVANAGH, BOYLE, ARCHER, and GRIFFIN, JJ., concurred with BRICKLEY, J.

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legislative acquiescence following *Huron Portland Cement Co v Public Service Comm,* 351 Mich 255; 88 NW2d 492 (1958). The historical process of legislative overlay, in which the Public Service Commission act, 1939 PA 3, was superimposed upon the Public Utilities Commission act, 1919 PA 419, which was itself superimposed upon the Railroad Commission act, 1909 PA 300 (with reference to 1909 PA 106 governing the transmission of electricity), has created a statutory jungle. Each decision issued by the courts in the area of utilities regulation entails a journey into the heart of darkness in which the only reliable guideposts are this Court's own prior decisions. The time has long passed for a comprehensive review of this legislation.

The relevant acts do contain specific grants of "managerial" authority to the Public Service Commission, although the very specificity of these grants indicates that general managerial authority has never been conferred upon the PSC. See, e.g., MCL 460.551, 460.552, 460.555; MSA 22.151, 22.152, 22.155.

## SIBLEY v DETROIT AUTOMOBILE INTER-INSURANCE EXCHANGE

Docket No. 80207. Argued January 6, 1988 (Calendar No. 3). Decided August 23, 1988.

Austin Sibley was awarded workers' compensation benefits under the Federal Employees' Compensation Act, 5 USC 8101 *et seq.*, for medical expenses and three-fourths of lost wages resulting from injuries suffered in an automobile accident in the course of his employment with the United States Postal Service. He also filed a claim for no-fault benefits with his insurer, the Detroit Automobile Inter-Insurance Exchange. In addition, a tort claim for noneconomic damages against the owner of the other vehicle involved in the accident resulted in a cash settlement. The federal government demanded reimbursement of benefits paid under the FECA from the settlement, which the plaintiff paid. The plaintiff then sought reimbursement of the monies paid to the federal government from the DAIIE. After reimbursement was denied, the plaintiff brought an action in the Wayne Circuit Court against the DAIIE, seeking reimbursement. The court, John H. Hausner, J., granted summary judgment for the defendant. The Court of Appeals, WAHLS, P.J., and R. B. BURNS and M. WARSHAWSKY, JJ., affirmed, finding no reason to treat FECA benefits differently from state workers' compensation benefits, and holding that the FECA benefits had been properly set off against the no-fault benefits (Docket No. 87376). The plaintiff appeals.

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

Because the plaintiff was required by law to refund the FECA benefits he received, the benefits were not provided or required to be provided under the laws of any state or the federal government and should not be subtracted from the personal

REFERENCES

Am Jur 2d, Federal Employer's Liability and Compensation Acts § 90.

See the Index to Annotations under Federal Employees' Compensation Act; Indemnity; Insurance; Workers' Compensation.

protection insurance benefits otherwise available to the plaintiff under the no-fault act.

1. Section 3109(1) of the no-fault act provides that benefits provided or required to be provided under the laws of any state or the federal government are to be subtracted from personal protection insurance benefits otherwise payable under the act. The purpose underlying the provision is the reduction of the basic cost of insurance by requiring setoff of government benefits that duplicate no-fault benefits and the coördination of the benefits a victim may receive. The focus of analysis is on whether the benefits are duplicative. Not all benefits provided or required to be provided under the laws of any state or the federal government must be subtracted. The test is whether the benefits serve the same purpose as the no-fault benefits and are provided or required to be provided as a result of the same accident.

2. Under the no-fault act, "benefits provided" refers to benefits permanently provided. To the extent benefits are retrieved by an alternative source provider out of a worker's tort recovery, they cease to be benefits provided within the meaning of § 3109(1) of the act. Therefore, the amount of FECA benefits initially received by the plaintiff should not be subtracted from the personal protection insurance benefits otherwise available to the plaintiff.

Reversed and remanded.

156 Mich App 519; 402 NW2d 51 (1986) reversed.

INSURANCE — NO-FAULT — COÖRDINATION OF BENEFITS — REIMBURSEMENT.

Workers' compensation benefits received by a federal employee under the Federal Employees' Compensation Act, which were required to be reimbursed to the federal government from the proceeds of a tort settlement, were not benefits provided or required to be provided under the laws of any state or the federal government for purposes of the coördination of benefits provision of the no-fault act and were not subject to subtraction from personal protection insurance benefits otherwise available under the no-fault act (5 USC 8101 *et seq.;* MCL 500.3109[1]; MSA 24.13109[1]).

*Brent S. Hunt* for the plaintiff.

*Brandt, Hanlon, Becker, Lanctot, McCutcheon, Martin & Schoolmaster* (by *Clair W. Hoehn*) and

*Gromek, Bendure & Thomas* (by *John A. Lydick,* of counsel) for the defendant.

CAVANAGH, J. Several times this Court has determined whether § 3109(1) of the no-fault insurance act[1] requires various state and federal government benefits to be subtracted from no-fault benefits. In this case we must determine whether § 3109(1) applies to the benefits plaintiff received but was later required to refund under the Federal Employees' Compensation Act (FECA), 5 USC 8101 *et seq.* We hold that because plaintiff was required by law to refund the benefits he had received, those benefits were not "provided or required to be provided" and therefore should not be subtracted from the personal protection insurance benefits otherwise available to plaintiff under the no-fault insurance act.

I

The facts in this case were submitted to the trial court by the parties in a stipulated "Statement of Facts," which is summarized in the Court of Appeals opinion:

> On August 15, 1978, plaintiff was injured in an automobile accident during the course of his employment with the United States Postal Service. On the date of the accident, plaintiff was the owner of an automobile insured by defendant. That automobile was not involved in the accident.
>
> Plaintiff filed a workers' compensation claim against the federal government under the Federal Employees' Compensation Act (FECA). 5 USC 8101 *et seq.* The claim was honored and plaintiff was ultimately paid $17,221.87 by the federal government, representing all of his medical expenses and three-fourths of his lost wages.

[1] MCL 500.3101 *et seq.;* MSA 24.13101 *et seq.*

Plaintiff had also filed a claim with defendant for no-fault benefits. Defendant honored the claim, but, pursuant to § 3109 of the no-fault act, deducted from the no-fault benefits otherwise payable the benefits plaintiff received pursuant to FECA. Defendant ultimately paid $14,498.68, which represented lost wages not reimbursed under FECA.

Plaintiff also pursued a tort claim for noneconomic damages against the owner and driver of the other vehicle involved in the accident. See MCL 500.3135; MSA 24.13135. Plaintiff settled the claim for $32,500. Thereafter, the U. S. Department of Labor, Office of Workers' Compensation, demanded reimbursement of benefits paid under FECA from the amount received by plaintiff from the tort claim settlement. The department sought reimbursement under 5 USC 8132, which provides in pertinent part as follows:

"If an injury or death for which compensation is payable under this subchapter is caused under circumstances creating a legal liability in a person other than the United States to pay damages, and a beneficiary entitled to compensation from the United States for that injury or death receives money or other property in satisfaction of that liability as the result of suit or settlement by him or in his behalf, the beneficiary, after deducting therefrom the costs of suit and a reasonable attorney's fee, shall refund to the United States the amount of compensation paid by the United States and credit any surplus on future payments of compensation payable to him for the same injury."

On August 31, 1983, plaintiff repaid the Department of Labor the principal sum of $12,186.69 plus interest of $2,195.60. Thereafter, plaintiff sought reimbursement of this payment from defendant. Defendant denied the claim and this litigation ensued. The parties filed cross-motions for summary disposition and, on August 23, 1985, summary disposition was granted in favor

of defendant. [156 Mich App 519, 521-522; 402 NW2d 51 (1986).]

The Court of Appeals affirmed, finding no reason to treat FECA benefits differently from state workers' compensation benefits and holding that plaintiff's FECA benefits had been properly set off against his no-fault benefits.

We granted plaintiff's application for leave to appeal. 428 Mich 910 (1987).

II

Section 3109(1) of the no-fault insurance act provides that certain benefits must be subtracted from personal protection insurance benefits available under the act:

> Benefits provided or required to be provided under the laws of any state or the federal government shall be subtracted from the personal protection insurance benefits otherwise payable for the injury. [MCL 500.3109(1); MSA 24.13109(1).]

The purpose of § 3109(1) is to reduce the basic cost of insurance by requiring a setoff of those government benefits that duplicate no-fault benefits[2] and coördinating those benefits a victim may receive. The focus of the analysis is whether the benefits are duplicative.[3] Thus, "not *all* '[b]enefits provided or required to be provided under the laws of any state or the federal government' must be subtracted from no-fault personal protection insurance benefits otherwise due."[4]

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[2] See *Tebo v Havlik,* 418 Mich 350, 367; 343 NW2d 181 (1984); *O'Donnell v State Farm Mutual Automobile Ins Co,* 404 Mich 524, 544; 273 NW2d 829 (1979).

[3] *Jarosz v DAIIE,* 418 Mich 565, 577; 345 NW2d 563 (1984).

[4] *Id.,* p 573.

This Court formulated a test to determine whether particular benefits must be set off from no-fault benefits in *Jarosz v DAIIE,* 418 Mich 565, 577; 345 NW2d 563 (1984):

> We conclude that the correct test is: state or federal benefits "provided or required to be provided" must be deducted from no-fault benefits under § 3109(1) if they:
>
> 1) Serve the same purpose as the no-fault benefits, and
>
> 2) Are provided or are required to be provided as a result of the same accident.

Unfortunately, the *Jarosz* test did not really anticipate the question presented by these facts. We are confronted here with legislation conferring on the payor of workers' compensation benefits a right of complete recovery out of the worker's tort recovery—a situation not specifically dealt with or contemplated by our Legislature when it crafted our no-fault scheme.

The primary underlying theme of the automobile no-fault act is that the automobile insurer pays without any right of reimbursement out of any tort recovery. It is an important, but secondary, concept that where benefits are provided from other sources pursuant to state or federal law, the amount paid by the other source reduces the automobile insurer's responsibility. But to the extent that the reduction in the automobile insurer's responsibility is from a source that retrieves reimbursement from the injured person's tort recovery, the amount so retrieved should not be deemed "benefits provided" within the meaning of the automobile no-fault act relieving the primarily liable automobile insurer of its primary responsibility to pay full benefits without reduction by reason of any tort recovery. Were it to be other-

wise, the worker's tort recovery, contrary to the spirit of the automobile no-fault act, would be used, in effect, to reimburse the alternative source (the federal government) of the other "benefits provided" that substituted for automobile no-fault benefits.

Because the reimbursement here is provided for by federal law, which preëmpts state law, we cannot, as in *Great American Ins v Queen,* 410 Mich 73; 300 NW2d 895 (1980), bar the alternative source (the federal government) from recovering against and from the tort recovery what it paid the injured worker. In fairness, however, in order to prevent a worker injured in an automobile accident from, in effect, paying for his own work loss/medical benefits, we can require the automobile no-fault insurer to repay benefits to that extent, in order to effectuate the underlying policies of the automobile no-fault act.[5]

We are persuaded that when the automobile no-fault act speaks of benefits "provided," it means benefits permanently provided. To the extent that benefits paid are retrieved by the alternative source provider out of the worker's tort recovery, they at that point cease to be "benefits provided" within the meaning of § 3109(1) relieving the automobile no-fault insurer of liability to the extent of "benefits provided" by alternative sources pursuant to state or federal law.

Because plaintiff was ultimately required to refund the FECA benefits he had received, he was left without that compensation for his medical services and lost wages. Therefore, his only recourse for

[5] It is most unlikely that the Legislature intended that all persons injured in automobile accidents would receive full work loss and medical benefits without any reduction of any tort recovery they might obtain, excepting only those relatively small number of persons injured in an automobile accident in their employment by the federal government.

economic damages was to seek payment from his no-fault carrier. Because, in fact, only single recovery was available to plaintiff, there was no duplicative recovery.[6]

We find that § 3109(1) of the no-fault act does not apply in this case. Therefore, the amount plaintiff initially received in FECA benefits should not be subtracted from the personal protection insurance benefits otherwise available to plaintiff under the no-fault insurance act. Plaintiff is entitled to personal protection benefits plus interest. We therefore reverse the decision of the Court of Appeals and remand this case to the circuit court for entry of an order consistent with this opinion.

RILEY, C.J., and LEVIN, BRICKLEY, BOYLE, ARCHER, and GRIFFIN, JJ, concurred with CAVANAGH, J.

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[6] See *Perez v State Farm Mutual Automobile Ins Co,* 418 Mich 634, 641; 344 NW2d 773 (1984).

## DETROIT BASE COALITION FOR THE HUMAN RIGHTS OF THE HANDICAPPED v DEPARTMENT OF SOCIAL SERVICES

Docket No. 80661. Argued April 5, 1988 (Calendar No. 4). Decided August 23, 1988.

Detroit Base Coalition for the Human Rights of the Handicapped and other plaintiffs brought an action in the Ingham Circuit Court against the Department of Social Services, seeking to prevent the DSS from implementing a policy mandating administrative hearings by telephone for recipients of public assistance who challenge the denial or reduction of assistance. The court, Thomas L. Brown, J., granted summary judgment for the DSS, finding that as long as the telephone hearings were constitutionally fair no requirement of law was violated, that the DSS policy change was not a change in or a violation of DSS rules, and that the DSS did not need to promulgate a rule under the Administrative Procedures Act to implement the policy. The Court of Appeals, ALLEN, P.J., and MACKENZIE, J. (J. P. SWALLOW, J., concurring), affirmed in an opinion per curiam (Docket No. 87153). The plaintiffs appeal.

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

The telephone hearing procedures of the Department of Social Services mandating telephone hearings for claimants challenging the denial or reduction of public assistance are inconsistent with its existing rules; the telephone hearing policy violates the rule-making provisions of the Administrative Procedures Act.

1. The Department of Social Services must conduct administrative hearings for persons who contest the denial or reduction of public assistance. It also must promulgate rules which provide adequate procedures for conducting such hearings. Under the Administrative Procedures Act, before a rule may be promulgated, an agency must follow a procedure which includes public hearings, public participation, notice, approval by the

REFERENCES

Am Jur 2d, Welfare Laws §§ 107, 108.

Sufficiency of notice or hearing required prior to termination of welfare benefits. 47 ALR3d 277.

joint committee on administrative rules, and preparation of statements, with intervals between each.

2. Under existing departmental rules regarding the conducting of hearings for claimants who contest the denial or reduction of public assistance, hearings are to be held at a reasonable time, date, and place, which normally is to be in the county where the client resides. The rules contemplate hearings at which the claimant appears at the place where the decisionmaker observes, considers, and evaluates the evidence. Thus, to comport with the rules, a hearing must be conducted where a hearing referee is present. Because the policy at issue would provide only for telephone hearings conducted outside the presence of a referee or for regional hearings in the presence of a hearing referee, but outside the presence of a department representative, it represents a modification of the manner in which fair hearings are to be conducted under the existing rules and thus is inconsistent with them.

3. The Department of Social Services is subject to the rule-promulgation requirements of the Administrative Procedures Act. A rule that does not comply with the procedural requirements of the APA is invalid. The policy bulletin at issue, which mandates telephone hearings, was not issued according to the requirements for promulgation of an agency rule. It modifies existing administrative rules and cannot be considered to be an interpretative statement that only explains underlying rules; nor is it an exercise of permissive statutory authority. The telephone hearing procedures are binding and affect the rights of the public to administrative hearings and the conduct of those hearings. The new procedures are not merely mechanical details for the conduct of hearings, but rather represent substantial changes in the detailed requirements for the conduct of fair hearings to determine claimants' rights under the Social Welfare Act and applicable federal law. They are extensive and were adopted, without notice to and comment from the general public and interested parties and without consideration by a joint committee, as rules which would provide adequate procedure for a fair hearing. Because the telephone hearing policy adopted by the DSS was not promulgated as a rule within the meaning of the APA, absent full compliance with the rule-making provisions of the APA, it cannot be implemented because it is without legal authority or effect under Michigan law.

4. A court may grant declaratory relief in a case of actual

controversy within its jurisdiction. In this case, there is sufficient adversity of positions to make the issue justiciable.

Reversed.

158 Mich App 613; 405 NW2d 136 (1987) reversed.

1. ADMINISTRATIVE LAW — DEPARTMENT OF SOCIAL SERVICES — PUBLIC ASSISTANCE — TELEPHONE HEARINGS.

Hearing procedures mandated by the Department of Social Services for claimants challenging the denial or reduction of public assistance, which would provide only for telephone hearings conducted outside the presence of a hearing referee or for regional hearings in the presence of a referee, but outside the presence of a department representative, are inconsistent with existing department rules governing the conducting of fair hearings; in addition, their promulgation violates the rule-making provisions of the Administrative Procedures Act (MCL 24.231-24.264, 400.8, 400.9; MSA 3.560[131]-3.560[164], 16.408, 16.409; 1979 AC, R 400.907, 400.912).

2. ADMINISTRATIVE LAW — DEPARTMENT OF SOCIAL SERVICES — PUBLIC ASSISTANCE — HEARINGS.

Department of Social Services rules regarding the conducting of hearings for claimants who contest the denial or reduction of public assistance provide that hearings be held at a reasonable time, date, and place, which normally will be in the county where the claimant resides, contemplate hearings at which the claimant appears at the place where the decisionmaker observes, considers, and evaluates the evidence (1979 AC, R 400.907).

Legal Aid of Central Michigan (by *M. Ann Miller*) for plaintiff Lansing Welfare Rights Organization.

Legal Services of Eastern Michigan (by *Terri L. Stangl*) for plaintiffs Intermediate Welfare Rights Organization and United Welfare Rights Organization.

Legal Services of Southeastern Michigan (by *Deborah A. Johnson*) for plaintiff Gladys Thompson.

Legal Services of Western Michigan (by *Terrie J. Hartman*) for plaintiff Michelle Koren.

Michigan Legal Services (by *Susan K. McPar-*

*land*) for plaintiffs Westside Mothers and Michigan Welfare Rights Organization.

Michigan Protection & Advocacy Service (by *Dolores M. Coulter*) for plaintiffs Michigan Association of Retarded Citizens, Detroit Base Coalition for the Human Rights of the Handicapped, Social Services for the Hearing Impaired, Washtenaw County Association of Retarded Citizens, and Justice in Mental Health.

*Frank J. Kelley,* Attorney General, *Louis J. Caruso,* Solicitor General, and *Erica W. Marsden,* Assistant Attorney General, for the defendants.

BOYLE, J. This Court granted leave to appeal to resolve two questions. We are asked to determine, first, whether the telephone hearing procedures are inconsistent with existing rules promulgated by the Department of Social Services. Second, we must determine whether the telephone hearing policy of the Department of Social Services violates the rule-making provisions of the Administrative Procedures Act. We hold that the telephone hearing procedures of the Department of Social Services are inconsistent with promulgated rules. We further hold that the telephone hearing policy of the Department of Social Services violates the rule-making provisions of the Administrative Procedures Act. Therefore, the decision of the Court of Appeals is reversed.

I

The plaintiffs consist of two groups. The first is the recipients of benefits (clients) under programs administered by the Michigan Department of Social Services, and the second is the advocacy organizations which represent them.

Pursuant to statute, administrative hearings are provided to clients whose benefits have been denied, reduced, or terminated. MCL 400.8-400.9; MSA 16.408-16.409. Since 1980, the welfare recipient or applicant has had a choice of an in-person hearing or a telephone hearing. In 1984, the DSS issued a policy bulletin stating that effective October 1, 1984, telephone hearings would be routinely conducted in cases involving applicants for or recipients of public assistance who are challenging the denial or reduction of public assistance.

On September 18, 1984, before this policy could be effected, three of the plaintiffs filed an original action for mandamus in the Court of Appeals and obtained a stay prohibiting implementation of this policy. This stay was lifted in *Goode v Dep't of Social Services,* 143 Mich App 756; 373 NW2d 210 (1985), lv den 424 Mich 882 (1986), with the Court holding that the policy did not violate the Open Meetings Act, MCL 15.261 *et seq.;* MSA 4.1800(11) *et seq.*

On September 26, 1984, this case was commenced in the Ingham Circuit Court. The plaintiffs are seeking injunctive or declaratory relief, or, in the alternative, a writ of mandamus or superintending control to prevent the defendants from implementing the policy. The plaintiffs contend that the policy is in contravention of promulgated rules of the DSS and violates the rule-making process of the Administrative Procedures Act, 1969 PA 306, ch 3, §§ 31-64, MCL 24.231-24.264; MSA 3.560(131)-3.560(164). The plaintiffs were granted an ex parte temporary restraining order prohibiting the implementation of the policy until further order of the circuit court. Both the defendants and the plaintiffs filed motions for summary disposition, and oral arguments on the instant parties' motions were heard by the circuit court on July

30, 1985. The plaintiffs did not assert that the DSS' policy violated any clients' due process or other constitutional rights. The trial court held that so long as telephone hearings were constitutionally fair, they violated no requirement of law. The court determined that the policy change did not constitute a change in or a violation of DSS rules and concluded that the DSS did not need to promulgate a rule under the APA to implement the policy. Accordingly, the trial court granted summary disposition on behalf of the defendants and dissolved the temporary restraining order. The plaintiffs appealed.

The Court of Appeals affirmed the trial court's decision.

II

The DSS is required to conduct administrative hearings for individuals who contest the denial or reduction of public assistance. MCL 400.8-400.9; MSA 16.408-16.409. Michigan law also requires the DSS to promulgate rules which must provide adequate procedures by which to conduct the hearings. MCL 400.9(1); MSA 16.409(1):

> [T]he director shall promulgate rules for the conduct of hearings within the state department. The rules shall provide adequate procedure for a *fair* hearing of appeals and complaints, when requested in writing by an applicant for or recipient of assistance or service, financed in whole or in part by federal funds. [Emphasis added.]

Since the adoption of a rule by an agency has the force and effect of law and may have serious consequences of law for many people, the Legislature has proscribed an elaborate procedure for rule promulgation. As set forth in the APA, 1969

PA 306, ch 3, §§ 31-64, MCL 24.231-24.264; MSA 3.560(131)-3.560(164), that process requires public hearings, public participation, notice, approval by the joint committee on administrative rules, and preparation of statements, with intervals between each process.

This action was taken because, in recent years, legislative bodies have delegated to administrative agencies increasing authority to make public policy and, consequently, have recognized a need to "ensure that none of the essential functions of the legislative process are lost in the course of the performance by agencies of many law-making functions once performed by our legislatures." Bonfield, State Administrative Rule Making, § 1.1.1, p 4. Thus, the question whether the policy may be adopted without compliance with the APA is more than a question of notice and hearing requirements. It is a question of the allocation of decision-making authority.

The rules promulgated by the DSS for the conduct of hearings are found in 1979 AC, R 400.901-400.922. Two rules are applicable here. 1979 AC, R 400.907 provides that hearings be held at "a reasonable time, date, and place which normally shall be in the county where a claimant resides." Second, 1979 AC, R 400.912 provides that a party to a DSS hearing is guaranteed six specific rights for prehearing and hearing procedures.

Prior to 1980, administrative hearings for clients whose benefits had been denied, reduced, or terminated were conducted before a hearing officer at the DSS office of a client's county of residence. Between 1980 and 1984, an applicant for or recipient of benefits had the option[1] of appearing in-person at a hearing at a local DSS office or permit-

[1] The telephone hearing procedure was voluntary in the sense that any claimant who desired an in-person hearing could receive one if

ting a hearing referee to hear the case by telephone. In an in-person hearing, the hearing referee traveled to the local office and had an opportunity to view all the witnesses and evidence. In a telephone hearing, the claimant, any witnesses, and the local DSS worker were in the local office, and the hearing referee was in either the department's Lansing or Detroit office. The hearing was conducted by speakerphones in each office.

In 1984, the DSS issued the policy bulletin which presents the issue in this case, Program Policy Bulletin No. 84-16, to provide for a telephone hearing using the same procedure in effect since 1980 or for a modified face-to-face hearing on written request. Program Policy Bulletin No. 84-16; Assistance Payments Manual, Item 630, p 6. Under the "modified in-person hearing" a claimant could travel to one of four hearing sites (Detroit, Escanaba, Grayling, or Lansing) and be present in the same room with the hearing referee, and the department representative would remain in the local office and participate by speakerphone. The case file would remain in the local office. The policy provides that, upon request, the department could schedule an in-person hearing in the county where the client lives if the client has an impairment which is in issue or which makes travel to one of the four sites impossible or impractical.

III

The plaintiffs maintain that Program Policy Bulletin No. 84-16 is inconsistent with and alters the existing rules. Specifically, plaintiffs contend

requested in a timely fashion. Further, the defendants maintain that eighty percent of claimants chose the telephone hearings. This is misleading. Only twenty percent of the claimants exercised their option for an in-person hearing.

that the policy conflicts with Rule 400.907 which states that hearings shall be conducted at "a reasonable time, date, and place which normally shall be *in the county where a claimant resides.*" (Emphasis added.) The plaintiffs submit that Rule 400.907 provides public assistance claimants who request a hearing with the right to have their appeal heard and conducted in the county where the claimant resides, and that the policy bulletin provides only for telephone hearings conducted outside the referee's presence or for regional hearings in the presence of the hearing referee, but without the presence of the department representative.

The defendants reply that when the hearing is conducted by telephone, it actually takes place at both the place where the claimant is present and the place where the hearing referee is present. The defendants thus contend that the hearing contemplated by the policy bulletin is consistent with Rule 400.907 because it is conducted in the county where the plaintiff resides.

The defendants rely on the Court of Appeals holding in *Goode v Dep't of Social Services, supra,* that telephone hearings take place both at the place where the hearing referee is located and at the local office where the claimant attends. The decision in *Goode* has no applicability to the instant case. In *Goode,* the Court held that the telephone hearing procedure does not violate the Open Meetings Act, MCL 15.261 *et seq.;* MSA 4.1800(11) *et seq.,* which requires that the performance of a necessary governmental function be open to the public. The Court of Appeals held that teleconference calls, which could be heard through speakerphones to all in a room, and the subsequent release of a written opinion announcing the

hearing officer's decision, were sufficient to meet this requirement.

We find persuasive the approach of the Illinois appellate court to the definition of "hearing." *Sleeth v Illinois Dep't of Public Aid,* 125 Ill App 3d 847; 466 NE2d 703 (1984). In *Sleeth,* the court invalidated a telephone hearing procedure on the ground that the procedure violated Ill Rev Stat, ch 23, ¶ 11-8.2[2] which requires that hearings "shall be heard in the county where the appellant resides." The court determined the situs of the telephone hearing to be where the hearing referee is located:

> The essence of a hearing is the opportunity to be heard by the listener. One can be heard by written affidavit, by closed circuit television, by video tape recording, by telephone or by actual appearance. Each method offers an opportunity to be heard, but only with the last mentioned method is the *situs of the hearing—is the place where the listener hears—in the actual presence of the speaker.*
>
> In the instant case, the listener was not one of the local office personnel in Peoria, but the officer or officers located in Chicago. The speakers were the plaintiffs, and under the procedures followed by the [Illinois Department of Public Aid] *the plaintiffs were not present at the situs of the hearing. It follows then that the hearing was not conducted in the county of the plaintiffs' residence.* We must conclude that the procedures utilized by the IDPA for telephone conference hearings failed to meet statutory requirements of the Illinois Public Aid Code. [*Sleeth, supra,* p 852. Emphasis added.]

The Illinois appellate court revisited this issue in

[2] Defendant claims that *Sleeth, supra,* is not applicable to this discussion because the Illinois statute also mandated "in-person" hearings. The court in *Sleeth* addressed the requirements of "in-person" and "in the county where claimant resides" separately.

*Padlo v Illinois Dep't of Public Aid,* 131 Ill App 3d 430; 475 NE2d 1068 (1985), and held:

> We agree that an appeal conducted by a teleconference phone call to a hearing officer located in a different county is not conducted "in person" *or "in the county where the appellant resides"* as required by sections 11—8.1 and 11—8.2 of the Illinois Public Aid Code (Ill Rev Stat 1983, ch 23, pars 11—8.1, 11—8.2). We, therefore, affirm the circuit court's order remanding the matter to the Department for a new hearing. [*Id.,* p 433. Emphasis supplied.]

We are persuaded that Rule 400.907 likewise contemplates a hearing at which the plaintiffs are present at the place where the decisionmaker is observing, considering, and evaluating the evidence. For purposes of Rule 400.907, we reject defendants' argument that the location of the telephone hearing is in two places simultaneously and hold that the hearing is considered and conducted at the place where the hearing referee is present. Therefore, telephone hearings or the modified face-to-face hearings which are the options available to claimants under the 1984 policy revision do not take place "in the county" in which the claimant resides.

A policy mandating telephone hearing procedures would mean that as a rule the hearings will *not* take place in the county in which a claimant resides, and therefore does not meet the statutory requirement of 1979 AC, R 400.907 that the hearing be held at "a reasonable time, date, and place which normally shall be in the county where a claimant resides."[3] Contrary to defendants' charac-

[3] Defendants note that every court that has addressed the question has held that telephone hearings do not violate due process. In *Casey v O'Bannon,* 536 F Supp 350 (ED Pa, 1982), the plaintiffs claimed that

terization, the policy mandating telephone hearings or modified in-person hearings represents a modification of the manner in which fair hearings are conducted and thus is inconsistent with the existing rules.

IV

The DSS is subject to the rule-promulgation requirements of the Administrative Procedures Act, MCL 24.201 *et seq.;* MSA 3.560(101) *et seq.*

It is undisputed that the policy bulletin at issue here was not issued pursuant to the requirements for promulgation of an agency rule. A rule that does not comply with the procedural requirements of the APA is invalid under Michigan law. See MCL 24.243, 24.245; MSA 3.560(143), 3.560(145); *Pharris v Secretary of State,* 117 Mich App 202; 323 NW2d 652 (1982) (guidelines for Secretary of State hearing examiners published in an internal policy manual were not binding because they were not promulgated pursuant to the APA).

The Legislature has defined "rule" broadly so as to defeat the inclination of "agencies to label as 'bulletins,' 'announcements,' 'guides,' 'interpretive bulletins,' . . . which, in legal operation and effect, really amount to rules . . . ." Cooper, 1 State Administrative Law, p 108.

> "Rule" means an agency regulation, statement, standard, policy, ruling or instruction of general applicability, which implements or applies law

having to travel to one of the six regional sites in order to have a face-to-face hearing violated their due process rights. *Id.,* p 351. In *Casey,* the court held that due process does not require that the examiner be able to see the witnesses as they testify. The same conclusion was reached in *New Mexico ex rel Human Services Dep't v Gomez,* 99 NM 261; 657 P2d 117 (1983). These cases are inapplicable to this discussion since plaintiffs do not contend that the telephone hearings violate due process.

> enforced or administered by the agency, or which prescribes the organization, procedure or practice of the agency, including the *amendment, suspension* or rescission thereof . . . . [MCL 24.207; MSA 3.560(107). Emphasis added.]

The second portion of the definition of "rule" is a series of specific exclusions from the broader concept. The classes of rules which are exempt from the rule-making requirements represent an effort to strike a fair balance between the need for adequate procedures to govern the proposal, adoption, and effectiveness of rules on the one hand, and the conflicting need for workable, efficient, economical, and effective government on the other. Bonfield, *supra,* p 399.

We are unable to accept the Court of Appeals conclusion that the telephone hearing procedure is excepted from the APA pursuant to subsection (h) of MCL 24.207; MSA 3.560(107):

> "Rule" means . . . but does not include the following:
>
> * * *
>
> (h) A form with instructions, an interpretive statement, a guideline, an informational pamphlet or other material which in itself does not have the force and effect of law but is merely explanatory.

This exception has been narrowly construed and requires that the interpretive statement at issue be merely explanatory. For example, in *Michigan Farm Bureau v Bureau of Workmen's Compensation,* 408 Mich 141, 159; 289 NW2d 699 (1980), the Court held that letters from the director in which he computed maximum and minimum workers' compensation weekly benefits were announce-

ments of the interpretation of an opinion of the Court of Appeals and consequently were interpretive statements within the meaning of the APA.

This construction follows from the principle that the preferred method of policymaking is by promulgation of rules. When action taken by an agency alters the status quo, those who will be affected by its future application should have the opportunity to be heard and to participate in the decisionmaking. See *Metromedia v Taxation Div,* 97 NJ 313; 478 A2d 742 (1984).

In construing administrative rules, courts apply principles of statutory construction. *General Motors Corp v Bureau of Safety & Regulation,* 133 Mich App 284; 349 NW2d 157 (1984). In addition, § 32(1) of the APA provides that any statutory definitions of words, phrases, or rules of construction made applicable to all statutes also apply to rules unless it is clear that such definition or construction was not intended. MCL 24.232; MSA 3.560(132).

The general rule when interpreting the language of a statute is to construe it according to its plain meaning. A fair interpretation of Rule 400.907 would be that at the time the rule was promulgated a *fair* hearing was a hearing which *must generally* take place in the county in which the claimant resides. It is clear that the rule as stated did not envision telephone hearings. Rather, it clearly contemplated a hearing in which all parties and the hearing referee were in attendance at one site, generally the place where the claimant resided.

The program bulletin issued by the DSS *mandating* telephone hearings modifies the existing administrative rules and cannot be considered an interpretive statement that only explains the un-

derlying rules.[4] The drafters could have adopted an in-person-only hearing rule similar to the Illinois statute or, see *Sleeth, supra,* a rule which required only that a hearing be held at a reasonable date, time, and place within the DSS' discretion. Instead, the unavoidable inference is that the drafters of Rules 400.907 and 400.912 contemplated that a hearing with all participants would usually be held in the county in which the claimant resides so as to insure that individual easy access to the decisionmaker, and that the word "normally" was inserted to allow exceptions to be made when necessary. The rule which mandates telephone hearings or modified in-person hearings is simply too broad to be deemed an interpretation of the rules, the language of which does not so much as hint at hearings which would *usually not* be held in the claimant's county.

The defendants also contend that the telephone hearing procedures are exempt from the rule-making requirements of the APA pursuant to subsection (j) of MCL 24.207; MSA 3.560(107), another exception to the definition of a rule:[5] "(j) A decision by an agency to exercise or not to exercise a permissive statutory power, although private rights or interests are affected." The defendants rely on the department's statutory authority to

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[4] In *Spruytte v Walters,* 753 F2d 498 (CA 6, 1985), the court determined that a policy directive prohibiting inmates from receiving books except from publishers was invalid because it conflicted with the state rule allowing inmates to receive books that did not threaten security. Regularly, in response to the argument that the policy directive was simply a legitimate interpretation of the administrative rule the court concluded, "The exception created by the Policy Directive is simply too broad to be deemed an interpretation of the Administrative Rule." *Id.,* p 504.

[5] The Court of Appeals did not reach this issue, having found the telephone hearing procedure not to be a rule in accordance with MCL 24.207(h); MSA 3.560(107)(h).

administer its public assistance programs. MCL 400.10, 400.14; MSA 16.410, 16.414.[6]

The situations in which courts have recognized decisions of the DSS as being within the § 7(j) exception are those in which explicit or implicit

[6] The state department is designated as the state agency to coöperate with the federal government in the administration of the social security act . . . including title 4, title 6, title 16, and title 19 and any amendments thereto or supplemental thereof. The state department may administer the food stamp act of 1964, as amended, . . . and any other law which the governor or the legislature of the state may designate. The department may coöperate with the proper departments or agencies of the federal government and with all other departments or agencies of the state and local governments, and supervise the administration by local governmental departments or agencies of any plans established by the state in coöperation with the federal government under these provisions and the rules promulgated pursuant thereto. . . .

The director, with the approval of the governor, may coöperate with the federal government, or any of its agencies or instrumentalities, in handling the welfare and relief problems and needs of the people of this state, to the extent authorized by the laws of this state.

The director may adopt any plan required or desirable to participate in the distribution of federal moneys or the assistance of the federal government, and may accept on behalf of the state any allotment of federal moneys. . . . The director may promulgate rules and enter into any agreement or agreements with federal, state, or local units . . . .

For the purpose of assuring full federal approval of the activities of the department and local departments with respect to the operation of a plan, the director may do all things reasonable and proper to conform with federal requirements pertaining to methods and standards of administration. [MCL 400.10; MSA 16.410.]

The state department shall have and be vested with the following additional powers and duties:

(b) To distribute, as provided in this act, subject to federal rules and regulations, and in accordance with the rules promulgated by the director, money appropriated by the legislature or received from the federal government for the granting of aid to dependent children . . . and for other relief or welfare services provided by law. [MCL 400.14(1)(b); MSA 16.414(1)(b).]

authorization for the actions in question has been found. For example, in *Colombini v DSS,* 93 Mich App 157; 286 NW2d 77 (1979), the Court held the DSS' adoption of a client reporting system (CRS) in eleven Michigan counties came within the § 7(j) exception. In this case, the Legislature included a provision in the annual DSS appropriation act, 1977 PA 105, which required the department to provide proof of the cost effectiveness of the CRS and obtain approval from the Senate and House appropriations committees if it wished to continue the program beyond December 1, 1977, thereby recognizing the implementation of the CRS.

Similarly, in *Hinderer v DSS,* 95 Mich App 716, 719; 291 NW2d 672 (1980), the Court held the department's decision to implement a "lag budgeting system" in making monthly payments under its Aid to Families of Dependent Children program was an exercise of the budgetary authority pursuant to applicable federal law and regulations.[7]

The attempt to implement a mandatory telephone hearing policy is not an exercise of permissive statutory authority. The only relevant statutory provision *mandates* that the department conduct hearings pursuant to promulgated rules. MCL 400.9(1); MSA 16.409(1).

The agency's label is not dispositive and the inquiry must focus on the "actual action undertaken by the directive, to see whether the policy being implemented has the effect of being a rule." *Schinzel v Dep't of Corrections,* 124 Mich App 217, 219; 333 NW2d 519 (1983).

The telephone hearing procedures are binding and affect the rights of the public to administrative hearings and the conduct of those hearings.

[7] MCL 400.14(1)(b); MSA 16.414(1)(b) authorized the department to distribute funds under the AFDC program pursuant to federal statutes and regulations.

The new procedures are not merely mechanical details for the conduct of hearings, but, rather, represent substantial changes in the detailed requirements for the conduct of fair hearings to determine claimants' rights under the Social Welfare Act and applicable federal law. The rules are extensive and were adopted, without notice and comment from the general public and interested parties and consideration by a joint committee, as rules which would provide "adequate procedure for a fair hearing." MCL 400.9(1); MSA 16.409(1). An agency is under a duty to follow its own rules. *Rand v Civil Service Comm,* 71 Mich App 581; 248 NW2d 624 (1976). This policy bulletin represents an alteration of the present rules and therefore must be promulgated as a rule under the proper procedures set out by the APA.

In sum, the telephone hearing policy is inconsistent with the existing rules and therefore cannot be implemented without benefit of rulemaking. The telephone hearing procedure has the full force and effect of law and represents an alteration or change from the rule. The department's effort to change substantially the manner in which it conducts its hearings solely through an internal policy bulletin and manual revision undermines the fundamental purpose of the APA:

> [B]ecause the adoption of a rule by an agency has the force and effect of law and may have serious consequences for many people, the legislature prescribed an elaborate procedure for rule promulgation in Chapter 3 of the Michigan Administrative Procedures Act . . . . These provisions are calculated to invite public participation in the rule-making process, prevent precipitous action by the agency, prevent the adoption of rules that are illegal or that may be beyond the legislative intent, notify affected and interested persons

> of the existence of the rules, and make the rules readily accessible after adoption. [Bienenfeld, Michigan Administrative Law, p 4-1.]

In the absence of rulemaking then, appellants have been deprived of rights under the APA 1) to receive notice of the telephone hearing policy as a proposed rule, 2) to comment on the rule at public hearings, and 3) to review the rule through the joint committee on administrative rules of the Michigan Legislature.

The telephone hearing policy adopted by the Department of Social Services was not promulgated as a rule within the meaning of the APA and therefore, absent full compliance with the rulemaking provisions of the APA, the policy cannot be implemented because it is without legal authority or effect under Michigan law.

V

The defendants contend that what plaintiffs believed might have happened when the revised procedures were implemented was purely speculative and without a factual basis. Further, defendants claim that since the policy change at issue was not yet implemented when the lawsuit was started, none of the plaintiffs had been prejudiced by the new procedures.

This attempt by the DSS to apply a policy that will govern the future conduct of administrative hearings without adopting the policy as a rule deprived the plaintiffs of important rights to participate in the promulgation of the agency's policy. The DSS failed to follow procedural requirements required by statute, and the plaintiffs, whose interests were intended to be protected or regulated

through the procedures, are the proper parties[8] to challenge the conduct of the DSS, i.e., noncompliance with the provisions of the APA.

In this context, declaratory judgment is appropriate. MCR 2.605(A) provides that a Michigan court may grant declaratory relief "[i]n a case of actual controversy within its jurisdiction . . . ." The controversy is whether the DSS was under a duty to comply with the notice and public-hearing requirements of §§ 41 and 42 of the APA before issuing the directive mandating the telephone hearings.[9]

The purpose of a declaratory judgment is to enable the parties to obtain an adjudication of their rights before actual injuries or losses have occurred. *Shavers v Attorney General,* 402 Mich 554; 267 NW2d 72 (1978). Further, the "declaratory judgment rule was intended and has been liberally construed to provide a broad, flexible remedy with a view to making the courts more accessible to the people." *Id.,* p 588. See 2 Honigman & Hawkins, Michigan Court Rules Annotated (2d ed), pp 682-708. What is essential to an actual controversy is that plaintiffs plead and prove facts which indicate an adverse interest assuring the sharpening of the issues raised.[10]

[8] Enforcement of the substantial-compliance standard "even at the insistence of a person who could not show personal prejudice, 'will encourage agency adherence to the statutory procedure and further the . . . purpose of increasing agency accountability . . . .'" Bonfield, *supra,* p 366.

[9] Ample authority supports the proposition that denial of a procedural opportunity to challenge agency action can give rise to standing regardless of the likelihood of success on the merits. 13 Wright & Miller, Federal Practice and Procedure (2d ed), § 3531.4, pp 433-434. See, also, *Nat'l Conservative PAC v Federal Election Comm,* 200 US App DC 89; 626 F2d 953 (1980); *Committee for Full Employment v Blumenthal,* 196 US App DC 155, 158; 606 F2d 1062 (1979); *Gardner v FCC,* 174 US App DC 234; 530 F2d 1086 (1976).

[10] For example, see *Crawford v Secretary of State,* 160 Mich App 88; 408 NW2d 112 (1987).

The policy bulletin issued by the DSS was, in effect, a rule and, had the plaintiffs not filed the suit, would be binding as of October 1, 1984. Section 63 of the APA authorizes an agency to issue a declaratory ruling on how a statute administered by the agency or a rule or order of the agency may apply to an actual state of facts. Section 64 provides that no one may commence an action for a declaratory judgment to test the validity or applicability of a rule without first requesting a declaratory ruling. This declaratory ruling, or the refusal to issue one, is then subject to judicial review.[11]

The plaintiffs are persons who have a distinct individual interest separate from that of the general public that will be affected[12] by agency policy and have been denied the opportunity to participate in that process.

In this context it is clear that there is sufficient adversity of positions to make the issue justiciable. The decision of the Court of Appeals which affirmed the trial court's dismissal of plaintiffs' complaint is reversed. Program Policy Bulletin No. 84-16 is inconsistent with the existing rules governing administrative hearings and, unless promulgated pursuant to the rule-making procedures of the

[11] The defendants issued the policy bulletin and refused to issue a declaratory ruling in response to plaintiffs' request.

[12] Plaintiffs-claimants threatened with termination of benefits have submitted affidavits detailing the specific problems they would experience with the mandatory hearings which were scheduled for them under Program Policy Bulletin No. 84-16 and, in addition, noted a willingness and desire to participate in the rule-making procedure through public hearings. For example, a claimant sanctioned by the DSS for alleged noncoöperation in connection with a paternity action noted the inability of the hearing referee to observe behavior would be detrimental because credibility would be the key issue in that hearing. Another individual, since there was an important factual dispute with the caseworker, needed an in-person hearing and witnesses present to properly plead his case. Neither the claimant nor the witnesses could afford the costs or the time to travel to Lansing.

APA, the DSS cannot implement a mandatory telephone hearing policy.

RILEY, C.J., and LEVIN, BRICKLEY, CAVANAGH, ARCHER, and GRIFFIN, JJ., concurred with BOYLE, J.

PROVIDENCE HOSPITAL v MORRELL

Docket No. 81443. Decided August 24, 1988. On application by the third-party defendant for leave to appeal, the Supreme Court, in lieu of granting leave, partially affirmed the judgment of the Court of Appeals insofar as it affirmed the district court's judgment in favor of the third-party plaintiff.

Providence Hospital brought an action in the 35th District Court against Russell A. Morrell, seeking payment of hospital maternity expenses incurred by his wife. Mr. Morrell filed a third-party complaint against United Fidelity Insurance Company, claiming that a health insurance policy was in force at the time Mrs. Morrell became pregnant. United Fidelity asserted that, at the time of the birth, the policy had been terminated. The court, James N. Garber, J., granted summary judgment for Mr. Morrell, finding that public policy limited the right of an insurer to cancel coverage for pregnancy. The Wayne Circuit Court, Helene N. White, J., affirmed. The Court of Appeals, GILLIS, P.J., and BEASLEY and SAWYER, JJ., affirmed in an opinion per curiam (Docket No. 88161). The insurer seeks leave to appeal.

In an opinion per curiam, signed by Justices LEVIN, CAVANAGH, BOYLE, and ARCHER, the Supreme Court *held:*

A health insurer remains liable for expenses related to a pregnancy which occurred while a health insurance policy was in force, but which were incurred after the policy was terminated. Although public policy considerations may override language in a health insurance policy giving the insurer a right to terminate coverage for pregnancy-related conditions where the pregnancy occurs during the life of the policy, on the facts of this case, it is inappropriate to expand the public policy to apply to conditions other than pregnancy arising during the life of a policy.

Affirmed in part and reversed in part.

Chief Justice RILEY and Justices BRICKLEY and GRIFFIN would grant leave to appeal, and would not summarily dispose of the case.

160 Mich App 692; 408 NW2d 521 (1987) affirmed in part and reversed in part.

*Edick, Esper & Runco* (by *Robert E. Edick*) for defendant Morrell.

*Jeanne Stempien* for third-party defendant United Fidelity Insurance Company.

PER CURIAM. The issue raised by this application for leave to appeal concerns the liability of a health insurance carrier for expenses incurred after the insurer terminates the policy, but resulting from a condition (in this case pregnancy) that arose during the life of the policy. The Court of Appeals held that, in that situation, the insurer remains liable for those expenses arising from that condition that would have been covered had the policy remained in effect. We modify the result reached by the Court of Appeals to limit its application to the particular context in which this case arose—expenses resulting from a pregnancy which began during the life of the policy.

I

In October, 1980, United Fidelity Insurance Company issued a group medical insurance policy to Morrell Builders, which Russell Morrell owned. Morrell and his wife, Norah, were insured under the policy.

In May, 1982, United Fidelity notified Morrell Builders that the policy coverage would terminate as of July 1, 1982. This notice was in accordance with the thirty-day notice requirement in the policy. There is no claim that the termination was based on the particular circumstances of the Morrells or Morrell Builders. Rather, the termination appears to have been part of a general course of action by United Fidelity to cease writing this kind of insurance.

At the time the policy was terminated, Norah

Morrell was pregnant. In September, 1982, she gave birth to a child at Providence Hospital. United Fidelity declined to pay the hospital expenses, relying on the previous termination of the policy. Russell Morrell also failed to pay the bill, and as a result Providence Hospital sued Morrell in district court. Morrell filed a third-party complaint against United Fidelity.

Both Morrell and United Fidelity moved for summary judgment. The district court granted summary judgment for the insured and ultimately entered a judgment in the amount of $2,329.05, plus interest. The circuit court affirmed. The Court of Appeals granted United Fidelity's application for leave to appeal, but ultimately affirmed in a per curiam opinion. 160 Mich App 697; 408 NW2d 521 (1987). United Fidelity has filed a delayed application for leave to appeal in this Court.[1]

II

This is not a case in which there is dispute about the interpretation of an insurance policy. Had it been in effect at the time Norah Morrell delivered her child, it would have provided coverage for the expenses incurred. Further, the insured does not contest United Fidelity's characterization of this policy as an "expenses incurred" policy, which bases coverage on the time when the expense is incurred, rather than on the time when the illness or condition giving rise to the expense occurred or arose.[2]

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[1] The Health Insurance Association of America and Blue Cross and Blue Shield of Michigan have filed motions for leave to file briefs as amici curiae in support of the application.

[2] The policy expressly excludes expenses incurred after termination of the policy:

Similarly, the lower courts have not interpreted the policy language as providing coverage in the circumstances of this case. Rather, they have held that public policy limits the ability of the insurer to avoid liability for expenses arising from conditions that came about during the policy coverage.

The district court noted authority for a public policy limitation on the right to cancel insurance contracts. *Murphy v Seed-Roberts Agency, Inc,* 79 Mich App 1; 261 NW2d 198 (1977). It concluded that this was a circumstance in which coverage should remain in effect:

> [T]his was a situation, as I have said earlier, where the Defendant Third Party Plaintiff was already in a circumstance whereby but only the simple passage of time there would definitely have

---

INSURING CLAUSE

(1) If an Insured or a Covered Dependent, while a Covered Person under the Policy for these Major Medical Expense Benefits (called "this Insurance" hereinafter), incurs Covered Expense for the necessary medical care and treatment of injury or sickness, the Company will pay benefits at the Percentage Payable rate up to the Maximum Benefit for such Expense that is in excess of the Deductible.

* * *

EXCLUSIONS

A charge is excluded from being a Covered Expense if, or to the extent that, it is not specifically included as such pursuant to the preceding subsections "COVERED EXPENSES" and "SPECIAL LIMITATIONS"; and, further, whether or not so included, a charge will in any case be excluded from being considered a Covered Expense if it is within any one of the following categories:

* * *

(15) Any charges incurred prior to the date on which this Insurance becomes effective with respect to the Covered Person and *any charges incurred after this Insurance terminates* with respect to the Covered Person except to the extent, if any, that such charges are covered pursuant to the terms and provisions of the subsection "EXTENDED BENEFITS." [Emphasis added.]

The provisions for extended benefits under the policy relate to continuation of coverage after termination in cases of disability, which are inapplicable to this case.

been a claim under any set of circumstances. There was no change of circumstances, there was no unforeseen risk. Everything that was covered could have been and should have been and, in fact, was seen.

There was a period of time—and this is the Court's Opinion—there was a period of time during that contract where the insurance company could not and did not have the unfettered right to terminate. That period commencing after the Third Party Plaintiff could not have obtained any insurance after the pregnancy was known about and only after the mere passage of time. I think it was at that time that the claim arose.

While the insurance company could cancel that policy for other purposes, if the Morrells had been in an automobile accident, that would have been a different circumstance after the attempted termination.

But for the very limited purposes of coverage of the pregnancy, I think that the insurance company could not cancel and therefore I must grant summary judgment in favor of Third Party Plaintiff.

Following affirmance by the circuit court, the Court of Appeals granted leave to appeal, but ultimately affirmed. The Court distinguished *Auto-Owners Ins Co v Blue Cross & Blue Shield of Michigan,* 132 Mich App 800; 349 NW2d 238 (1984), on the ground that it involved a dispute between two insurers, rather than between the insurer and the insured.[3] It noted the authority for

[3] In *Auto-Owners,* a woman who was injured in an automobile accident had coverage under both an Auto-Owners no-fault policy and a Blue Cross group health plan through her employer. Blue Cross paid medical expenses until the injured woman was dropped from the employer's health plan because she was unable to return to work. Auto-Owners then began making payments under the no-fault policy and brought the action against Blue Cross to recover those benefits. However, the Court of Appeals concluded that Blue Cross properly terminated coverage under the terms of its policy and was not liable

use of a public policy rationale for avoiding cancellation of an insurance policy, and then turned to the facts of this case.

While the policy language here was clear, the Court applied the public policy exception. Unlike the trial court, however, the Court of Appeals did not limit its holding to pregnancy-related expenses, but rather applied it to any condition existing at the time of cancellation:

> Although the termination provisions of the policy at issue, as well as the provision that only those expenses incurred during the life of the policy are covered, have a clear meaning and definition in the policy, we do not believe that the public policy of this state will permit the enforcement of such a termination or cancellation clause where the effect is to render a now uninsurable person without insurance coverage for those conditions which exist at the time of termination. In the case at bar, Norah Morrell was pregnant at the time of the termination of the United Fidelity policy. An insurance company cannot assume a risk when a person is apparently healthy and, thereafter, disavow the risk when the person has developed an illness or other coverable condition.
>
> Therefore, we hold that where, as here, an insured develops a condition during the life of a health insurance policy and that policy is subsequently cancelled or terminated by the carrier, the carrier remains liable for those expenses which arise from that condition where those expenses would be covered by the policy had it not been terminated. [160 Mich App 701-702.][4]

for expenses incurred after termination even though they arose from an injury that occurred while the policy was in effect.

[4] The Court made clear that it meant this ruling to apply only to disputes between the insured and the insurer. It left open the result it would reach in a case, like *Auto-Owners, supra,* where the action is between two insurance carriers.

III

We agree with the Court of Appeals that public policy considerations may override insurance policy language giving the insurer the right to terminate coverage. However, we conclude that the Court of Appeals expansion of that principle beyond the pregnancy context of this case to require coverage of all conditions arising during the life of the policy was unwarranted. Unlike most conditions requiring medical treatment, pregnancy often results from the deliberate decision of the insured. This brings into play the principle of giving effect to the reasonable expectations of the insured.[5] See, e.g., *Zurich Ins Co v Rombough,* 384 Mich 228, 232-233; 180 NW2d 775 (1970); *State Farm Mutual Automobile Ins Co v Ruuska,* 412 Mich 321; 314 NW2d 184 (1982).[6]

Further, the Court of Appeals expansion of the prohibition on terminations to all conditions occurring during the life of the policy creates the potential for enormous expansion of liability of an insurer for payment of very expensive long-term care benefits. By contrast, the limitation of the holding of this case to pregnancy-related expenses creates such an exposure for only a finite time and involves amounts of expenditures that should be predictable. In these circumstances, it was not appropriate to expand the principle on which the district court decided the case so far beyond the scope of the issue litigated by the parties.

[5] See *Brown v Blue Cross & Blue Shield, Inc,* 427 So 2d 139 (Miss, 1983).

[6] The reasonable expectation principle functions in a slightly different way in the present situation than in most cases. Usually, the question is the insured's expectation as to the interpretation of what is covered by the insurance contract. Here, the kind of benefits were clearly within the scope of the policy. The expectation with which we are concerned is the insured's belief as to whether the insurance will remain in effect in spite of the existence of the termination clause.

Accordingly, pursuant to MCR 7.302(F)(1), we affirm the judgment of the Court of Appeals insofar as it affirmed the district court's judgment in favor of third-party plaintiff Morrell, but disavow the language of the Court of Appeals opinion that would expand the principle of the district court's decision to conditions other than pregnancy arising during the life of the insurance policy.[7]

LEVIN, CAVANAGH, BOYLE, and ARCHER, JJ., concurred.

RILEY, C.J., and BRICKLEY and GRIFFIN, JJ. We would grant leave to appeal but would not dispose of this case summarily.

[7] We express no opinion as to the result in a case in which questions regarding application of the principle to other kinds of conditions are raised and litigated.

TEPER v PARK WEST GALLERIES, INC

Docket No. 79642. Argued November 4, 1987 (Calendar No. 8). Decided August 24, 1988. Rehearing denied *post,* 1207.

Miriam Teper brought an action in the Oakland Circuit Court against Park West Galleries, Inc., and Albert Scaglione, its owner, alleging wrongful discharge from her employment and claiming damages for past and future compensation, including future pension benefits. The court, Hilda R. Gage, J., entered judgment on a jury verdict for the plaintiff. The Court of Appeals, MAHER, P.J., and CYNAR and T. GILLESPIE, JJ., reversed in an opinion per curiam, ruling that the Employee Retirement Income Security Act preëmpted the award of damages for lost pension benefits (Docket No. 83194). The plaintiff appeals.

In an opinion by Justice BOYLE, joined by Justices BRICKLEY, CAVANAGH, and ARCHER, the Supreme Court *held:*

The award of future pension benefits in a wrongful discharge action under Michigan law against an employer, rather than against an employee benefit plan or an administrator or fiduciary of the plan, was not precluded by the preëmption provision of the Employee Retirement Income Security Act.

1. The ERISA was intended to make pension profit-sharing and stock bonus plans more effective in providing retirement income for employees. The act applies to private retirement plans which are voluntary on the part of employers. It was designed to increase the number of persons participating in retirement plans, to ensure that those who participate do not lose benefits as a result of unduly restrictive forfeiture provisions or failure of the plans to accumulate sufficient funds to meet obligations, and to make tax laws relating to such plans fairer by providing greater equality of treatment for the different taxpaying groups involved. To accomplish these goals, the ERISA imposes participation, funding, and vesting requirements on pension plans,

REFERENCES

Am Jur 2d, Pensions and Retirement Funds § 1.

What constitutes a "pension" within meaning of federal statutes excluding actions on claims for pensions from jurisdiction of federal courts. 40 ALR2d 646.

setting various uniform standards for reporting, disclosure, and fiduciary responsibility. However, the act does not mandate that employers provide any particular benefits; rather, it creates a national body of law regulating such plans, including a preëmption provision which supersedes all state laws insofar as they relate to a covered benefit plan.

2. Federal case law has held that an expressly preëmptive relationship to an ERISA plan is established when a state law interferes with a benefit plan by altering the level of benefits which would be paid out under the plan from state to state, by altering the terms of a plan such as the requirements for eligibility, or by subjecting the fiduciaries of a plan to claims other than those provided for in the ERISA. Express preëmption turns upon whether the state law places any fiscal, administrative, or legal burdens upon the plan, not upon hypothetical possibilities. There must be a real, if only indirect, relationship between a challenged state law and an employee benefit plan. Proper analysis of the scope of the preëmption provision requires more than an inquiry into whether a state law is logically related to an ERISA plan; it must be guided by respect for the separate spheres of governmental authority preserved in the federalist system. Where state actions are found to be too tenuous, remote, or peripheral, ERISA preëmption will not obtain.

3. In this case, because the award of future pension benefits did not impose an administrative, fiscal or legal burden upon the pension plan or an administrator or a fiduciary of the plan, it does not relate to a pension plan within the meaning of the ERISA. Thus, Michigan law is not preëmpted.

Chief Justice RILEY, joined by Justice LEVIN, concurring, stated that the sole basis for the plaintiff's claim of wrongful discharge is Michigan common law. An action for breach of an employment contract traditionally has been a matter of state regulation that Congress presumably did not intend to preëmpt. The rights and duties of the parties in this case arise from a contract of employment founded entirely upon state law, rather than upon the federal Employment Retirement Income Security Act. Under § 1144 of the ERISA, a state law is preëmpted if it relates to an ERISA plan and purports to regulate its terms and conditions. A state law relates to an employee benefit plan if it has a connection with or reference to the plan. But to initiate preëmption, the state law must also purport to regulate a term or condition of the plan.

In this case, the plan provides for vested and not future pension credits in the event an employee is terminated. Federal

regulations involve the determination of an employee's accrued benefit. There is no language in the federal regulations or the plan itself concerning the determination of future benefits under an employment contract.

Reversed.

Justice GRIFFIN, dissenting, stated that the plaintiff's claim for future pension benefits as part of her wrongful discharge action under *Toussaint v Blue Cross & Blue Shield of Michigan*, 408 Mich 579 (1980), is precluded by the preëmption provision of the Employment Retirement Income Security Act, particularly in light of the fact that a remedy relating to such benefits was available under the terms of her employer's pension plan and the regulations promulgated under the ERISA. The plaintiff's claim clearly had a connection with or reference to the defendant's ERISA plan because it was necessarily based on the existence and terms and conditions of the pension plan. Insofar as under *Toussaint* Michigan law otherwise might allow an award in excess of entitlement under the plan, it is preëmpted.

153 Mich App 520; 396 NW2d 210 (1986) reversed.

LABOR RELATIONS — RETIREMENT — EMPLOYEE RETIREMENT INCOME SECURITY ACT — PREËMPTION.

An award of future pension benefits in a wrongful discharge action under Michigan law against an employer, rather than against an employee benefit plan or an administrator or fiduciary of the plan, did not relate to the pension plan within the meaning of the Employee Retirement Income Security Act and thus was not precluded by the preëmption provision of the act (29 USC 1144[a]).

*Sommers, Schwartz, Silver & Schwartz, P.C.* (by *Joseph A. Golden* and *Patrick Burkett*), for the plaintiff.

*Bodman, Longley & Dahling* (by *James J. Walsh, Charles N. Raimi,* and *Jeanne A. Van Egmond*) for the defendants.

Amici Curiae:

*Clark, Klein & Beaumont* (by *Dwight H. Vincent, Robert G. Buydens, J. Walker Henry,* and *Beverley B. Brielmaier*) for Michigan Manufacturers Association.

*Stark & Gordon* (by *Sheldon J. Stark*) for Michigan Trial Lawyers Association.

BOYLE, J. In this case we are asked to consider whether an award of future pension benefits in a wrongful discharge claim under Michigan law is precluded by the preëmption provision of § 514 of the Employee Retirement Income Security Act, 29 USC 1144(a). We conclude that the ERISA does not expressly[1] preëmpt Michigan law in this area. We therefore reverse the decision of the Court of Appeals and reinstate that portion of the trial court's amended judgment awarding future pension benefits.[2]

I

The plaintiff was first employed by defendant Park West Galleries on August 1, 1976, at the age of forty-four. She was initially hired as a part-time bookkeeper but was given a full-time position after two months. In 1978, the plaintiff was promoted to executive assistant and instructed by the owner of Park West Galleries, Albert Scaglione, to hire an assistant to perform her former bookkeeping functions. In subsequent years, as the business grew, the plaintiff was given the position of director of marketing, auction, and sales. Albert Scaglione assured the plaintiff at various times during her employment that her position was a secure one which would be available for her lifetime if she continued to perform well. In 1980, the plaintiff qualified for participation in Park West Galleries defined benefit pension plan. On June 19, 1981, at

[1] See n 15.

[2] We view the Court of Appeals decision as affirming the balance of the amended judgment entered by the trial court.

the age of forty-nine, the plaintiff was discharged from her employment at Park West Galleries.

The plaintiff filed a claim in circuit court on July 27, 1982, alleging, inter alia, that she had been wrongfully discharged in violation of her contract of employment. The plaintiff claimed damages in the nature of past and future compensation, including future pension benefits. The plaintiff's claims were tried before a jury on January 17-26, 1984. At the close of proofs, the defendants moved for a directed verdict on the claim for pension benefits,[3] citing the preëmption provision of the ERISA, 29 USC 1144(a). The trial court denied the motion but submitted the question of pension benefits to the jury for a special verdict. The jury returned a verdict for the plaintiff, finding damages for lost pension benefits in a present value amount of $89,220.[4] The trial court subsequently denied the defendants' alternative motions for judgment notwithstanding the verdict or a new trial on the same ERISA preëmption ground.

The defendants appealed the trial court's ruling in the Michigan Court of Appeals, raising the single issue of preëmption. In a decision dated July 22, 1986, the Court of Appeals reversed, ruling that the ERISA preëmpted the award of damages for lost pension benefits.[5] We granted leave to appeal in an order dated March 24, 1987.

[3] The claim for pension benefits was for future benefits, excluding those for which the plaintiff was already vested under the plan at the time of her discharge.

[4] The jury also found damages in the amount of $14,660.80 for front and back pay as well as $500 for slander per se, although those damages are not at issue in this appeal.

[5] A contrary conclusion was reached by another Court of Appeals panel in *Sepanske v Bendix Corp*, 147 Mich App 819; 384 NW2d 54 (1985).

II

A. THE STATUTE

The ERISA, as explained by the United States Senate Committee on Finance,

> [i]s designed to make pension profit-sharing, and stock bonus plans more effective in providing retirement income for employees who have spent their careers in useful and socially productive work. It encourages provision for the retirement needs of many millions of individuals. At the same time, the committee recognized that private retirement plans are voluntary on the part of the employer, and, therefore, it has carefully weighed the additional costs to the employer and minimized them to the extent consistent with minimum standards for retirement benefits.
>
> In broad outline, the bill is designed—
>
> (1) to increase the number of individuals participating in retirement plans;
>
> (2) to make sure that those who do participate in such plans do not lose their benefits as a result of unduly restrictive forfeiture provisions or failure of the plan to accumulate and retain sufficient funds to meet its obligations; and
>
> (3) to make the tax laws relating to such plans fairer by providing greater equality of treatment under such plans for the different taxpaying groups involved. [93d Cong (2d Sess), 1974 US Code Cong & Admin News, p 4890.]

To accomplish these goals, the statute imposes participation, funding, and vesting requirements on pension plans. It also sets various uniform standards for reporting, disclosure, and fiduciary responsibility under both pension and welfare plans. However, the ERISA does *not* mandate that employers provide any particular benefits. *Shaw v Delta Air Lines, Inc,* 463 US 85, 91; 103 S Ct 2890; 77 L Ed 2d 490 (1983).

Of principal interest in this appeal is the preëmption provision of the ERISA in which Congress declared:

> [T]he provisions of this title and title IV shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 4(a) and not exempt under section 4(b). [88 Stat 897.]

The issue we address is the scope of this provision. The remedies available to the plaintiff under Michigan contract law[6] appear to "relate to" her defined benefit pension plan. On the other hand, in the United States Supreme Court's rulings on the ERISA preëmption provision, it is presumed that Congress did not intend to preëmpt areas of traditional state regulation. See, e.g., *Metropolitan Life Ins Co v Massachusetts,* 471 US 724, 740; 105 S Ct 2380; 85 L Ed 2d 728 (1985). Thus, we must determine more precisely what related areas of state law are preëmpted by the ERISA and whether the plaintiff's claims fall within one or more of those areas.

### B. THE FEDERAL DECISIONS

In *Alessi v Raybestos-Manhattan, Inc,* 451 US 504; 101 S Ct 1895; 68 L Ed 2d 402 (1981), the United States Supreme Court first considered the scope of the ERISA's preëmption provision. The state law at issue was a section of New Jersey's workers' compensation act prohibiting a setoff of workers' compensation benefits against employee retirement pension benefits. *Id.,* pp 507-508. The New Jersey set-off provision precluded a reduction in workers' compensation payments, not pension

[6] For the purposes of ERISA's preëmption provision, the word "law" is defined so as to include case law. 29 USC 1144(c)(1).

payments. Nevertheless, the Supreme Court held that the New Jersey provision was preëmpted because it ultimately affected the administration of pension funds by indirectly interfering with the integration method for calculating benefits.[7] *Id.*, p 524. Unfortunately for our purposes, the *Alessi* Court declined an invitation to determine the outer boundaries of ERISA preëmption. *Id.*, pp 524-525.

ERISA preëmption was next considered by the United States Supreme Court in the context of New York statutes forbidding discrimination in employment, including discrimination in employee benefit plans on the basis of pregnancy. *Shaw v Delta Air Lines, Inc, supra,* p 88. The *Shaw* Court unanimously held that New York law was preëmpted by the ERISA. The Court reasoned that the words "relate to" were used by Congress in a broad sense, including laws which directly regulated employee benefit plans as well as those affecting employee benefit plans by implication. *Id.*, pp 96-99. Since the obvious implication of the New York statutes was to require disbursements under employee benefit plans for otherwise noncompensable, pregnancy-related disability, the state law did fall within the general ERISA preëmption provision.[8] The *Shaw* Court was careful to note, however, that

[7] Presumably, the New Jersey statute actually would have increased the resources available to the pension fund for integration and thus was not a financial burden on pension funds. However, the New Jersey law did impose a significant administrative burden because it required a distinct method for the calculation of benefits under the plan for New Jersey workers.

[8] *Shaw* involved two New York statutes, the Human Rights Law, NY Exec Law, §§ 290-301 (McKinney), and the Disability Benefits Law, NY Work Comp Law, §§ 200-242 (McKinney). In addition to holding that these statutes fell within the general ERISA preëmption provision by virtue of their *relation to* employee benefit plans, the *Shaw* Court also considered the statutes under the ERISA preëmption

> [s]ome state actions may affect employee benefit plans in too tenuous, remote, or peripheral a manner to warrant a finding that the law "relates to" the plan. Cf. *American Telephone and Telegraph Co v Merry,* 592 F2d 118, 121 (CA 2, 1979) (state garnishment of a spouse's pension income to enforce alimony and support orders is not preëmpted). [*Shaw, supra,* p 100, n 21.]

Two years later, in *Metropolitan Life, supra,* a Massachusetts statute, requiring certain minimum mental health care benefits in general health insurance policies, was upheld in a challenge under the ERISA preëmption provision.[9] Again, the United States Supreme Court had no difficulty in finding that the statute fell within the general preëmption provision of the ERISA, 29 USC 1144(a), in that the state law did "relate to" employee benefit plans. However, the Court also found an exception for insurance regulation to be applicable. See 29 USC 1144(b)(2)(A).[10] The *Metropolitan Life* Court acknowledged that certain "disuniformities" from state to state would result from its ruling, but concluded that these inevitably flowed from the decision of Congress to preserve local insurance regulation. *Id.,* p 747.

In *Pilot Life Ins Co v Dedeaux,* 481 US 41; 107 S Ct 1549; 95 L Ed 2d 39 (1987), a complaint was filed for tortious breach of contract, breach of

exceptions, 29 USC 1144, which are not at issue in this appeal. *Shaw* ultimately held that the New York Human Rights Law is preëmpted by the ERISA insofar as it renders the activities of a plan unlawful which are not unlawful under Title VII of the Civil Rights Act, 42 USC 2000e *et seq. Shaw* also held that the New York Disability Benefits Law is preëmpted insofar as it regulates benefits under a multibenefit plan, but exempt from ERISA preëmption insofar as it regulates separately administered disability benefit plans.

[9] The Massachusetts statute was also upheld under a National Labor Relations Act preëmption challenge.

[10] The plaintiff in this appeal does not assert that any statutory exception to ERISA preëmption is applicable.

fiduciary duties, and fraud in the inducement on the basis of Pilot Life's termination of Dedeaux's long-term disability benefits under a group plan. Pilot Life was both the insurer and administrator of the plan. *Id.,* pp 43-44. All of Dedeaux's claims were based upon an allegedly improper processing of its claims under the plan. Dedeaux's complaint stated causes of action only under state law. None of the causes of action available under the ERISA was asserted by Dedeaux against Pilot Life. See 29 USC 1132. The unanimous *Pilot Life* Court held that Dedeaux's complaint did "relate to" an employee benefit plan and did not fall within any ERISA preëmption exception. The Court concluded that the ERISA's civil enforcement provisions were Dedeaux's exclusive remedy against the plan and its fiduciaries. *Id.,* p 57.

In the companion case of *Metropolitan Life Ins Co v Taylor,* 481 US 58; 107 S Ct 1542; 95 L Ed 2d 55 (1987), the United States Supreme Court considered the more specific, procedural question of removal jurisdiction under the ERISA in cases alleging improper administration of employee benefit plans. Taylor had filed common-law claims for breach of contract and "mental anguish" against Metropolitan Life as the administrator of his group disability plan. Taylor joined those claims with additional claims against his employer, General Motors, for wrongful termination and failure to promote on the basis of the alleged disability. The claims against both defendants were originally filed in state court. Metropolitan Life and General Motors petitioned for removal to federal court, alleging federal question jurisdiction over the disability benefits claims and *pendent* jurisdiction over the remaining claims. The United States Supreme Court upheld the removal, ruling that the ERISA preëmpted Taylor's common-law claims

and also displaced them with the ERISA's own civil enforcement provisions. See 29 USC 1132. It is important to note, however, that the *Taylor* Court was not required to address the question of ERISA preëmption of the claims against the employer, since removal jurisdiction was not based upon those claims.[11] See *Taylor v General Motors Corp,* 826 F2d 452 (CA 6, 1987) (addressing the pendent claims on remand).

Most recently, in the watershed opinion of *Fort Halifax Packing Co, Inc v Coyne,* 482 US 1; 107 S Ct 2211; 96 L Ed 2d 1 (1987), the United States Supreme Court rejected an ERISA preëmption challenge to a Maine statute requiring a one-time severance payment to employees in the event of a plant closing. *Fort Halifax* is particularly significant for two reasons. First, it is the first United States Supreme Court opinion in which a statute survived an express ERISA preëmption challenge without reference to a specific ERISA preëmption exception and therefore represents the first United States Supreme Court opinion defining the outer boundaries of the general ERISA preëmption provision. Second, *Fort Halifax* contains the most detailed and explicit United States Supreme Court discussion of the purposes underlying the ERISA preëmption provision.

The *Fort Halifax* Court emphasized that an ERISA preëmption analysis must be guided by respect for the separate spheres of governmental authority preserved in our federal system. *Fort*

[11] We acknowledge that, in *Morningstar v Meijer, Inc,* 662 F Supp 555 (ED Mich, 1987), the *Taylor* holding was viewed as a ruling that the retaliatory discharge claim against the employer was preëmpted by the ERISA and supplanted by the ERISA's civil-enforcement provisions. See 29 USC 1132, 1140. While we decline to embrace this view, we do note that it is consistent with our holding. The plaintiff herein, like Morningstar, has not alleged a retaliatory discharge and would therefore not be subject to ERISA preëmption.

*Halifax, supra,* 482 US 19. Citing *Alessi, supra,* the Court explained the federal interest as follows:

> ERISA's preëmption provision was prompted by recognition that employers establishing and maintaining employee benefit plans are faced with the task of coördinating complex administrative activities. A patch-work scheme of regulation would introduce considerable inefficiencies in benefit program operation, which might lead those employers with existing plans to reduce benefits, and those without such plans to refrain from adopting them. Preëmption ensures that the administrative practices of a benefit plan will be governed by only a single set of regulations. See, e.g., HR Rep No. 93-533, p 12 (1973) ("[A] fiduciary standard embodied in Federal legislation is considered desirable because it will bring a measure of uniformity in an area where decisions under the same set of facts may differ from state to state"). [*Fort Halifax, supra,* 482 US 11.]

On the other hand, the Court also noted a state interest in the serious economic consequences of plant closings. *Id.,* 482 US 19, n 13.

The *Fort Halifax* Court found that federal and state interests were properly reconciled in the Maine statute, explaining:

> Fort Halifax found no need to respond to passage of the Maine statute by setting up an administrative scheme to meet its contingent statutory obligation, any more than it would find it necessary to set up an ongoing scheme to deal with the obligations it might face in the event that some day it might go bankrupt. The company makes no contention that its statutory duty has in any way hindered its ability to operate its retirement plan in uniform fashion, a plan that pays retirement, death, and permanent and total disability benefits on an ongoing basis. . . . The obligation imposed by the Maine statute thus differs radically in

impact from a requirement that an employer pay ongoing benefits on a continuous basis.

The Maine statute therefore creates no impediment to an employer's adoption of a uniform benefit administrative scheme. Neither the possibility of a one-time payment in the future, nor the act of making such a payment, in any way creates the potential for the type of conflicting regulation of benefit plans that ERISA preëmption was intended to prevent. As a result, preëmption of the Maine law would not serve the purpose for which ERISA's preëmption provision was enacted. [*Fort Halifax, supra,* 482 US 14-15.]

From the foregoing authority we conclude that a preëmptive relationship to an ERISA plan is established when state law interferes with a plan by: 1) altering the level of benefits which would be paid out under a given plan from state to state, 2) altering the terms of a plan, such as the requirements for eligibility, or 3) subjecting the fiduciaries of a plan to claims other than those provided for in the ERISA itself. Thus, in *Alessi,* the New Jersey set-off preclusion for workers' compensation benefits was preëmpted by the ERISA because it altered the level of benefits which would be paid to a beneficiary under a plan in New Jersey. The New York law in *Shaw* was preëmpted because it had the effect of altering the terms of a disability plan to include coverage for pregnancies. Finally, in *Pilot Life* and *Metropolitan Life Ins Co,* the common-law claims were preëmpted because they subjected the fiduciaries of the plans to liability apart from that expressly created by the ERISA.

Our conclusion that the boundaries of the ERISA's express preëmption are demarcated by these relations is consistent with both the purpose and method of Congress in creating the ERISA. The purpose, as noted in the United States Senate

Finance Committee's report, was to encourage the development of employee benefit plans. However, the method chosen by Congress was not a direct requirement that employers provide certain benefits, *Shaw, supra,* p 91, but the creation of a uniform national body of law regulating such plans. *Id.,* p 99, quoting 120 Cong Rec 29197, 29933. With these purposes and methods in mind, we turn to the question whether the ERISA preëmpted this plaintiff's claim for future pension benefits as damages in her wrongful discharge claim.

### C. THE RELATIONSHIP BETWEEN LOST FUTURE PENSION BENEFITS IN A WRONGFUL DISCHARGE CLAIM AND THE ERISA

Defendants Park West Galleries and Albert Scaglione initially argue that the award of future pension benefits in the plaintiff's wrongful discharge claim does "relate to" the Park West pension plan because the damages represent future pension benefits which would have accrued to the plaintiff under the plan. In fact, according to the defendants, the amended judgment entered in this case specifically identifies this portion of the plaintiff's award as "for the pension."

The defendants' argument would be compelling if the award of future pension benefits had been against Park West Galleries, Inc., Defined Benefit Pension Plan. There is, however, no danger of such an award in this case. The plan itself is not and never has been a party to this action. Furthermore, no trustee or administrator of the plan has been joined in a capacity as administrator or trustee. In short, the simple fact that the damage award was based in part on the terms of the plan does not place any fiscal or administrative burden

upon the plan itself. This relationship to the plan is, in the words of the *Shaw* Court, too "peripheral" to trigger ERISA preëmption. *Shaw, supra,* p 100, n 21.[12]

The defendants also argue that the award of future pension benefits relates to the pension plan because the plan itself provides a remedy for the loss of future benefits in circumstances of this kind. Article VI, § 5 of the plan does provide for vested credits when an employee's employment is terminated "for any reason."[13] The defendants additionally assert that the ERISA regulations, specifically 29 CFR 2530.200a-2530.200b-3, are incorporated in the Park West plan by law and would provide for the accrual of future pension credits in addition to vested credits upon the basis of a successful claim for lost wages.[14]

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[12] As the concurring opinion of Chief Justice RILEY notes, the sole basis for the plaintiff's claim of wrongful discharge is a traditional area of Michigan common law. The rights and duties of these litigants have their genesis in a contract of employment. The fact that *damages* were calculated with reference to the plan does not change the nature of this cause of action. See *Lingle v Norge Div of Magic Chef, Inc,* 486 US 399; 108 S Ct 1877; 100 L Ed 2d 410 (1988) (the fact that additional, substantive rights are provided to an employee who is the victim of a retaliatory discharge for claiming workers' compensation benefits does not inextricably link the cause of action to similar rights under the employee's collective bargaining agreement, nor does it invoke federal preëmption under § 301 of the Labor Management Relations Act, 29 USC 185). But see also *Metropolitan Life Ins Co v Massachusetts,* 471 US 724, 747; 105 S Ct 2380; 85 L Ed 2d 728 (1985) (unlike ERISA, the NLRA contains no statutory preëmption provision), and see n 15.

[13] Again we must note that the claim for pension benefits was for future benefits, *excluding* those for which the plaintiff was already vested under the plan. The parties have agreed that the present value of those vested benefits which were excluded from damages was approximately $5,000.

[14] It is alleged by the defendants and amicus curiae Michigan Manufacturers Association that these ERISA regulations would allow the plaintiff to obtain additional accruals under the plan upon the basis of the jury's award of front and back pay. See n 4. Actually, additional accruals are allowed by regulation only for back pay. 29 CFR 2530.200b-2(a)(3). In addition, no more than 501 hours of service are required to be credited by regulation, 29 CFR 2530.200b-2(a)(2)(i),

Assuming, arguendo, that the defendants' interpretations of the plan and relevant ERISA regulations are correct, we are nevertheless forced to conclude that the ERISA preëmption provision is inapplicable. The question of express ERISA preëmption does not turn upon whether an alternative remedy is offered under the plan or under the ERISA.[15] Indeed, the *Shaw* Court implicitly ac-

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although a particular plan may require that additional hours of back pay "service" be credited. 29 CFR 2530.200a-2. We are apprised of no provision in the Park West Galleries defined pension plan which requires accruals in excess of 501 hours of back pay. The record does not disclose whether the jury considered these regulations in awarding pension benefits, although the record also fails to disclose any attempt by the defendants to have the jury instructed in this regard.

[15] As we have noted above, the ERISA does contain its own civil enforcement mechanism. 29 USC 1132. While it may be asserted that creation of this mechanism carries with it an *implied* preëmption, the question is largely rendered academic by the fact that actions under § 1132 generally "relate to" plans in that they impose a fiscal, administrative, or legal burden upon plans. One possible exception to this rule would be retaliatory discharges which are proscribed under 29 USC 1140 and made actionable under 29 USC 1132a(3)(B)(ii), although in our view, even this cause of action carries a high probability of imposing fiscal, administrative, or legal burdens upon a plan. We need not address this issue, since the plaintiff has not pled a cause of action under 29 USC 1132, nor have the defendants argued or briefed the issue of implied preëmption. However, we observe no inconsistency between the remedies provided in 29 CFR 2530 and Michigan law in this case. See n 11. Thus, to the extent that the defendants' argument suggests implied preëmption, state law must be treated far more deferentially. As one commentator has explained:

> [W]here Congress legislates "in a field which the States have traditionally occupied . . . we start with the assumption that the historic police powers of the States [are] not to be [ousted] by the Federal Act unless that was the clear and manifest purpose of Congress." Because this test looks to the nature of the subject regulated rather than the character of the federal regulatory scheme, the standards upon which it relies closely parallel those that would be applied if the state regulation or taxation were challenged under the commerce clause. If, under the *Cooley* doctrine, [*Cooley v Bd of Wardens of the Port of Philadelphia,* 53 US (12 How) 299; 13 L Ed 996 (1851)], the activity or interest affected by a challenged state action is regarded as "local," and if the state action contravenes no other commerce clause requirement, then total federal preëmption will not be inferred in the absence of an obvious congres-

knowledged that, apart from the New York statutes, no law would preclude plan administrators from discriminating against pregnancy-related disability prior to the effective date of the Pregnancy Discrimination Act, 42 USC 2000e(k). *Id.*, p 89. ERISA preëmption instead, as discussed above, turns upon whether state law places any fiscal, administrative, or legal burdens upon the plan. In our view, the fact that the plaintiff may have had additional remedies available under the plan does not indicate that pursuit of her remedy against her employer creates a fiscal, administrative, or

sional intent to bar state action over the same subject matter. On this basis, the Court ruled in *Huron Portland Cement Co v City of Detroit,* [362 US 440; 80 S Ct 813; 4 L Ed 2d 852 (1960)], that a municipality may enforce its smoke abatement ordinance against a federally licensed steamship engaged in interstate commerce, even though structural modification of the vessel was required to bring it into compliance with the antipollution statute. Similarly, while federal occupation of the field defined by direct regulation of safety designs for nuclear power plants had been made clear in *Pacific Gas & Electric Co* [*v State Energy Resources Conservation & Development Comm,* 461 US 190; 103 S Ct 1713; 75 L Ed 2d 52 (1983)], the Court in *Silkwood v Kerr-McGee Corp,* [464 US 238; 104 S Ct 615; 78 L Ed 2d 443 (1984)], held that state law providing for compensatory and punitive damages for tort victims, including victims of radiation injuries, was *outside* the occupied field and therefore not preëmpted. In reaching this conclusion, the Court was clearly influenced by the long tradition of state concern with the compensation of victims of negligently, recklessly, or intentionally inflicted injury.

On the other hand, if the field is one that is traditionally deemed "national," the Court is more vigilant in striking down state incursions into subjects that Congress may have reserved to itself. It was not surprising, therefore, that the Court invalidated the state alien registration law in *Hines v Davidowitz,* [312 US 52; 61 S Ct 399; 85 L Ed 581 (1941)]; the Court was extremely solicitous of the paramount federal interest in matters germane to foreign affairs. [Tribe, American Constitutional Law (2d ed), pp 499-500. Emphasis in the original.]

In our view, the field of individual employment contracts is one which states have traditionally occupied. Since we find no clear and manifest purpose within § 1132 to oust states from this field, we would be reluctant to find a § 1132 remedy exclusive under a theory of implied preëmption.

legal burden upon the plan itself.[16] Viewed in this light, the defendants' second argument is merely a more sophisticated version of the earlier argument that the accrual of future pension benefits relates to the plan because the award was calculated on the basis of the terms of the plan.[17] Again, we can only conclude that this relationship is too peripheral to trigger ERISA preëmption. *Shaw, supra.*

Finally, we reject the Court of Appeals reasoning that sound policy requires ERISA preëmption of these damages because:

> The prospect of jury awards under state law for lost pension benefits is a severe disincentive to the establishment of private pension plans and inconsistent with ERISA's express preëmption of all state laws that "relate to" plans under its coverage. [153 Mich App 520, 527; 396 NW2d 210 (1986).][18]

In our view, it is an equally plausible microeconomic hypothesis that employers "buy" labor at market rates and therefore would be required to substitute other, recoverable forms of compensation in the event that they elect to discontinue pension contributions. Moreover, even assuming that the economic analysis of the Court of Appeals is correct, we would find the relationship too remote to trigger ERISA preëmption. *Shaw, supra,* p

[16] Although the imposition of an administrative burden might suggest preëmption, not every state law which imposes an administrative burden upon an ERISA plan is preëmpted. See *Mackey v Lanier Collections Agency & Service, Inc,* 486 US —; 108 S Ct 2182; 100 L Ed 2d 836 (1988) (state law allowing the garnishment of employee ERISA welfare plan benefits not preëmpted).

[17] To the extent that the argument also implies a duplication of recovery, we hasten to add that this was a question of proofs which might have been submitted in the trial court. In fact, it appears from the record that the future pension benefits awarded to the plaintiff were reduced by her vested amount under the plan.

[18] We are aware that the Court of Appeals analysis in this case was rendered without the benefit of *Fort Halifax.*

100, n 21. Our reading of the ERISA preëmption provision indicates that there must be a real, if only indirect, relationship between the challenged state law and an employee benefit plan. The relationship posited in the Court of Appeals analysis is merely hypothetical. It might similarly be posited, for example, that an increase in Michigan's minimum wage[19] would discourage the creation of pension funds by simultaneously reducing the amount of an employer's income allocable to pensions and increasing the level of benefits specified under a pension plan,[20] yet we would be loath to rule that state minimum wage law is preëmpted by the ERISA. Such a relationship is, in the language of the *Shaw* Court, simply too "remote" to trigger ERISA preëmption. *Shaw, supra.*[21]

We agree with the conclusion of the dissent that this wrongful discharge claim has some relationship to the Park West Defined Benefit Pension Plan. However, as made clear by the decisions of the United States Supreme Court, proper analysis of the scope of the ERISA preëmption provision requires more than an inquiry as to whether state law is logically related to an ERISA plan. We reject an all-encompassing view of this legislation which would subordinate the sovereign powers of this state to the limited authority of the federal government. As the United States Supreme Court has explained:

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[19] See MCL 408.381 *et seq.;* MSA 17.255(1) *et seq.*

[20] In art VI, § 1 of the Park West Galleries, Inc., defined benefit pension plan, for example, the amount of the benefit is directly proportional to wages paid during the years of service.

[21] In *Gilbert v Burlington Industries, Inc,* 765 F2d 320, 327 (CA 2, 1985), aff'd sub nom *Roberts v Burlington Industries, Inc,* 477 US 901; 106 S Ct 3267; 91 L Ed 2d 558 (1986), it was explained that when a state statute of general application does not affect the structure, the administration, or the type of benefits provided by an ERISA plan, the mere fact that the statute has some economic effect does not require that the statute be invalidated.

> ERISA preëmption analysis "must be guided by respect for the separate spheres of governmental authority preserved in our federalist system." *Alessi v Raybestos-Manhattan, Inc,* 451 US [504] 522 [68 L Ed 2d 402; 101 S Ct 1895 (1981)]. [*Fort Halifax Packing Co, supra,* 482 US 19.]

In sum, our review of the defendants' arguments and the record in this case fails to show that the award of future benefits imposes an administrative, fiscal, or legal burden upon the employee benefit plan. We therefore conclude that the award of future pension benefits is not preëmpted under the ERISA. Finding no merit in the remaining issue raised by the defendants, we decline to discuss it in this appeal.[22]

## III

## CONCLUSION

Recent federal law establishes that state law is preëmpted under the ERISA, 29 USC 1144(a) when the state law "relates to" an employee benefit plan by: 1) altering the level of benefits which would be paid out under a given plan from state to state, 2) altering the terms of the plan such as requirements for eligibility, or 3) subjecting the fiduciaries of a plan to claims other than those provided in the ERISA itself. Furthermore, even state law which relates to an employee benefit plan by imposing a fiscal, administrative, or legal burden upon the employee benefit plan may not be preëmpted by the ERISA if the relationship is so remote as to constitute merely a hypothetical possibility. Since the award of future pension benefits in this wrongful discharge claim was against the

[22] The defendants have argued alternatively that a loss of future pension benefits was too remote or speculative to recover as damages for a breach of employment contract.

employer, rather than the pension plan or an administrator or a fiduciary of the plan, it does not relate to a pension plan within the meaning of the ERISA. The decision of the Court of Appeals is reversed and the judgment of the circuit court is reinstated.

BRICKLEY, CAVANAGH, and ARCHER, JJ., concurred with BOYLE, J.

RILEY, C.J. (*concurring*). I agree with the result in the majority opinion that § 514 of the Employee Retirement Income Security Act, 29 USC 1144, does not expressly preëmpt a jury award of future pension benefits in a *Toussaint* action.[1] However, I write separately to highlight certain facts which provide additional support for applying the "remote relationship" exception in this case and, alternatively, to offer what I believe to be a more workable approach to ERISA preëmption than that adopted in the majority opinion.

I

In support of its holding, the majority has apparently relied on the "tenuous, remote [and] peripheral" relationship exception derived from *Shaw v Delta Air Lines, Inc,* 463 US 85, 100, n 21; 103 S Ct 2890; 77 L Ed 2d 490 (1983). The plaintiff's damage award, in the words of the Court in the majority opinion, does not sufficiently relate to the Park West pension plan because the award, though based in part upon the terms of the plan, places no "fiscal, administrative, or legal burden upon the plan itself." *Ante,* pp 218-219. See *ante,* pp 215-216, 221. The majority properly derives

[1] *Toussaint v Blue Cross & Blue Shield of Michigan,* 408 Mich 579; 292 NW2d 880 (1980).

its reasoning from the United States Supreme Court decision in *Fort Halifax Packing Co, Inc v Coyne,* 482 US 1; 107 S Ct 2211; 96 L Ed 2d 1 (1987), wherein a Maine severance pay statute was upheld against an ERISA preëmption challenge.

However, in my view, if the majority chooses to apply the "remote relationship" exception in this case, it should emphasize some additional facts. The Court has apparently relied solely on the fact that the plaintiff has not made a claim of liability under the ERISA or against the plan itself (nor against any administrator or fiduciary of the plan). I agree with the Court that this is an important consideration. However, in my opinion, this fact, standing alone, is insufficient to justify the application of the "remote relationship" exception in this case. I would also stress the nature of the plaintiff's suit to support a holding that the damage award in this case is related too peripherally to the ERISA plan to warrant preëmption.

The sole basis for the plaintiff's claim of wrongful discharge is Michigan common law. An action for breach of an employment contract, such as the plaintiff's, has traditionally been an area of state regulation, one that Congress presumably did not intend to preëmpt. *Metropolitan Life Ins Co v Massachusetts,* 471 US 724, 740; 105 S Ct 2380; 85 L Ed 2d 728 (1985). See also *Mackey v Lanier Collections Agency & Service, Inc,* 486 US —; 108 S Ct 2182; 100 L Ed 2d 836 (1988) (Congress did not intend to preëmpt the application of state garnishment procedures to ERISA welfare benefit plans); *American Telephone & Telegraph Co v Merry,* 592 F2d 118, 121 (CA 2, 1979) (Congress did not intend the ERISA to alter traditional support obligations, and, therefore, the state garnishment of a spouse's pension income to enforce alimony and support orders is not preëmpted). The rights and duties of

the parties herein have their genesis in a contract of employment founded entirely upon state law, rather than upon the ERISA or an ERISA plan. The Park West plan was introduced at the trial in this case merely to serve as a measure of damages suffered as a result of the employer's breach under *Toussaint v Blue Cross & Blue Shield of Michigan,* 408 Mich 579; 292 NW2d 880 (1980). Furthermore, the plan itself has remained entirely unaffected throughout this suit because state law requires the breaching employer to pay such damages out of its own assets, rather than out of the plan. In my view, these facts provide further support for applying the "remote relationship" exception in this case.

II

Although I find the foregoing analysis persuasive, I believe a more practicable approach to ERISA preëmption can be elicited from the plain language of § 1144. Congress has specifically provided that "this chapter shall supersede any and all State laws insofar as they may now or hereafter *relate to* any employee benefit plan . . . ." 29 USC 1144(a) (emphasis added). Although this provision is extremely broad, it is not all-encompassing. *Lane v Goren,* 743 F2d 1337, 1339 (CA 9, 1984). For instance, 29 USC 1144(b)(2)(A) precludes preëmption of any state law "which regulates insurance, banking, or securities." Similarly, § 1144(b)(4) provides that the preëmption provision "shall not apply to any generally applicable criminal law of a State." Congress has further explained the scope of ERISA preëmption in the definitional section, 29 USC 1144(c)(2), wherein the term "state" for preëmption purposes is characterized as "a State, any political subdivisions thereof,

or any agency or instrumentality of either, *which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this subchapter."* (Emphasis added.)

A fundamental principle of statutory construction is that where a statute supplies its own glossary, a court must apply the terms as expressly defined. *Erlandson v Genesee Co Employees' Retirement Comm,* 337 Mich 195, 204; 59 NW2d 389 (1953); *McRaild v Shepard Lincoln Mercury, Inc,* 141 Mich App 406, 410; 367 NW2d 404 (1985). See, generally, 73 Am Jur 2d, Statutes, §§ 223-226, pp 412-413. Thus, interpreting the language of § 1144 using the definitions Congress itself has supplied, a state law is preëmpted if it "relate[s] to" an ERISA plan and "purports to regulate" its terms and conditions. This approach to ERISA preëmption has been adopted by the Second and Ninth Circuits.[2] *Lane, supra; Martori Bros Distributors v James-*

[2] The Sixth Circuit Court of Appeals has indicated its disapproval of this approach, although it expressly declined to decide whether § 1144(c)(2) limits the ERISA preëmption provision. See *Authier v Ginsberg,* 757 F2d 796, 799, n 4 (CA 6, 1985), cert den 474 US 888 (1985).

The Sixth Circuit reasoned that reliance on § 1144(c)(2) "purports to regulate" language to limit ERISA preëmption "would be contrary to the legislative history of ERISA. Congress rejected explicitly a proposed preëmption provision which reached only specific subjects covered by ERISA in favor of the current broad language of Section 1144(a)." *Id.;* see also *Shaw, supra* at 98-99, ns 18-20 (explaining § 1144(a)'s evolution from narrow conflict of content approach to its broad present form).

I agree with the Sixth Circuit that Congress purposefully drafted § 1144(a) in its current broad language. It is indisputable that Congress intended to preëmpt state laws relating to benefit *plans,* rather than laws relating to specific matters covered by the ERISA, i.e., reporting, disclosure, funding, vesting, fiduciary responsibility, etc. *Shaw, supra* at 98.

In my opinion, however, applying § 1144(c)(2) to § 1144(a) does not contravene Congress' intent in this regard. Support for this position can be found in the express language of § 1144(c)(2), which comports with that of § 1144(a) (the ERISA supersedes state laws that "relate to any *employee benefit plan*[*s*]"). Section 1144(c)(2) similarly addresses only "State" action which "purports to regulate . . . the terms and conditions of *employee benefit plans* . . . ." (Emphasis added.) The

*Massengale,* 781 F2d 1349 (CA 9, 1986), cert den 479 US 1018; 107 S Ct 435; 93 L Ed 2d 385 (1986); *Rebaldo v Cuomo,* 749 F2d 133 (CA 2, 1984), cert den 472 US 1008 (1985). See also *Sommers Drug Stores v Corrigan Enterprises, Inc,* 793 F2d 1456 (CA 5, 1986), cert den 479 US 1034; 107 S Ct 884; 93 L Ed 2d 837 (1987).

The United States Supreme Court has pronounced that a state law "relates to" an employee benefit plan if it "has a connection with or reference to such a plan." *Shaw, supra* at 97. Given this expansive definition, it would appear that the damage award herein relates to the Park West plan since the jury referred to the plan when it calculated the amount of the plaintiff's lost pension benefits. Nonetheless, even assuming the award satisfies the Supreme Court's interpretation of a state law which "relates to" an ERISA plan, in order to trigger preëmption under § 1144, the state action must also "purport to regulate" a term or condition of the plan.

The defendants and amicus curiae, Michigan Manufacturers Association, have maintained throughout this appeal that the amount of the jury award conflicts with the amount the plaintiff would have received under Article VI, § 5 of the Park West plan and incorporated ERISA provisions, 29 CFR 2530.200a-2530.200b-3. Thus, it is arguable that the jury award indirectly regulates the terms of the plan.

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definition in § 1144(c)(2) does not mention the purported regulation of the specific subjects of the ERISA. Thus, it is possible to apply § 1144(c)(2) to § 1144(a) without undermining congressional intent. In fact, as mentioned previously, a basic rule of construction mandates the application of statutorily defined terms. *Erlandson* and *McRaild, supra.*

In conclusion, therefore, § 1144(c)(2) should be applied to § 1144(a). Such an application is not only consistent with the express language and legislative history of the ERISA preëmption provision, but also mandated by the rules of statutory construction.

After examining these provisions, I have concluded that they simply do not apply in the instant case. Article VI, § 5 of the Park West plan provides for *vested,* not *future,* pension credits in the event an employee is terminated. Similarly, the cited CFR provisions, which are promulgated pursuant to 29 USC 1054(b)(3)(A) involve the determination of an "employee's *accrued* benefit." There is simply no language in the ERISA regulations or in the plan itself concerning the determination of future benefits under an employment contract. Thus, it would be improper to blindly apply them to the plaintiff's *Toussaint* claim without regard to the scope of the provisions themselves.

In conclusion, therefore, I would apply § 1144(c)(2) to the ERISA preëmption provision, § 1144(a), and hold that the plaintiff's jury award is not preëmpted since it in no way "purports to regulate" any term or condition of the Park West pension plan.

For the foregoing reasons, I concur in the result of the majority opinion.

LEVIN, J., concurred with RILEY, C.J.

GRIFFIN, J. I respectfully dissent. Plaintiff's claim for future pension benefits as part of her action for wrongful discharge under *Toussaint v Blue Cross & Blue Shield of Michigan,* 408 Mich 579; 292 NW2d 880 (1980), is precluded by the preëmption provision, § 514, of the Employee Retirement Income Security Act, 29 USC 1144(a), particularly in light of the fact that a remedy relating to such benefits was available under the

terms of the Park West pension plan and the regulations promulgated under the ERISA.[1]

Section 514(a) of the ERISA preëmpts "any and all State laws insofar as they may now or hereafter *relate* to any employee benefit plan . . . ." 29 USC 1144(a) (emphasis supplied). The ERISA preëmption provision has been characterized as the "most sweeping [federal] preëmption statute ever enacted [by Congress]." *Authier v Ginsberg,* 757 F2d 796, 801, n 8 (CA 6, 1985).

When it enacted the ERISA, Congress took into account a number of policy considerations. In addition to the goal of providing protection for employees, Congress considered it important that costs to employers be controlled so as to encourage the improvement of existing plans and the creation of new plans for the benefit of workers. For example, the following excerpts from the legislative history are revealing:

> [T]he committee is aware that under our voluntary pension system, *the cost of financing pension plans is an important factor in determining whether any particular retirement plan will be adopted and in determining the benefit levels if a plan is adopted, and that unduly large increases in costs could impede the growth and improvement of the private retirement system.* [93rd Cong (2d Sess), 1974 US Code Cong & Admin News 4682. See also pp 4670, 4890, and 4904. Emphasis added.]

> [T]hese new requirements [in the ERISA] have been carefully designed to provide adequate protection for employees and, at the same time, provide *a favorable setting for the growth and development of private pension plans.* It is axiomatic to anyone who has worked for any time in this area that *pension plans cannot be expected to develop if costs are made overly burdensome, particularly for*

[1] Article II, § 10 of the Park West plan. 29 CFR 2530.200b-2(b)(c).

> *employers who generally foot most of the bill.* This would be self-defeating and would be unfavorable rather than helpful to the employees for whose benefit this legislation is designed. [Statement by the Hon. Al Ullman, Ranking Majority Member of the House Committee on Ways and Means. *Id.,* p 5167. Emphasis supplied.]

As the Court of Appeals panel recognized in this case, "[t]he possibility of jury awards for 'lost pension benefits' that far exceed a plaintiff's entitlement under the pension plan itself would not create 'a favorable setting for the growth and development of private pension plans.' " 153 Mich App 520, 526-527; 396 NW2d 210 (1986).

In pursuit of its goals, Congress determined that it would be important and necessary to preëmpt all state laws, including judge-made law, which "may now or hereafter relate" to any employee benefit plan:

> [W]ith the narrow exceptions specified in the bill, the substantive and enforcement provisions of the conference substitute are intended to preëmpt the field for Federal regulations, *thus eliminating the threat of conflicting or inconsistent State and local regulation of employee benefit plans. This principle is intended to apply in its broadest sense to all actions of State or local governments, or any instrumentality thereof, which have the force or effect of law.* [120 Cong Rec 29933 (August 22, 1974) (Sen. Williams). Emphasis supplied.]

The problems which Congress sought to avoid by enacting the preëmption provision were also described by the United States Court of Appeals for the Fourth Circuit:

> Any hope of uniformity in employer obligations would be lost were we to allow various states'

common law governing these obligations to coexist with federal common law under ERISA. Under such a scheme, employers would not only be faced with dual requirements within a single state, but with different state requirements wherever they do business. ERISA surely contemplates a different result. [*Holland v Burlington,* 772 F2d 1140, 1147, n 5 (CA 4, 1985), aff'd sub nom *Brooks v Burlington,* 477 US 901; 106 S Ct 3267; 91 L Ed 2d 559 (1986).]

The United States Supreme Court has repeatedly recognized the pervasive breadth of the ERISA's preëmption provision. See *Pilot Life Ins Co v Dedeaux,* 481 US 41; 107 S Ct 1549; 95 L Ed 2d 39 (1987); *Metropolitan Life Ins Co v Massachusetts,* 471 US 724, 739-740; 105 S Ct 2380; 85 L Ed 2d 728 (1985). Furthermore, it has not been overlooked that Congress rejected the opportunity to adopt a narrower preëmption provision which would have preëmpted only those state laws which deal *directly* with ERISA plans. *Shaw v Delta Air Lines, Inc,* 463 US 85, 98-100; 103 S Ct 2890; 77 L Ed 2d 490 (1983).

As stated by the Court in *Pilot Life Ins Co, supra,* p 54,

> The deliberate care with which ERISA's civil enforcement remedies were drafted and the balancing of policies embodied in its choice of remedies argue strongly for the conclusion that ERISA's civil enforcement remedies were intended to be exclusive.

Further,

> Congress used the words "relate to" in § 514(a) in their broad sense. To interpret § 514(a) to preëmpt only state laws specifically designed to affect employee benefit plans would be to ignore

> the remainder of § 514. It would have been unnecessary to exempt generally applicable state criminal statutes from preëmption in § 514(b), for example, if § 514(a) applied only to state laws dealing specifically with ERISA plans. [*Shaw v Delta Air Lines, Inc,* 463 US 98.]

As the United States Supreme Court recognized in *Shaw,* 463 US 96-97,

> A [state] law "relates to" an employee benefit plan, in the normal sense of the phrase, if it has a *connection with or reference to such a plan.* [Emphasis supplied.]

In the instant case, plaintiff's claim for future pension benefits as part of her wrongful discharge suit clearly had "a connection with or reference to" the defendant's ERISA pension plan because the claim was necessarily based on the existence and terms of the plan. Where the plaintiff, as in this case, introduces into evidence a pension plan covered by the ERISA in order to prove damages, the plaintiff's claim necessarily and obviously "relate[s] to" the plan. Insofar as under *Toussaint* Michigan law might otherwise allow an award in excess of entitlement under the plan, it is and should be preëmpted.

Article VI, § 5 of the Park West plan sets forth a defined benefit for any employee whose employment is terminated "for any reason" other than death prior to the normal retirement date. Those provisions are supplemented by ERISA regulations which are incorporated into the plan by reference. Art II, § 10.

Under the Park West plan, which incorporates ERISA regulations, an employee who is wrongfully terminated would be entitled to the addition of pension credits on the basis of an award of back

pay. The plan does not contemplate the type of large jury award for future pension benefits which was awarded in this case. Contrary to positions taken in the majority and concurring opinions, I believe that by allowing such an award, different than that provided under the pension plan, Michigan's law, as set forth in *Toussaint, supra,* and applied in this case, "purports to regulate," at least indirectly, the "terms and conditions" of the Park West plan. 29 USC 1144(c)(2).

As the concurring opinion points out, "[t]here is simply no language in . . . the plan itself concerning the determination of future benefits" (*ante,* p 227) such as were awarded by the jury in plaintiff's *Toussaint* action.[2] Yet, the majority would allow the jury to utilize the plan in calculating an award of future benefits which is at odds with the terms of the plan. This amounts to state regulation of an ERISA plan. In *Fort Halifax Packing Co, Inc v Coyne,* 482 US 1, 13, n 8; 107 S Ct 2211; 96 L Ed 2d 1 (1987), the Court held that "state laws requiring the payment of benefits also 'relate to a[n] employee benefit plan' if they attempt to dictate what benefits shall be paid under a plan."

The majority analysis leans heavily on the fact that this action was brought against the employer rather than the plan itself. To set aside ERISA preëmption on that basis not only elevates form over substance, but it ignores a line of cases which have already held that preëmption applies even though the suit is directed at the employer instead of its plan. See *Sorosky v Burroughs Corp,* 826 F2d 794 (CA 9, 1987); *Ellenburg v Brockway, Inc,*

[2] To the extent that the concurring opinion intimates that the jury award was based on future pension benefits not contemplated by the Park West plan, such award was not for foreseeable damages, contrary to basic contract law. See, generally, 22 Am Jur 2d, Damages, § 42, pp 65-66.

763 F2d 1091 (CA 9, 1985); *Gilbert v Burlington Industries, Inc,* 765 F2d 320 (CA 2, 1985), aff'd 477 US 901; 106 S Ct 3267; 91 L Ed 2d 558 (1986); *Blau v Del Monte Corp,* 748 F2d 1348 (CA 9, 1985), cert den 474 US 865 (1985); *Kelly v IBM Total & Permanent Disability Income Plan,* 573 F Supp 366 (ED Pa, 1983), aff'd without opinion 746 F2d 1467 (CA 3, 1984); *Witkowski v St Anne's Hosp of Chicago,* 113 Ill App 3d 745; 69 Ill Dec 581; 447 NE2d 1016 (1983).

Because I conclude that the award of future pension benefits under the recently developed *Toussaint* law in Michigan is preëmpted by the ERISA in this case, I would affirm the decision of the Court of Appeals.

PEOPLE v DAWSON

Docket No. 79479. Argued November 3, 1987 (Calendar No. 4). Decided August 24, 1988.

Robert C. Dawson was charged in the Kalamazoo Circuit Court with assault with intent to commit sexual penetration. The court, John E. Fitzgerald, J., granted the defendant's motion for mistrial after the prosecutor misstated the evidence. Prior to the second trial, the defendant moved to bar retrial on the basis of double jeopardy. The court, Fredric A. Grimm, J., denied the defendant's motion, finding that because the defendant retained primary control over the course followed in the original trial, retrial was not barred. Following the second trial, the defendant was convicted by a jury. The Court of Appeals, WALSH, P.J., and MACKENZIE and R. R. FERGUSON, JJ., reversed, holding that jeopardy had attached and that retrial was precluded because the prosecutor had consciously and wilfully engaged in improper conduct, indifferent to the probability that a mistrial would result (Docket No. 65415). The people appeal.

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

Retrial of a criminal defendant is barred where the prosecutor intended to goad the defendant into moving for a mistrial.

1. An accused's protection against being twice placed in jeopardy for the same offense may bar retrial where the initial prosecution ends in a mistrial. Where the motion for mistrial is made by the prosecutor or by the trial court, sua sponte, and the prosecutor or judge made an apparently innocent error, or where the conduct prompting the mistrial was outside their control, retrial will be allowed where manifestly necessary. Where the motion for mistrial was made by the defendant or with his consent and the mistrial was caused by innocent conduct of the prosecutor or judge, or by factors beyond their control, or by the conduct of defense counsel, retrial generally

REFERENCES

Am Jur 2d, Criminal Law § 286.

Am Jur 2d, Trial §§ 192, 1104.

Double jeopardy as bar to retrial after grant of defendant's motion for mistrial. 98 ALR3d 997.

is allowed. However, where prosecutorial conduct provokes the defendant's motion for mistrial, the defendant may not have waived double jeopardy protection.

2. A retrial is an exception to the general double jeopardy bar. Where a mistrial results from apparently innocent or even negligent prosecutorial error, or from factors beyond the prosecutor's control, the public interest in allowing a retrial outweighs the double jeopardy bar. The balance tilts where, on the basis of the objective facts and circumstances of the case, the trial court finds that the prosecutor intended to goad the defendant into moving for a mistrial. Because in this case the people conceded at oral argument that the trial prosecutor intended to bring about a mistrial, remand to the trial court for such finding of fact is not necessary, the result reached by the Court of Appeals is affirmed, and retrial is barred by the Double Jeopardy Clause.

Affirmed.

154 Mich App 260; 397 NW2d 277 (1986) affirmed.

1. CRIMINAL LAW — CONSTITUTIONAL LAW — MISTRIAL — PROSECUTORIAL MISCONDUCT.

Retrial of a criminal defendant is barred where the prosecutor intended to goad the defendant into moving for a mistrial (US Const, Am V; Const 1963, art 1, § 15).

2. CRIMINAL LAW — CONSTITUTIONAL LAW — DOUBLE JEOPARDY — MISTRIAL — PROSECUTORIAL MISCONDUCT.

Retrial of a criminal defendant may be barred on double jeopardy grounds where a mistrial is declared; the focus is on the nature of the conduct prompting the mistrial, and retrial will be allowed if the declaration of the mistrial was manifestly necessary; however, where a defendant's motion for mistrial is prompted by intentional prosecutorial misconduct the defendant may not have waived double jeopardy protection (US Const, Am V; Const 1963, art 1, § 15).

*Frank J. Kelley,* Attorney General, *Louis J. Caruso,* Solicitor General, *James J. Gregart,* Prosecuting Attorney, and *Michael H. Dzialowski,* Assistant Prosecuting Attorney, for the people.

*Milton J. Marovich* and *John R. Scholten* for the defendant.

LEVIN, J. The double jeopardy provisions of the

Michigan[1] and federal[2] constitutions protect an accused from being twice put in jeopardy for the same offense. "Being twice put in jeopardy" includes being subjected to a retrial after the initial prosecution ends in a mistrial.[3] An exception to the double jeopardy bar has been made, and retrials allowed, where the prosecutorial or judicial errors requiring the mistrial appear to have been innocent[4] or were beyond the prosecutor's control.[5] A general exception has also been made where the mistrial was granted on the defendant's motion or with his consent.[6] Where prosecutorial conduct provoked the defendant's motion for mistrial, however, the Double Jeopardy Clause has sometimes been held to bar retrial.[7]

This appeal presents the question when, where the court finds that prosecutorial conduct provoked a defendant's motion for mistrial, the double jeopardy provision bars retrial. We adopt the federal standard and hold that retrial is barred where the prosecutor intended to goad the defendant into moving for a mistrial.

In this case, counsel for the people conceded at

[1] Const 1963, art 1, § 15.

[2] US Const, Am V. The federal provision applies to the states through the Fourteenth Amendment. *Benton v Maryland,* 395 US 784; 89 S Ct 2056; 23 L Ed 2d 707 (1969).

[3] The accused is placed in jeopardy once a jury has been selected and sworn. *People v Barker,* 60 Mich 277, 290; 27 NW 539 (1886). See also *Crist v Bretz,* 437 US 28; 98 S Ct 2156; 57 L Ed 2d 24 (1978).

[4] For example, an error in drafting an indictment. See *Illinois v Somerville,* 410 US 458; 93 S Ct 1066; 35 L Ed 2d 425 (1973).

[5] For example, where a mistrial is declared because of a juror's misconduct, or his illness, disability, or death. See *Thompson v United States,* 155 US 271; 15 S Ct 73; 39 L Ed 146 (1894); *Simmons v United States,* 142 US 148; 12 S Ct 171; 35 L Ed 968 (1891); *People v Grimmett,* 388 Mich 590, 598; 202 NW2d 278 (1972), rev'd on other grounds *People v White,* 390 Mich 245; 212 NW2d 222 (1973); *People v Hutchings,* 137 Mich 527; 100 NW 753 (1904).

[6] *People v Grimmett,* n 5 *supra.*

[7] See, e.g., *United States v Martin,* 561 F2d 135 (CA 8, 1977); *United States v Kessler,* 530 F2d 1246 (CA 5, 1976).

oral argument in this Court that the trial prosecutor intended to bring about a mistrial. But for such concession, we would remand to the trial court for a factual determination. We affirm the result arrived at by the Court of Appeals reversing Robert Dawson's conviction.

I

Dawson was charged with assault with intent to commit sexual penetration.[8] The crime was alleged to have occurred early in the morning of June 28, 1981,[9] in Kalamazoo. The prosecutor alleged that Dawson lured complainant Mark Nelson to Dawson's home and that, when Nelson became uneasy and left, Dawson forced him at knife point to a small park near Dawson's home, where Dawson attempted to force Nelson to submit to anal intercourse. According to the prosecution, Nelson managed to struggle free and escape to a nearby street, where he was first struck by a truck and then taken to a hospital by passers-by. The prosecution's only evidence that Dawson assaulted Nelson was Nelson's testimony.

Dawson denied assaulting Nelson. He claimed that Nelson paid him to submit to sexual contact, and that Nelson suggested using the park. When Dawson was unable to complete the act, Nelson became hysterical and ran away.

The prosecutor first called Terry Sweeney, who had accompanied Dawson earlier in the evening in

[8] MCL 750.520g(1); MSA 28.788(7)(1).

[9] There was some confusion whether the alleged crime occurred late in the evening of the 27th or early in the morning of the 28th. The prosecutor at the original trial claimed that the initial contact between Nelson and Dawson and the assault itself occurred on June 28. The prosecutor at retrial (not the original prosecutor) asserted that the preliminary events occurred on the 27th, with only the assault itself occurring on the 28th. Defense counsel did not contest this assertion.

question. There was no substantive direct or cross-examination. The prosecutor then called Detective Robert Gay of the Kalamazoo police. Again there was no direct examination. On cross-examination, Detective Gay stated that he had found no signs of any struggle when searching the area where Nelson claimed he had struggled with Dawson. On redirect examination, Detective Gay stated, to the prosecutor's apparent surprise,[10] that he had not recovered any evidence at all from the park.

The prosecutor next called Nelson. Nelson was twenty-three years old at the time of the original trial, twenty-two at the time of the alleged assault. Nelson testified that on the evening in question he was sitting alone watching television in his girl friend's ground floor apartment. Two men came to the door. Nelson testified that one, Dawson, said that they had been walking by and had seen the gymnastic photos which Nelson's girl friend had on the walls of her apartment. Nelson said that he invited them inside. Nelson said that they remained for a total of fifteen minutes, that each of the three men drank one or two beers, and that they talked generally of their work and of sports. Nelson testified that he and Dawson then left together.[11]

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[10] The prosecutor asked the question twice.

*Q.* Can you tell me what, if anything, you found?
*A.* Nothing.
*Q.* Absolutely nothing?
*A.* Nothing.

At the original trial no witness testified to recovering any evidence from the scene of the alleged assault. At the retrial, Officer John Shubnell of the Kalamazoo Police, who was not called at the original trial, testified to visiting the scene with Nelson in the early morning hours after the assault was alleged to have occurred, and recovering a pair of crutches and a shirt which Nelson identified as his.

[11] When asked what had happened to Dawson's friend, Terry Swee-

Nelson testified that he left with Dawson because he had run out of beer, and that Dawson had suggested that they go to the house of a friend of Dawson's, obtain some beer there, and return to Nelson's girl friend's apartment. Nelson agreed. With his right leg encased in a cast from ankle to hip,[12] Nelson proceeded on crutches to what he thought was Dawson's friend's house, which was approximately a ten-minute walk from the apartment.

Nelson said that Dawson unlocked the door and went inside, with Nelson following.[13] Dawson then went down into the basement for several minutes. When he returned he asked Nelson if he wanted to see the basement. Nelson said no and further told Dawson that he was going back to the apartment. Nelson testified that he then walked out of the door.[14]

According to Nelson, after he had taken just several steps (still using his crutches) Dawson "grabbed [him] by the back of [his] collar and had [a] knife in [his] back and said 'Keep walking and shut up.' "[15] Nelson said that he then dropped his crutches and hobbled along in front of Dawson.

The two proceeded alongside some railroad tracks. Along one side of the tracks was a creek. Nelson testified that he thought that if he could reach the creek, he could break his cast and run away from Dawson. Nelson said that he struggled

ney, Nelson said that in fact he had left "maybe a minute" after arriving, and had apparently not had any beer or talked with the other two.

[12] Nelson had broken his ankle while performing gymnastics.

[13] Nelson testified that he thought that since Dawson had a key to the house it was really Dawson's house, and not his "friend's."

[14] Nelson made no mention of Terry Sweeney arriving at the house.

[15] When asked by the prosecutor whether the knife was actually stuck in his back or just pressed against it, Nelson repeated that it was "in [his] back."

with Dawson,[16] who still had hold of his collar and had a knife stuck into his back, escaped and ran into the creek. Dawson was right behind. Nelson said that his cast did break at the ankle and knee.

Nelson said that he and Dawson struggled in the creek. Dawson choked Nelson[17] and told him that if he made any noise, Dawson would kill him. Nelson said that while Dawson was choking him he was also cutting Nelson with the knife. Nelson testified that he was cut on his thumb, neck, and back. Nelson said that Dawson was also trying to get Nelson's pants off. Nelson repeatedly testified that Dawson did not say why he wanted to get Nelson's pants off.

Nelson testified that he then grabbed the knife (which had ended up in the weeds) and "grabbed a hold [sic] of this tree and pushed away from [Dawson] and took off from [Dawson]." Nelson ran across a little field toward a street. Dawson "took a dive" at Nelson, but Nelson rolled away and went into the street to try and wave someone down. Nelson said that he tried waving down a truck, but the truck did not stop. Nelson fell back against the curb, and the truck ran over his cast. A young man and young woman driving home from a late-night date saw Nelson, offered help, and took him to the hospital.

Defense counsel then began his cross-examination. Nelson said that Dawson came to the door of the apartment at approximately 8:00 P.M. Nelson then said that, contrary to his earlier testimony, both Dawson and Dawson's friend (Terry Sweeney) stayed for some fifteen minutes in the apartment.

[16] Dawson held a black belt in karate.

[17] Nelson told the prosecutor that Dawson's choking did not leave any marks on his neck. This statement contradicted the prosecutor's assertion in his opening statement that the jury would see photographs of the bruises on Nelson's neck caused by the choking.

Dawson and his friend were "jumping around doing something," putting on some kind of a play fight. Dawson's friend then left, and just Nelson and Dawson drank beer. Nelson then reasserted that the only reason he agreed to go on crutches over to what he thought was Dawson's friend's house was to obtain some more beer. Nelson acknowledged that there was a store selling beer directly across the street from the apartment.

Nelson said that approximately a half-hour to forty minutes elapsed between meeting Dawson and being taken to the hospital. After pressing by defense counsel, he expanded this estimate to an hour.[18]

Nelson made a number of denials. He denied that he initiated contact with Dawson. He denied that Dawson and his friend left the apartment, bought some beer, and then returned. He first denied that Dawson returned after leaving with his friend,[19] but then said that Dawson did leave with his friend and then returned alone. He denied paying Dawson for sexual contact.

Nelson stated for the first time that his girl friend had returned to the apartment while Dawson was still there. Nelson maintained his original version that he had been cut a number of times on the neck, even though the photograph taken at the hospital did not show such cuts.[20]

On redirect examination, Nelson returned to his direct examination testimony that Dawson did not leave the apartment and then return, but rather that Dawson and his friend arrived, the friend left,

[18] So that assuming, as Nelson said, he first met Dawson at 8:00 P.M., the assault would have been over by 9:00 P.M.

[19] This denial was consistent with his direct testimony.

[20] The photograph showed only the front of Nelson's neck. After viewing the photograph, Nelson said that the cuts were on the back of his neck. He admitted, however, that the only purpose of the photograph was to record his injuries.

and then Nelson left with Dawson. Nelson for the first time said that when Dawson was trying to pull Nelson's pants down, Dawson told Nelson that the reason he wanted to do so was to force Nelson into having anal intercourse.[21] Nelson was then excused.

After calling Officer Cristopher Sorrentino of the Kalamazoo Police, who gave no substantive testimony, the prosecution called Toni Hramika, Nelson's girl friend and the tenant of the apartment where Nelson and Dawson met. Hramika worked at a restaurant near her apartment. The night of the alleged assault, she returned home between 7:00 and 9:00 P.M. Nelson was there, sitting outside the front door drinking beer with Dawson. Hramika said, contrary to Nelson's testimony, that Nelson and Dawson went across the street, bought beer at the store there, and then returned to the apartment. Hramika overheard them discussing going over to Dawson's house.[22] Contrary to Nelson's testimony that the only reason he left with Dawson was to obtain some beer, Hramika testified that she heard Nelson and Dawson discussing going over to Dawson's house to obtain marijuana.

Nelson said that he would be back in fifteen minutes, but he was not. Hramika had made plans to spend the night at a girl friend's apartment. She waited for Nelson for half an hour and then left. She repeatedly called her apartment from her girl friend's, and Nelson finally answered between 11:15 and 11:45 P.M. Hramika said Nelson sounded

[21] Prior to redirect examination there had been a consultation between counsel and the judge and a short recess. During the consultation the judge pointed out to the prosecutor that Nelson's direct testimony failed to establish an element of the charged crime—that Dawson intended to sexually assault Nelson. During the subsequent recess, the prosecutor talked with Nelson. Nelson denied that the prosecutor told him what to say.

[22] Hramika made no mention of their discussing going to Dawson's "friend's" house.

"very shaken up." She said that Nelson accused Dawson of trying to rape him.

On cross-examination, Hramika admitted that several days after the alleged assault she had told Detective Gay that on the evening in question she had arrived home between 11:30 P.M. and midnight, not between 7:00 and 9:00 P.M. Hramika also testified that, contrary to Nelson's assertion that Dawson had stuck the knife into his back, she had seen no cuts on his back. She was not sure whether there were cuts on his neck.

The prosecutor then called Angela Hosek. She and Scott Courtney were driving home from a date and had stopped at the intersection where Nelson testified he had tried to wave down a truck. Hosek said she saw Nelson fall off the side of a van.[23] Hosek said that Courtney then rolled down his window, asked Nelson if he needed help, and went out to help him. Hosek also went over to Nelson. Nelson told them that somebody had tried to rape him. They took him to the hospital.

On cross-examination, Hosek confirmed that she did not see Nelson standing in the street trying to wave someone down. Rather, she saw him fall off the side of a van. Furthermore, she said that this occurred at 1:00 A.M., four hours later than the time to which Nelson testified.

Courtney, the next witness, while generally corroborating Hosek's testimony, testified that Nelson related an account to him[24] that was entirely different from Nelson's testimony in court. Nelson told Courtney that

> he was walking home or he was on crutches at that time because the leg was broken previously

[23] She was sure it was a van and not a truck.

[24] Apparently Nelson related this version to Courtney before Hosek arrived.

> and a man offered him a ride so he accepted it. He waundered [sic] back to his apartment and that's when he [sic] tried to sexually assault him and he broke away and then he went on to say that his arms and his hands hurt and that he used a knife that was about that [six to eight inches] big.

On cross-examination, Courtney confirmed Hosek's statement that 1:00 A.M. was the time they first saw Nelson. Courtney affirmed that Nelson told him that he had been walking home, was offered a ride by someone, accepted it and ended up at this person's apartment.[25] Courtney said that Nelson told him that Nelson knew where his assailant lived and was going to "get" him. Nelson did not complain of being stabbed in the back or cut on the neck. When Courtney first saw Nelson in the street, Nelson had no shirt and his pants were down about his knees.

On redirect examination, the prosecutor questioned Courtney's report. Courtney again confirmed that Nelson told him he accepted an offer of a ride from someone who took him to an apartment.[26] The judge, finding that the subject had been adequately covered, then repeatedly sustained objections to the prosecutor's questions. The prosecutor then rested.[27]

The defense first called Terry Sweeney, who had accompanied Dawson during the early portion of the evening in question. Sweeney and Dawson

[25] Courtney also testified at Dawson's retrial. This testimony as to Nelson's telling Courtney that he was picked up and assaulted by someone offering him a ride on his way home did not come out on Courtney's direct testimony during the prosecution's case in chief, and defense counsel did not attempt to elicit this testimony.

[26] Courtney consistently used the term "apartment," not "house," in relating what Nelson had told him.

[27] In refusing defense counsel's request for a directed verdict, the judge declared, "It's obvious from the record that there has [sic] been some inconsistencies from [sic] the testimony, but that's for the jury to decide."

were acquaintances. That evening they met at a mutual friend's home and then went to Dawson's sister's home, leaving there at 7:15 P.M. On the way to Dawson's house, they passed by the apartment where Nelson was staying. Sweeney had never seen Nelson before. Nelson was standing in the doorway, and he and Dawson began talking. Sweeney said that he and Dawson, after staying for several minutes, went to the convenience store[28] across the street and then returned to the apartment. Sweeney said that they remained there with Nelson for approximately one hour.

Sweeney and Dawson then left Nelson and went to Dawson's house, arriving there around 8:00 P.M. Sweeney stayed for five minutes and then returned to his house to change clothes in preparation for going out with Dawson, Dawson's girl friend, and Dawson's sister later that night. Sweeney returned to Dawson's home between 9:00 and 10:00 P.M. Sweeney said that Dawson was talking with Nelson in the kitchen. Sweeney testified that he went into another room, and that after about fifteen minutes Dawson and Nelson left. Dawson said he would return. Sweeney then went outside and saw Dawson's girl friend coming up the driveway. Sweeney called to Dawson, who was then walking with Nelson along the railroad tracks, to tell him, but apparently Dawson did not hear. Sweeney did not see Nelson walking in front of Dawson. Rather, Sweeney said that Nelson had his arm around Dawson's shoulder. Sweeney waited at Dawson's house for approximately forty-five minutes and then left, leaving a note for Dawson. Sweeney did not see Dawson again that night.[29]

[28] Apparently they went to the store to buy beer.

[29] On cross-examination, Sweeney testified that he had seen Dawson just several times "at the store" since that night. Dawson never told Sweeney that he had been arrested, and Sweeney still was not sure

Dawson testified next. Dawson agreed with Sweeney's testimony as to how the evening began. When walking from Dawson's sister's house to Dawson's house, Dawson and Sweeney passed the apartment where Nelson was staying. Nelson was standing in the doorway, began talking to them, and invited them in. Dawson and Sweeney had some beer, and then went across the street to buy some more beer, which they brought back to the apartment. They stayed for approximately one hour, and then Dawson and Sweeney left for Dawson's house. Dawson said that Nelson invited him to return later.

Dawson testified that approximately half an hour after leaving, he returned to the apartment where Nelson was staying. Dawson said that Nelson propositioned him, offering him drinks, marijuana, and money to let Nelson perform oral sex upon Dawson. Dawson agreed.[30] Toni Hramika then returned to the apartment. Dawson said that he and Nelson then went to the convenience store across the street, bought some beer, and at Nelson's suggestion left it at Toni's apartment, so that she would think that he was coming right back.

Dawson said that he and Nelson then walked over to Dawson's house. Sweeney came back and walked into the living room, while Dawson and Nelson stayed in the kitchen. Dawson's housemate was downstairs in the basement with his girl friend. With his housemate and Sweeney present, Dawson testified that he did not see how he and Nelson could complete their deal at Dawson's house. Nelson, however, said that he wanted to do

why Dawson had been arrested. Sweeney could not be specific about exactly when the events to which he had testified took place. It could have been anytime in June or July.

[30] Dawson said that he had been out of work for seven to eight months, was drinking heavily, and needed the money.

"something" that night. Dawson testified that he did not want to return the $37-$40 which Nelson had given him, and agreed to walk Nelson home.

Dawson testified that he and Nelson walked down the railroad tracks to a small park. Nelson suggested that they complete their deal in the park. Dawson assented, and Nelson unzipped Dawson's pants. Dawson said that he was unable to become sexually aroused. Dawson testified that when he told Nelson that they may as well forget the agreement, Nelson stood up and took off running toward his house. Dawson then returned home.

Dawson denied using a knife or making any attempt to force sexual contact. When asked whether he had "ever assaulted anybody in [his] life," Dawson answered no.

On cross-examination, the prosecutor suggested that Dawson had made a number of sexual approaches to other males. Dawson denied attempting to have such "homosexual encounters." One of Dawson's prior jobs had been as a counselor in a juvenile home, and the prosecutor began naming teen-aged boys who had resided at the juvenile home while Dawson was a counselor and asking Dawson if he had not attempted to solicit sexual contact with them.[31] Dawson admitted that he knew the young men but denied soliciting sexual contact. After defense counsel objected to this line of questioning, the prosecutor stated that he would prove that Dawson had made such solicitations.[32]

[31] For example, the prosecutor asked, "Isn't it true that you said to Don Allen, 'How about a blow job? You'll get points easier?' " With regard to another former resident, the prosecutor asked, "In fact, you had contact and you said to him something to the effect of, 'You and I could get along a lot better if you gave me some blow jobs.' Isn't that what you said?"

[32] The trial judge ruled that the "similar acts" exception, MRE 404(b), allowed the prosecutor to ask these questions. This question

After a brief redirect examination, Dawson was excused.

The last defense witness was Detective Gay. He testified that had there been visible injuries to Nelson's back or neck, as Nelson had testified, the police department would have photographed them.

The prosecutor then began his rebuttal. The prosecutor sought to introduce evidence supporting his suggestions that Dawson had made a number of sexual approaches to other males. The first witness, Michael Cornell, was a former resident of the juvenile home who had known Dawson. Cornell testified that after he had been placed in a foster home, Dawson visited and took Cornell fishing. He also bought Cornell some rum. Cornell said that when he offered to pay Dawson for the rum, Dawson told him that "you can pay me in another way." Cornell testified that he took this as "faggoty."[33] Cornell did not testify to any further "incidents."

The prosecutor next called Ray Brown, another former juvenile home resident. Brown testified that at one point when he and Dawson were fighting, Dawson "asked me if we could get along better if he gave me a couple blows." When asked how he took Dawson's statement, Brown said "[o]ffensively." "Before I started thinking about it, I was getting angry. It could have meant hit me, it could have meant anything else. I took it angrily and it was over." The prosecutor then attempted to impeach Brown, implying that Brown had earlier stated that Dawson explicitly referred to sexual contact. The judge sustained defense objections to a number of questions. In an ensuing sidebar,

was not briefed on appeal, and we do not in this opinion address the propriety of this use of the "similar acts" exception.

[33] When asked why he took it as "faggoty," Cornell said that that was the only way he saw of taking it.

the judge stated that he would not allow impeachment on a collateral matter.[34]

The prosecutor, noting that it was then 4:30 P.M., requested a recess until the following Tuesday.[35] The judge refused. The prosecutor, stating that he probably had "another three or four hours of direct examination," then began asking Brown questions like "can you tell us the very first day or time it was that you met Mr. Dawson or what that occasion was?" and "How many floors are there in the Juvenile Home please?" Defense counsel objected on relevancy grounds and the judge sustained the objections. After repeated rounds of such questions and sustained objections, the prosecutor asked the following question: "Can you tell us how many times Mr. Dawson offered you a blow job?" Defense counsel objected and moved for a mistrial. The prosecutor, when asked if he had any response, replied "Nope." The court granted the mistrial.

Defense counsel subsequently moved to bar any retrial on the basis of double jeopardy. The prosecutor successfully argued that any such motion

[34] The judge further indicated that he was dissatisfied with the evidence produced by the prosecution to support the suggestions that Dawson had previously solicited sexual contact with other males.

> [T]he criteria that must be applied to that evidence when it's brought in to show previous similar acts, the mandates of our Appellate Court decisions require that testimony must be clear, explicit, plain[,] unequivocal, words to that effect. That certainly is not the nature of the testimony thus far both as to the previous incident with Mr. Cornell and both [sic] as to this Witness . . . .

[35] Defense counsel noted that the prosecutor had planned to call three witnesses in rebuttal. As the judge indicated, the two who had already testified had not supported the prosecutor's suggestion that Dawson had solicited male juveniles for sexual contact. Defense counsel noted that the third witness had left the building and obviously did not want to be present. Defense counsel suggested that the request for a recess was simply a delaying tactic.

must be filed and the prosecutor given four days' notice.

Defense counsel filed his motion and argued it the first day of Dawson's retrial.[36] A different judge was presiding. Defense counsel had not requested a transcript of Dawson's original trial, and no such transcript was available.[37] The judge, relying on *People v Benton,* 402 Mich 47; 260 NW2d 77 (1977), denied the motion. The judge read *Benton* as holding that where the defendant "retain[ed] primary control over the course to be followed" in the original trial, double jeopardy would not bar a retrial. The judge found that here the defendant had exercised "primary control" because it was defense counsel who moved for the mistrial.

Dawson was convicted on retrial. The Court of Appeals reversed on the basis of the Double Jeopardy Clause. We affirm the Court of Appeals decision, but adopt a different double jeopardy analysis.

II

The Michigan[38] and federal[39] constitutions provide that no person shall twice be put in jeopardy for the same offense. The purpose of the double jeopardy prohibition is to limit the state to having generally only one attempt at obtaining a conviction. Otherwise, the state could repeatedly prosecute persons for the same crime, transforming the trial process itself into a punishment and effectively punishing the accused without his having been adjudged guilty of an offense meriting punish-

[36] March 23, 1982.

[37] The prosecutor argued that the motion was not timely. The prosecutor noted that a jury had already been selected, and that several of the prosecution's witnesses had come from out of state.

[38] Const 1963, art 1, § 15.

[39] US Const, Am V.

ment.[40] Further, because the state can devote its resources to improving the presentation of its case, the probability of a conviction may increase with each retrial. As the United States Supreme Court said in *Green v United States,* 355 US 184, 187-188; 78 S Ct 221; 2 L Ed 2d 199 (1957):

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.[41]

An accused is placed in jeopardy as soon as the jury is selected and sworn.[42] Hence, double jeopardy protection attaches before the conclusion of the trial. Where the trial ends before a verdict—where a mistrial is declared—the Double Jeopardy Clause may bar a retrial.

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[40] [S]ociety's awareness of the heavy personal strain which a criminal trial represents for the individual defendant is manifested in the willingness to limit the Government to a single criminal proceeding to vindicate its very vital interest in enforcement of criminal laws. [*United States v Jorn,* 400 US 470, 479; 91 S Ct 547; 27 L Ed 2d 543 (1971) (plurality opinion).]

[41] For discussion of the policies underlying the Double Jeopardy Clause, see Findlater, *Retrial after a hung jury: The double jeopardy problem,* 129 U Pa L R 701 (1981); Kessler, *Prosecutorial misconduct —No double jeopardy absent an intent to provoke a mistrial,* 12 Golden Gate U L R 115 (1982); Klarman, *Mistrials arising from prosecutorial error: Double jeopardy protection,* 34 Stan L R 1061 (1982); Ponsoldt, *When guilt should be irrelevant: Government overreaching as a bar to reprosecution under the Double Jeopardy Clause after* Oregon v Kennedy, 69 Cornell L R 76, 80-81 (1983).

[42] See n 3 *supra.*

The Double Jeopardy Clause does not bar all retrials. The Supreme Court of the United States has held that the charged offense may be retried where the mistrial was declared because of a hung jury.[43] The Court has fashioned a balancing test focusing on the cause prompting the mistrial.[44] The thrust of the Court's decisions is that the Double Jeopardy Clause does not bar retrial where the prosecutor or judge made an innocent error[45] or where the cause prompting the mistrial was outside their control.[46] Where the motion for mistrial is made by the prosecutor, or by the judge sua sponte, retrial will be allowed if declaration of the mistrial was "manifest[ly] necess[ary]":

> [T]he law has invested Courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. [*United States v Perez,* 22 US (9 Wheat) 579, 580; 6 L Ed 165 (1824).][47]

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[43] See *People v Thompson,* 424 Mich 118; 379 NW2d 49 (1985).

[44] See *Oregon v Kennedy,* 456 US 667, 682; 102 S Ct 2083; 72 L Ed 2d 416 (1982) (Stevens, J., concurring) ("The defendant's interest in finality is not confined to final judgments; he also has a protected interest in having his guilt or innocence decided in one proceeding. That interest must be balanced against society's interest in affording the prosecutor one full and fair opportunity to present his evidence to the jury. Our decisions in the mistrial setting accordingly have accommodated the defendant's double jeopardy interests with legitimate prosecutorial interests."); *United States v Jorn,* n 40 *supra,* p 480 ("[I]t becomes readily apparent that a mechanical rule prohibiting retrial whenever circumstances compel the discharge of a jury without the defendant's consent would be too high a price to pay for the added assurance of personal security and freedom from governmental harassment which such a mechanical rule would provide."); *Wade v Hunter,* 336 US 684, 688-690; 69 S Ct 834; 93 L Ed 974 (1949).

[45] See n 4 *supra.* Where a mistrial is declared because of defense counsel's misconduct, the Double Jeopardy Clause will not bar retrial. See *People v Anderson,* 409 Mich 474, 485; 295 NW2d 482 (1980).

[46] See n 5 *supra.*

[47] Where a reviewing court holds that the mistrial was not mani-

Where the motion for mistrial was made by defense counsel, or with his consent, and the mistrial was caused by innocent conduct of the prosecutor or judge, or by factors beyond their control, or by defense counsel himself, retrial is also generally allowed, on the premise that by making or consenting to the motion the defendant waives a double jeopardy claim.[48]

Where a defendant's motion for mistrial is prompted by intentional prosecutorial conduct,[49] however, the defendant may not, by moving for a mistrial, have waived double jeopardy protection. The United States Supreme Court has held that the Double Jeopardy Clause bars retrial where prosecutorial conduct was intended to provoke the defendant into moving for a mistrial. *Oregon v Kennedy,* 456 US 667; 102 S Ct 2083; 72 L Ed 2d 416 (1982).[50]

Justice Powell, who provided the majority's fifth

festly necessary, the double jeopardy prohibition bars retrial. See, e.g., *People v Benton,* 402 Mich 47; 260 NW2d 77 (1977).

[48] See *People v Benton,* n 47 *supra.*

[49] Other courts have held that the apparently intentional or grossly negligent misconduct of other court officials and of the state's witnesses may be attributed to the prosecutor. See, e.g., *State v Rathburn,* 37 Or App 259; 586 P2d 1136 (1978). See also *State v Kennedy,* 295 Or 260, 274-275; 666 P2d 1316 (1983).

[50] The conduct at issue in *Kennedy* was a question asked of an expert witness for the state on redirect examination. Defense counsel, questioning the expert on cross-examination and apparently attempting to establish bias, had asked the witness if he had filed a criminal complaint against the defendant. The witness stated that he had. On redirect examination, when the prosecutor attempted to elicit the reasons why the witness had filed the complaint, the trial judge sustained a series of objections. The Court noted that the Oregon appellate court "later explained that [defendant's] 'objections were not well taken, and the judge's rulings were probably wrong." *Oregon v Kennedy, supra,* 456 US 669, n 1, quoting 49 Or App 415, 417; 619 P2d 948 (1980). The following exchange then occurred:

> "*Prosecutor:* Have you ever done business with [defendant]?
> "*Witness:* No, I have not.
> "*Prosecutor:* Is that because he is a crook?" [*Kennedy,* 456 US 669.]

vote in *Oregon v Kennedy*,[51] wrote in a special concurrence, "[b]ecause 'subjective' intent often may be unknowable," a "court—in considering a double jeopardy motion—should rely primarily on the objective facts and circumstances of the particular case." *Id.*, pp 679-680. Justice Powell did not find intent in *Kennedy* because there was "no sequence of overreaching," because "the prosecutor not only resisted, but also was surprised by, the defendant's motion for a mistrial," and because "the prosecutor testified—and the trial court found as a fact and the appellate court agreed—that there was no 'intention . . . to cause a mistrial." *Id.*

Two state supreme courts, perceiving the wording of the *Kennedy* standard as too narrow, have adopted their own formulations. See *State v Kennedy*, 295 Or 260; 666 P2d 1316 (1983),[52] and *Pool v*

The trial judge then granted defendant's motion for a mistrial, and found that the prosecutor, by asking "Is that because he is a crook?" did not intend to cause a mistrial. The Court did not disturb the trial judge's finding.

[51] While the Court was unanimous in holding that on these facts the federal double jeopardy provision did not bar retrial, four justices disagreed with the majority's analysis, urging instead adoption of a standard that they perceived as providing greater double jeopardy protection.

[52] The Oregon Supreme Court, following remand by the United States Supreme Court, in *State v Kennedy*, 295 Or 260; 666 P2d 1316 (1983), perceived two deficiencies in the federal approach. First, the federal test focused solely on prosecutorial conduct, "[b]ut prosecutors are not the only officials whose conduct may cause a mistrial or a reversal." *Id.*, p 275. Other court officials, such as the bailiff, may be equally guilty of misconduct requiring a mistrial. Second, finding that the prosecutor intended to cause a mistrial means finding that the prosecutor acted in contempt of court and violated professional ethical standards. *Id.* Such a finding may carry consequences for the prosecutor—consequences so severe that judges may attempt to avoid making such a finding. "[This finding] places too heavy a burden on the inference that a defendant must ask a judge to draw from the objective conduct and circumstances." *Id.*, p 276.

Because of these perceived problems the Oregon court adopted a different approach. The Oregon double jeopardy provision bars retrial

*Superior Court,* 139 Ariz 98; 677 P2d 261 (1984).[53]

> when improper official conduct is so prejudicial to the defendant that it cannot be cured by means short of a mistrial, and if the official knows that the conduct is improper and prejudicial and either intends or is indifferent to the resulting mistrial or reversal. [*Id.*]

Barring retrial in such cases is appropriate, said the Court, because

> [w]hen this occurs, it is clear that the burden of a second trial is not attributable to the defendant's preference for a new trial over completing the trial infected by an error. Rather, it results from the state's readiness, though perhaps not calculated intent, to force the defendant to such a choice. [*Id.*]

Like the United States Supreme Court, the Oregon Supreme Court agreed with the trial judge's finding that the prosecutor's misconduct was not intentional, or made in bad faith, or even grossly negligent. The court affirmed the defendant's conviction on retrial.

[53] The Arizona Supreme Court in *Pool v Superior Court,* 139 Ariz 98; 677 P2d 261 (1984), also adopted a different formulation. *Pool* concerned

> the cumulative effect of a line of questioning in which the prosecutor posed numerous improper questions resulting in at least two bench conferences and one court admonishment. The trial judge granted a mistrial on grounds of improper conduct. [*Pool, supra,* p 106.]

The trial judge found that the prosecutor did not intend to provoke a mistrial.

Reviewing the record, the court held that "[t]he conduct of the prosecutor was egregiously incorrect to the extent that we must infer that the questions were asked with knowledge that they were improper." *Id.,* p 107. The prosecutor could have engaged in improper conduct for several reasons. He may have intended to force the defendant to seek a mistrial, or

> [h]e may have sought to avoid a serious danger of acquittal by using whatever method was available to convict, proper or improper. He may have intended to harass the defendant without thought of the risk of mistrial because of anger at either defendant or defense counsel. He may have simply intended to retaliate for what he perceived as improper conduct of defense counsel, no matter what the risk of mistrial. [*Id.*]

It developed at trial that the prosecutor had mischarged Pool. If Pool moved for a mistrial, "the prosecution could procure a new indictment with correct charges." *Id.* Regardless of the prosecutor's motivation, his conduct violated the double jeopardy prohibition.

III

The Court of Appeals adopted the Arizona test set forth in *Pool, supra. People v Dawson,* 154 Mich App 260, 267; 397 NW2d 277 (1986). The Court of Appeals said that while the prosecutor's conduct at Dawson's original trial did not rise to the "intended to provoke a mistrial" standard of *Oregon v Kennedy, supra,* it did qualify under the *Pool* approach as conduct that the prosecutor "knew [was] improper, and that he [engaged in] with indifference, if not a specific intent, to create unfair prejudice." *Dawson, supra,* p 273.

At oral argument before this Court, counsel for the people conceded that the trial prosecutor's

> In such a situation, the State has intentionally exposed the defendant to multiple trials for the same crime and has destroyed his expectation of completing the proceeding before the original tribunal. This is exactly what the double jeopardy provision was intended to prevent. [*Id.,* p 109.]

The court held that Arizona's double jeopardy prohibition barred retrial where the following three conditions were met:

> 1. Mistrial is granted because of improper conduct or actions by the prosecutor; and
> 2. such conduct is not merely the result of legal error, negligence, mistake, or insignificant impropriety, but, taken as a whole, amounts to intentional conduct which the prosecutor knows to be improper and prejudicial, and which he pursues for any improper purpose with indifference to a significant resulting danger of mistrial or reversal; and
> 3. the conduct causes prejudice to the defendant which cannot be cured by means short of a mistrial. [*Id.,* pp 108-109.]

The court in a footnote stated that the judge was to infer the prosecutor's knowledge and intent from an objective reading of the record. *Id.,* pp 108-109, n 9.

Applying this standard to the case before it, the court inferred, from the "egregiously improper" nature of the prosecutor's conduct at trial, that the prosecutor intentionally engaged in misconduct. The court further inferred that the prosecutor's purpose "was, at best, to avoid the significant danger of acquittal which had arisen, prejudice the jury and obtain a conviction no matter what the danger of mistrial or reversal." *Id.,* p 109. The court held that Arizona's double jeopardy prohibition barred Pool's retrial.

conduct was improper under the *Oregon v Kennedy* standard.[54] The prosecutor urged this Court to follow the *Oregon v Kennedy* standard and to reject the *Pool* formulation adopted by the Court of Appeals. In light of the prosecutor's concession that the trial prosecutor's conduct was improper under the *Oregon v Kennedy* standard, there is no need in the instant case to decide whether this Court should go further than the federal standard.

Retrials are an exception to the general double jeopardy bar. Where a mistrial results from apparently innocent or even negligent[55] prosecutorial error, or from factors beyond his control, the public interest in allowing a retrial outweighs the double jeopardy bar. The balance tilts, however, where the judge finds, on the basis of the "objective facts and circumstances of the particular case," that the prosecutor intended to goad the defendant into moving for a mistrial.[56]

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[54] Counsel for the people said:

> I think that this is a perfect example of the transcript that you can use and apply the *Kennedy* standard to. . . . I think based on the record that this, if you're ever going to get a record where you can apply the *Kennedy* test this is it.

[55] See *United States v Thomas*, 728 F2d 313, 318 (CA 6, 1984).

[56] See *Oregon v Kennedy, supra*, pp 675-676:

> [A] standard that examines the intent of the prosecutor, though certainly not entirely free from practical difficulties, is a manageable standard to apply. It merely calls for the court to make a finding of fact. Inferring the existence or nonexistence of intent from objective facts and circumstances is a familiar process in our criminal justice system. When it is remembered that resolution of double jeopardy questions by state trial courts are reviewable not only within the state court system, but in the federal court system on habeas corpus as well, the desirability of an easily applied principle is apparent.
>
> Prosecutorial conduct that might be viewed as harassment or overreaching, even if sufficient to justify a mistrial on defendant's motion, therefore, does not bar retrial absent intent on the part of the prosecutor to subvert the protections afforded by

IV

Ordinarily a trial judge will determine whether the prosecutor intended to goad the defendant into moving for a mistrial.[57] The judge's findings are subject to appellate review under the "clearly erroneous" standard.[58] In the instant case, counsel for the people conceded during oral argument that the trial prosecutor intended to cause a mistrial. But for such concession, we would remand to the trial court for a factual determination.

The prosecutor's case was going badly. The police had not recovered any evidence from the scene of the crime. The only evidence implicating Dawson was the testimony of Nelson, the complaining witness, who had contradicted himself on at least one crucial matter—first stating that Dawson never said why he wanted Nelson to take off Nelson's pants, and then saying that Dawson said that he wanted to have anal intercourse with Nelson. Nelson's testimony was also confused con-

the Double Jeopardy Clause. A defendant's motion for a mistrial constitutes "a deliberate election on his part to forgo his valued right to have his guilt or innocence determined before the first trier of fact." *United States v Scott,* 437 US 82, 93 [98 S Ct 2187; 57 L Ed 2d 65] (1978). Where prosecutorial error even of a degree sufficient to warrant a mistrial has occurred, "[t]he important consideration, for purposes of the Double Jeopardy Clause, is that the defendant retain primary control over the course to be followed in the event of such error." *United States v Dinitz,* [424 US 600, 609; 96 S Ct 1075; 47 L Ed 2d 267 (1976)]. *Only where the governmental conduct in question is intended to "goad" the defendant into moving for a mistrial may a defendant raise the bar of double jeopardy to a second trial after having succeeded in aborting the first on his own motion.* [Emphasis supplied.]

See also *United States v Sanchez,* 806 F2d 7, 9 (CA 1, 1986); *United States v Posner,* 764 F2d 1535 (CA 11, 1985).

[57] The "goad the defendant into moving for a mistrial" standard "calls for a finding of fact by the court . . ., an inquiry for which the trial court is best suited." *United States v Posner,* n 56 *supra,* p 1539.

[58] MCR 2.613(C); see *Robinson v Wade,* 686 F2d 298, 309 (CA 5, 1982).

cerning the times and events leading up to the alleged assault. One of the state's corroborating witnesses then testified that Nelson had provided him with a completely different account—that he was attacked not near the railroad tracks, but rather in an apartment by a man who offered him a lift home. Nelson's girl friend apparently surprised the prosecutor, and discredited Nelson, by stating that Nelson went with Dawson not to obtain beer, as Nelson had testified, but rather to obtain marijuana.

The testimony of the prosecutor's rebuttal witness did not support the prosecutor's allegations of prior sexual solicitations. The prosecutor's last rebuttal witness left the building before testifying. The prosecutor appeared to be stalling for time, apparently hoping that the court would declare a recess and thereby enable the prosecutor to marshal his forces over the weekend. When a recess appeared unlikely, the prosecutor asked, "Can you tell us how many times Mr. Dawson offered you a blow job?" which he clearly knew was improper. Finally, the prosecutor neither appeared surprised by nor argued against the mistrial motion. When asked whether he had any response to defense counsel's request for a mistrial, the prosecutor responded, "Nope."

We affirm the result arrived at by the Court of Appeals, and hold that Dawson's retrial is barred by the Double Jeopardy Clause.

RILEY, C.J., and BRICKLEY, CAVANAGH, BOYLE, ARCHER, and GRIFFIN, JJ., concurred with LEVIN, J.

PEOPLE v RAY

Docket No. 80168. Argued December 8, 1987 (Calendar No. 3). Decided September 8, 1988.

Daniel E. Ray was convicted by a jury in the Genesee Circuit Court, Donald R. Freeman, J., of arson of a dwelling. The Court of Appeals, BEASLEY, P.J., and HOOD, J. (WALSH, J., dissenting), remanded the case to the trial court to conduct a separate hearing outside the presence of the jury to determine whether the defendant had waived his Fifth Amendment right to remain silent and his Fifth and Sixth Amendment rights to the presence of counsel at a postpolygraph interrogation during which the defendant made an allegedly incriminating statement (Docket No. 82573). The people appeal.

In an opinion by Justice BOYLE, joined by Chief Justice RILEY and Justices BRICKLEY, ARCHER, and GRIFFIN, the Supreme Court *held:*

Neither state or federal law nor public policy requires the automatic suppression at trial of statements made by a defendant during the administration of a polygraphic examination. In this case, the facts did not present an issue which required the trial court, sua sponte, to conduct a separate hearing to determine whether the defendant made an intelligent and voluntary waiver of his Fifth and Sixth Amendment rights.

1. Results of polygraph examinations are not admissible at trial. The basic rationale for preclusion is that the technique has not received the degree of acceptance or standardization among scientists which would allow admissibility. The reliability of statements made during a polygraph examination, however, does not depend on the validity of the polygraph examination or on the examiner's skill in conducting the test or interpreting the results, nor does use of such statements im-

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REFERENCES

Am Jur 2d, Evidence §§ 526 *et seq.*, 551, 582 *et seq.*, 832.

Admissibility of polygraph evidence at trial on issue of voluntariness of confession made by accused. 92 ALR3d 1317.

Admissibility in evidence of confession made by accused in anticipation of, during, or following polygraph examination. 89 ALR3d 230.

properly denigrate cross-examination. Such statements may be reliable and voluntary even though made during the course of a polygraph examination. The key inquiry is whether the statements are voluntary and is to be made on the basis of the facts of each case. Blanket prohibition of polygraph use in investigations is not warranted. Neither public policy nor federal or state law requires that statements made before, during, or after the administration of a polygraph examination be excluded per se as evidence at trial.

2. Where a defendant challenges the voluntariness of a confession, a separate hearing outside the presence of the jury must be conducted to determine voluntariness. Absent a challenge by the defendant, a trial court may have a duty to raise the issue on its own where the alerting circumstances, such as a defendant's mental, emotional, or physical condition, evidence of police threats, or other obvious forms of physical and mental distress, clearly and substantially raise a question of voluntariness or implicate other due process concerns.

3. In this case, the facts raise no clear and substantial questions regarding whether the defendant voluntarily waived his Fifth Amendment right against self-incrimination or his Fifth and Sixth Amendment rights to counsel. The defendant voluntarily submitted to the polygraph examination and, while in the presence of counsel, was instructed regarding his rights and signed a written waiver of his right to counsel during the examination and the questioning immediately preceding and following the examination. Under the circumstances, it was not necessary to rewarn the defendant of his rights immediately after the polygraph machine was shut off. The admissibility of such statements is to be resolved by determining whether in the totality of the circumstances the waiver could have been knowing and voluntary.

Justice ARCHER, concurring, stated that the totality of the circumstances approach toward a defendant's waiver of his rights to counsel encompasses the state's duty to prove that the waiver was an intentional and intelligent relinquishment of a known right and that the defendant was apprised of the nature of the protection which an attorney can provide.

Judgment of the Court of Appeals vacated and conviction affirmed.

Justice LEVIN, joined by Justice CAVANAGH, dissenting, stated that the Court of Appeals has broad authority to order evidentiary hearings whenever in its judgment such hearings are necessary or appropriate to enable it to discharge its reviewing function. In this case, it was within its authority to order an

evidentiary hearing to determine whether the defendant voluntarily waived his rights to remain silent and to have counsel present at the postpolygraphic interrogation.

156 Mich App 31; 401 NW2d 296 (1986) vacated.

1. CRIMINAL LAW — CONFESSIONS — POLYGRAPH EXAMINATIONS.

Neither state or federal law nor public policy requires the automatic suppression at trial of statements made by a defendant during the administration of a polygraphic examination.

2. CRIMINAL LAW — POLYGRAPH EXAMINATIONS — SEPARATE STATEMENTS.

Results of polygraph examinations are not admissible at trial; however, statements made during a polygraph examination, may be reliable and voluntary and are not required to be excluded per se as evidence at trial.

3. CRIMINAL LAW — CONFESSIONS — VOLUNTARINESS — *WALKER* HEARINGS.

Where a defendant did not challenge the voluntariness of a confession and no alerting circumstances clearly and substantially raised the question of voluntariness, a trial court did not have a duty, sua sponte, to conduct a separate hearing out of the presence of the jury to inquire into the voluntariness of the defendant's statements.

*Frank J. Kelley,* Attorney General, *Louis J. Caruso,* Solicitor General, *Robert E. Weiss,* Prosecuting Attorney, *Donald A. Kuebler,* Chief, Appellate Division, and *Mark Sanford,* Assistant Prosecuting Attorney, for the plaintiff.

*Terrance P. Sheehan* for the defendant.

BOYLE, J.

INTRODUCTION

This Court granted leave to appeal in the instant case to resolve two questions. We are asked to determine first, whether statements made by a defendant during the course of a polygraph examination should be admissible at trial as a matter of state or federal constitutional law or public policy. Secondly, we must determine whether the Court of

Appeals erred in this case in imposing a duty on the trial court to hold a *Walker*[1] hearing sua sponte in the presence of alerting circumstances.

We hold that neither state or federal law nor public policy requires the automatic suppression at trial of statements made by a defendant during the administration of a polygraph examination. We further hold that the facts of this case did not present an issue which required the trial court to conduct a *Walker* hearing sua sponte in order to determine whether the defendant made an intelligent and voluntary waiver of his Fifth and Sixth Amendment rights.[2]

## I. FACTS

The defendant was convicted by a jury in the Genesee Circuit Court of arson of a dwelling. He was sentenced to serve not less than 160 months nor more than 240 months in prison.

The Court of Appeals remanded the case to the trial court for the purpose of holding a *Walker* hearing to determine whether the defendant had waived his Fifth Amendment right to remain silent and his Fifth and Sixth Amendment rights to the presence of counsel at a postpolygraph interrogation during which defendant made an allegedly incriminating statement. The Court of Appeals ordered that if the trial court were to find on remand that there was an ineffective waiver, de-

[1] *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).

[2] The issue in this case is not whether "the Court of Appeals was within its authority in ordering an evidentiary hearing," as the dissent suggests. *Post*, p 279. The issue is whether the Court of Appeals was correct in concluding that because of alerting circumstances the trial court erred in not sua sponte ordering a hearing. Defendant does not claim on appeal that trial counsel sought a hearing that was denied, nor does he make any allegations of fact that his statement was involuntary or not knowingly and understandingly made. The issue is one of law; whether the ambiguity of the form imposed a duty on the trial court to hold a hearing.

fendant's confession should be suppressed, the conviction set aside, and a new trial ordered. On a finding of a valid waiver, the defendant's conviction is affirmed.

The Court of Appeals summarized the testimony produced at trial as follows:

> The charge against defendant arose out of a fire which started in an apartment formerly occupied by two of defendant's friends. The evidence presented at trial revealed that the fire had been intentionally set. The evidence also revealed that on the day preceding the fire, defendant had assisted his two friends in moving out of the apartment. The landlord of the apartment had evicted defendant's friends for nonpayment of rent.
>
> A neighbor of defendant's friends testified that just before the fire started he observed a man flicking a butane lighter on the patio of the apartment where the fire started. The neighbor also testified that he had seen the man earlier in the day helping someone move out of the apartment. The neighbor went on to testify that he had reported his observations to the police and, in a photographic lineup conducted on the day following the fire, he had identified defendant as the man who had been flicking the lighter. As a vital part of his case, the prosecutor also offered the testimony of a state police sergeant that defendant had allegedly confessed to setting the fire, which testimony was admitted over the objection of defendant.
>
> Defendant testified at trial. He admitted that he had been in the general area of the apartment building when the fire started, but he denied any involvement in starting the fire. Through his own testimony, defendant went on to assert an alibi defense. He claimed that he and one of his friends who had just moved out of the apartment had been driving near the apartment building when they saw the fire. Defendant testified that after he and his friend saw the fire they went to the scene

to watch. Defendant also denied that he had confessed. [156 Mich App 31, 34-35; 401 NW2d 296 (1986).]

## II. SHOULD STATEMENTS MADE BY A DEFENDANT DURING THE COURSE OF A POLYGRAPH TEST BE ADMISSIBLE AT TRIAL AS A MATTER OF STATE OR FEDERAL CONSTITUTIONAL LAW OR PUBLIC POLICY?

In *People v Barbara,* 400 Mich 352, 364; 255 NW2d 171 (1977), this Court held that the results of a polygraph examination are not admissible at trial. The basic rationale for the *Barbara* Court's conclusion was that the polygraph technique had not received the degree of acceptance or standardization among scientists which would allow admissibility. *Id.* See also *People v Davis,* 343 Mich 348, 370; 72 NW2d 269 (1955), quoting *People v Becker,* 300 Mich 562, 566; 2 NW2d 503 (1942).

The judicial concern with scientific consensus regarding the procedure is because " 'the quantity [the polygraph] attempts to measure—the truthfulness of a witness—is . . . directly related to the essence of the trial process.' " *People v Barbara, supra,* p 404, quoting note, *The emergence of the polygraph at trial,* 73 Colum L R 1120, 1141 (1973). Thus, exclusion at trial of polygraph results rests upon the judicial estimate that the trier of fact will give disproportionate weight to the results and consider the evidence as conclusive proof of guilt or innocence. See also McCormick, Evidence (2d ed), § 207, p 507.

The question whether statements made before, during, or after the administration of a polygraph examination, as opposed to the results themselves, should be excluded from trial as a matter of law or public policy has never been specifically addressed by this Court.

The general rule in other jurisdictions is that statements are not inadmissible merely because they were made during the course of a polygraph examination. Anno: *Admissibility in evidence of confession made by accused in anticipation of, during, or following polygraph examination,* 89 ALR3d 230. *State v Erickson,* 403 NW2d 281 (Minn App, 1987). In general, a defendant will be unsuccessful in challenging the admissibility of an alleged polygraph-induced confession unless specific coercive conduct or a denial of constitutional rights can be shown, as opposed to a mere allegation that the polygraph examination improperly influenced the defendant's confession of the crime.

The defendant argues that because the polygraph test is scientifically unsound, it should not be used by police agencies and prosecutors as an investigative technique to secure admissions or confessions.

The fact that a test has not been deemed sufficiently reliable to authorize admission of the results in evidence does not support a logical inference that the defendant's statements made during or following the test are not reliable. The premise cannot support the defendant's conclusion because the statements made by an examinee during a polygraph examination *can be* disassociated from the underlying test.

By contrast, the rationale for excluding the results of hypnotically induced testimony extends to statements made after the examination, *People v Gonzales,* 415 Mich 615; 329 NW2d 743 (1982). During hypnosis the subject is in a condition of altered consciousness marked by heightened suggestibility. *Id.,* p 623. Hypnosis contributes to the formation of memories, to a belief in the truth of those memories, and to the inability of the individual or any other person to distinguish between the

real, but repressed, memories and those memories induced by the hypnosis. *Id.* Consequently, because the process of hypnosis "is not a reliable means of accurately restoring forgotten incidents," *id.,* p 626, and because posthypnotic testimony would unfairly denigrate the defendant's right to cross-examination, the testimony of witnesses is excluded. However, the use of hypnosis has not been foreclosed "as an extremely useful investigative tool," *id.,* p 627, and we also have held that statements made before hypnosis that are not associated with the process are not excludable. *People v Nixon,* 421 Mich 79; 364 NW2d 593 (1984).

The reliability of statements made during a polygraph examination does not depend on the validity of the polygraph test or the examiner's skill in conducting the test or interpreting its results, nor does the use of such statements improperly denigrate effective cross-examination. It follows, then, that a statement may be reliable and voluntary even though it was made during the course of a polygraph examination. See *State v Blosser,* 221 Kan 59, 60-63; 558 P2d 105 (1976). The key inquiry is whether the statement[3] is voluntary, and such a determination is best made on the facts of each case.

The defendant further submits that there is confusion and ambiguity concerning the admissibility of statements obtained during the administration of a polygraph examination. We recognize a potential for confusion exists in a situation where a defendant may not knowingly and intelligently waive certain rights *if* the distinction between results of a polygraph examination and statements made before, during, or after a poly-

[3] See *Jackson v Denno,* 378 US 368, 385-386; 84 S Ct 1774; 12 L Ed 2d 908 (1964).

graph examination is not adequately explained to the defendant. See, e.g., *People v Leonard,* 421 Mich 207; 364 NW2d 625 (1984). However, not every situation involving the administration of a polygraph examination will give rise to this potential confusion. Where the distinction is sufficiently explained and the defendant is capable of understanding the distinction, a knowing and voluntary waiver of rights is clearly a possibility. Accordingly, a claim by a defendant that such confusion prevented a knowing and voluntary waiver of his rights can only be decided on a case-by-case basis.[4]

Therefore, we conclude, as have the overwhelming majority of jurisdictions that have considered the issue, that a blanket prohibition of polygraph use in investigative practices is not warranted. Further, we conclude that neither public policy nor federal or state law requires that statements made before, during, or after the administration of a polygraph examination are excludable per se as evidence at trial. Current procedures designed to test the voluntariness of such statements are adequate to insure that a statement that is unreliable or obtained without a knowing and intelligent waiver of a defendant's rights will not be used at trial.

### III. DID THE COURT OF APPEALS ERR IN IMPOSING A DUTY ON THE TRIAL JUDGE TO HOLD A *WALKER* HEARING SUA SPONTE IN THE PRESENCE OF ALERTING CIRCUMSTANCES?

In the landmark case, *Jackson v Denno,* 378 US 368; 84 S Ct 1774; 12 L Ed 2d 908 (1964), the

[4] The defendant does not claim that he failed to understand the advice of rights because of confusion or ambiguities in the waiver form.

United States Supreme Court held that the constitution requires that at some point during criminal proceedings a defendant have the right to object to the use of his confession and to have a fair hearing and reliable determination on the issue of voluntariness. In a later case, *Wainwright v Sykes,* 433 US 72; 97 S Ct 2497; 53 L Ed 2d 594 (1977), the Court further held, however, that "the Constitution does not require a voluntariness hearing absent some contemporaneous challenge to the use of the confession." *Id.,* p 86.

Michigan follows the so-called "orthodox" rule providing for a separate hearing outside the presence of the jury for the purpose of allowing the trial judge to determine the voluntariness of a confession. If the judge finds the confession to be involuntary, the matter ends there and the jury never considers it. If the confession is found to be voluntary, it is admitted with jury consideration limited only to weight and credibility, *People v Walker (On Rehearing),* 374 Mich 331; 132 NW2d 87 (1965). Michigan also requires that a defendant challenge the voluntariness of a confession before demanding that a *Walker* hearing be held. *People v Shipp,* 21 Mich App 415, 420; 175 NW2d 529 (1970); *People v Hooks,* 112 Mich App 477; 316 NW2d 245 (1982).

In *People v Hooks, supra,* p 480, Judge RILEY recognized an exception to the general raise-or-waive rule where the factual situation itself raises a substantial question of voluntariness. "Alerting circumstances may be a defendant's mental, emotional or physical condition, evidence of police threats, or other obvious forms of physical and mental duress."

The reason for the alerting-circumstances exception is that a conviction based on an involuntary

confession deprives the defendant of due process.[5] " '[T]he proscription against the use of involuntary confessions reflects the basic societal conviction that the very integrity of the criminal justice system is compromised when it operates to take advantage of a person whose volitional capacity is seriously impaired.' " *Hooks, supra,* p 481, quoting *United States v Powe,* 192 US App DC 224, 232; 591 F2d 833 (1978). See also *United States v Renteria,* 625 F2d 1279, 1283 (CA 5, 1980); *United States v Bentley,* 726 F2d 1124, 1128-1129 (CA 6, 1984); *United States v Taylor,* 374 F2d 753, 756 (CA 7, 1967); *Hizel v Sigler,* 430 F2d 1398, 1400-1401 (CA 8, 1970); *Jacobson v California,* 431 F2d 1017, 1018-1019 (CA 9, 1970); *United States v Hart,* 729 F2d 662, 666 (CA 10, 1984); *United States ex rel Gainer v New Jersey,* 278 F Supp 127 (D NJ, 1967); *Commonwealth v Harris,* 371 Mass 462; 358 NE2d 982 (1976); *State v Pearce,* 266 NC 234; 145 SE2d 918 (1966).

In *Hooks,* the incriminating statement was obtained roughly eight hours after the defendant had been seriously wounded in the chest and struck on the head. At the time of the statement, he was attached to a life-support machine, had various tubes attached to his body, was in pain, under medication, and in a weakened state both physically and mentally. The defendant also testified that he had not read the officer's transcription of his statement before he signed it and that the officer had to hold his head up so that he could see the line he was signing.

The weakened mental and physical state of the

[5] Similar considerations arise when the evidence raises sufficient doubt as to defendant's competency to stand trial. Because the conviction of a legally incompetent defendant is a deprivation of due process, evidence that raises a "bona fide" doubt as to competence obligates a sanity hearing sua sponte. *Pate v Robinson,* 383 US 375, 385; 86 S Ct 836; 15 L Ed 2d 815 (1966).

defendant was considered sufficient to present "an alerting circumstance which should have triggered the court's *sua sponte* inquiry into the voluntariness of the statement." *Hooks, supra,* p 482. Because the burden placed upon the trial court by this holding was "immense," Judge RILEY emphasized the necessity to rule narrowly on the basis of the extreme facts of the case.

Undoubtedly, certain alerting circumstances require the trial court to raise the issue of voluntariness on its own. We also agree that because of the heavy burden placed upon the trial court by such a rule, the *Hooks* rule is limited to those cases in which the evidence clearly and substantially reflects a question about the voluntary nature of a confession or implicates other due process concerns. We do not find in this case any challenge to the defendant's statements that raise a due process issue regarding the defendant's physical or mental capacity to make a voluntary statement,[6] as in *People v Hooks, supra,* and, therefore, this exception to the general raise-or-waive rule is inapplicable. The rule of *Jackson v Denno, supra,* and the exception to the raise-or-waive rule is directed to those situations in which a confession might be involuntary in the traditional sense that that term was historically used in Fifth Amend-

[6] The United States Supreme Court has recently articulated a distinction between the interest protected by *Miranda,* the due process "voluntariness" inquiry, and the concerns underlying the evidentiary issue of reliability. In *Colorado v Connelly,* 479 US 157; 107 S Ct 515; 93 L Ed 2d 473 (1986), the Court held that coercive governmental activity was the aim of the due process voluntariness issue, that such activity is a predicate to finding that a confession is not voluntary within the meaning of the Due Process Clause, and that "*Miranda* protects defendants against government coercion leading them to surrender rights protected by the Fifth Amendment; it goes no further than that . . .," *supra,* 479 US 170. The Court concluded that in the absence of police overreaching, the respondent's mental condition did not preclude a finding of a voluntary waiver of *Miranda* rights, and that the admissibility of such statements is to be resolved by state laws governing the admission of evidence.

ment jurisprudence. See, e.g., *Payne v Arkansas,* 356 US 560; 78 S Ct 844; 2 L Ed 2d 975 (1958); *Haynes v Washington,* 373 US 503; 83 S Ct 1336; 10 L Ed 2d 513 (1963). In this case, the Court of Appeals has extended the *Hooks* exception to require an additional inquiry sua sponte regarding whether the defendant made an intelligent and voluntary waiver of the prophylactic rules of *Miranda v Arizona,* 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966), and the Sixth Amendment right to counsel. Perhaps because over time the profession has come to use the term, "*Walker* hearing" to refer to that phase of motion practice in which all issues of admissibility of a defendant's statements are resolved,[7] the Court of Appeals did not distinguish the voluntariness issue from the separate and distinct concerns addressed in *Miranda.* The Court of Appeals decision focuses on whether the defendant's Fifth Amendment right against self-incrimination and his Fifth and Sixth Amendment rights to counsel were validly waived as opposed to whether the defendant's confession was voluntary. However, as the Supreme Court has observed, a "simple failure" to administer *Miranda* warnings is not in itself a violation of the Fifth Amendment. *Oregon v Elstad,* 470 US 298, 306, n 1; 105 S Ct 1285; 84 L Ed 2d 222 (1985).

The *Miranda* exclusionary rule, however, serves

[7] It is not only difficult to conclude that the circuit judge should have been alerted to a need for a *Walker* hearing on the basis of an alleged ambiguity in the waiver form, but since the defendant's motion to suppress was renewed, it is even more difficult to conclude what the remand would encompass. Presumably since the defendant's counsel did challenge the admissibility of the statement, but did not call defendant to the stand, the remand would be for this purpose. However, defendant does not claim he did not understand the waiver form or that counsel was ineffective. Although the opportunity was available to the defendant and his trial counsel at the circuit court hearing, it was not exercised. There is nothing in defendant's pleadings to suggest that it would be exercised at the hearing on remand which the Court of Appeals has ordered.

> the Fifth Amendment and sweeps more broadly than the Fifth Amendment itself. It may be triggered even in the absence of a Fifth Amendment violation. The Fifth Amendment prohibits use by the prosecution in its case in chief only of *compelled* testimony. Failure to administer *Miranda* warnings creates a presumption of compulsion. Consequently, unwarned statements that are otherwise voluntary within the meaning of the Fifth Amendment must nevertheless be excluded from evidence under *Miranda*. [*Id.* at 306-307.]

Clearly, this is not a case involving a voluntariness issue such as *Hooks*. We therefore conclude that *People v Hooks* did not require the remand to the trial court here ordered.

### IV. DID DEFENDANT WAIVE HIS CONSTITUTIONAL RIGHTS?

The primary grounds for the Court of Appeals decision to remand the case for a *Walker* hearing is an alleged ambiguity arising in the waiver form itself. The waiver form did not recite the well-established rule in Michigan that the results of a polygraph examination are not admissible at trial. *People v Barbara, supra.* Rather, it stated that any statements by the defendant made *during* the testing phase and questioning, *before* and *after,* could be used against him in a court of law. The Court of Appeals believed that these circumstances created an ambiguity in the acknowledgment portion of the waiver as to "whether *any* evidence would be admissible from the polygraph procedure." 156 Mich App 44. (Emphasis added.)

We disagree with the Court of Appeals that the facts of this case raised clear and substantial questions as to whether the defendant voluntarily

waived his *Miranda* right or his "Fifth[8] or Sixth Amendment" rights to counsel.

The facts indicate that the defendant was arrested on October 14, 1983, approximately one month after the fire. After he was arraigned, he was released on bond. On November 10, 1983, defendant voluntarily submitted to a polygraph examination. Defendant's counsel, Robin Wheaton, accompanied him to the Michigan State Police post in Flint where the examination was to take place.

Sergeant Bratton, who administered the interrogation and polygraph examination, testified that she read to the defendant in the presence of his attorney each of the statements in the acknowledgment and asked him if he understood his rights and was willing to waive them. The defendant replied in the affirmative, and then signed the acknowledgment included on the waiver form which included:

> I understand that I have the right to remain silent and that anything that I say during the testing phase and questioning, before or after, can be used against me in a court of law. I further understand that I may exercise my right to remain silent and stop answering questions at any time. [156 Mich App 36.]

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[8] The prosecutor assumes for the sake of this argument only that defendant was in "custody" for *Miranda* purposes at the time of the examination. See *People v Lumley,* 154 Mich App 618; 398 NW2d 474 (1986).

In *Michigan v Tucker,* 417 US 433; 94 S Ct 2357; 41 L Ed 2d 182 (1974), the Supreme Court recognized that there is a distinction between the Fifth Amendment privilege as such and the particular "procedural safeguards" defined in *Miranda* to assure that Fifth Amendment rights not be denied individuals in the context of custodial interrogation. There may also be a distinction between the adequacy of waiver required for a Fifth and a Sixth Amendment right. *People v Bladel (After Remand),* 421 Mich 39; 365 NW2d 56 (1984), aff'd sub nom *Michigan v Jackson,* 475 US 625; 106 S Ct 1404; 89 L Ed 2d 631 (1986). In view of our conclusion that defendant's statements were properly admitted, we need not resolve this question.

During a separate hearing at trial, it was revealed that prior to the examination, and while in the presence of counsel, defendant signed a written waiver of his right to counsel during the examination and during the questioning immediately before and after the examination.

The waiver form was received into evidence. Also, during the separate record, Mr. Wheaton agreed with Sergeant Bratton that he had been present when the defendant was advised of his rights and waived them. He also elicited from the sergeant that these rights were not repeated immediately prior to the postexamination questioning which occurred approximately two hours after the initial warnings were given.

Sergeant Bratton was then permitted to testify at trial during the people's case in chief that after the examination she asked the defendant a rhetorical question, that she thought he and Rod Anderson had set fire to the apartment. Defendant allegedly responded, "Right."[9]

Before trial, defense counsel renewed his objection in a motion to suppress the statements. Defense counsel argued that although the examining officer read the defendant *Miranda* warnings prior to the polygraph examination, she did not do so again after the examination which continued for a considerable length of time, thus failing to insure that the defendant understood that the same protections applied after the test as before the test.

[9] The record establishes that at the preliminary examination trial counsel did not specify the reason for his objection to the admission of defendant's statement. Indeed, it appears that both the prosecutor and the defense counsel believed that it would be improper to inject evidence of the polygraph examination before the examining magistrate. Defense counsel ultimately withdrew the objection, relieving the prosecutor of any duty to introduce the waiver form. While it was inadvertently revealed that a polygraph examination was involved, that fact was not considered by the examining magistrate in his decision to bind over the defendant.

In denying the motion to suppress the statements, the circuit judge held that nothing in the testimony pinpointed a fatal passage of time between the *Miranda* warnings and the statement—therefore defendant's waiver applied to the postexamination interview. The issue thus presented on this record is whether the failure to readvise the defendant of *Miranda* rights at the conclusion of the examination prevents a voluntary and intelligent waiver per se.

We conclude in the circumstances of this case that it was not necessary to rewarn the defendant of his constitutional rights in the limited exchange that ensued immediately after the polygraph machine was shut off. In *Wyrick v Fields,* 459 US 42, 47; 103 S Ct 394; 74 L Ed 2d 214 (1982), the United States Supreme Court rejected the Eighth Circuit Court's holding that a failure to rewarn a suspect prior to the postpolygraph interview was a violation per se of his Fifth Amendment right to have counsel present at the interview. Recognizing that we are free to formulate another test, we adopt the *Wyrick* interpretation and hold that the admissibility of such statements is to be resolved by a review as to whether in the "totality of circumstances" the waiver of the Fifth Amendment right could be considered knowing and voluntary.

In this case, the only circumstance intervening between the preexamination rights and postexamination questioning which was alleged to be of moment was the two-hour time period that encompassed the preinterview conversation, the test itself and the postexamination interview. In addition, the same person who had warned defendant of his rights the first time, and who conducted the polygraph examination, also conducted the postexamination questioning. Cf. *United States v Gillyard,* 726 F2d 1426 (CA 9, 1984). Therefore, as in

*Wyrick,* it was not reasonable to expect a rewarning of those rights at that time. Finally, and most importantly, the defendant's waiver expressly extended to a postexamination interview.

Further, it is clear that this is not a situation in which defendant was isolated from counsel. While free on bond, the defendant appeared voluntarily for the examination and was accompanied by counsel who remained at the police station for the duration of the examination. Counsel and defendant were informed that counsel could not be present during the examination, yet counsel made no objection. See *State v Erickson, supra.* There is no allegation that the defendant wished to confer with counsel during the questioning but was not allowed to do so. Nor does the defendant contend that the questioning was beyond what was expected or agreed upon. Cf. *State v Baillargeon,* 124 NH 355; 470 A2d 915 (1983).

This case is distinguishable from *People v Leonard, supra.* In that case, a stipulation was entered into by the prosecutor and defense counsel whereby the results of the polygraph examination and opinions drawn therefrom would *not be admissible* in evidence. Defense counsel argued that the stipulation suppressed all evidence from questions during the examination, including any statements made by the defendant. In *Leonard,* it was quite clear that there was a misconception on the defendant's part as to what was and what was not to be admitted at trial.

In this case, the examining officer specifically informed the defendant that anything he might say during the testing phase and questioning, *before* or *after,* could be used against him in a court of law. Further, counsel was present when the defendant was so informed. Unlike *Leonard,* the instant defendant never attacked the state-

ment on the ground that because it was made during the course of a polygraph examination he believed the statement would be inadmissible at trial. Rather, the objection was based solely on the fact that the officer failed to rewarn the defendant of his constitutional rights.

CONCLUSION

Clearly the issue in this case is distinguishable from that presented by *People v Hooks, supra.* The trial court was not obligated to conduct a further hearing to determine the voluntariness of a defendant's waiver of his right to remain silent or his Fifth or Sixth Amendment rights to counsel during interrogation. Therefore, the Court of Appeals erred in ordering a remand. Further, we find that this defendant made a voluntary and a valid waiver of his constitutional rights. There is no question that the defendant's rights were waivable or that on this record they were in fact waived.

RILEY, C.J., and BRICKLEY, ARCHER, and GRIFFIN, JJ., concurred with BOYLE, J.

ARCHER, J. (*concurring*). I have signed Justice BOYLE's opinion because I consider the "totality of circumstances" approach toward the defendant's waiver of his right to counsel to encompass the factors listed within Chief Justice WILLIAMS' separate opinion in *People v Leonard,* 421 Mich 207, 224; 364 NW2d 625 (1984).

Finally, I note that the waiver form defendant signed on November 10, 1983, at 9:48 A.M., contained the following language:

> I understand that the polygraph test and the questioning, before and after, cannot be conducted with a lawyer actually present in the examination room, and I am willing to waive his/her presence. However, I fully understand that I have the right

to talk with and have the assistance of a lawyer at any time during the polygraph test or questioning and that I may stop the test or questioning at any time and exercise that right.

LEVIN, J. (*dissenting*). The Court of Appeals was within its authority in ordering an evidentiary hearing on the questions whether Ray voluntarily waived his right to remain silent and to have his counsel present at the postpolygraph interrogation. The Court of Appeals has broad authority, no less so than this Court, to order an evidentiary hearing whenever in its judgment such a hearing is necessary or appropriate to enable it to discharge its reviewing function.[1]

The circumstances of this case indicate that there is reason to question the voluntariness of

[1] The majority in the Court of Appeals spoke of "clear error" in holding "that the magistrate and the acting circuit judge should have been alerted to the need for a *Walker* hearing." *People v Ray,* 156 Mich App 31, 44, 46-47; 401 NW2d 296 (1986).

Ray's lawyer moved in the circuit court to suppress evidence of the statement, "Right," stating that evidence of the statement had been introduced at the preliminary examination, that such a statement to be admissible in evidence must be voluntary, and that Ray's constitutional rights were violated because, among other things, the officer did not repeat the *Miranda* warnings after the conclusion of the polygraph examination. The motion asked the court to "suppress the Defendant's statement, or in the alternative, order an evidentiary hearing on this matter."

The acting circuit judge did not order an evidentiary hearing, but rather reviewed the preliminary examination transcript and found that the defendant freely and voluntarily made the statement. At the trial, the circuit judge, referring to the motion heard by the acting circuit judge, said "[t]hey, obviously, did not have to make a separate record" and declared that the "Court sustains the ruling made by the lower court, apparently in review of the suppression material."

The defendant's lawyer thus sought an evidentiary hearing. The motion to suppress the evidence was decided on the basis of the testimony at the preliminary examination which was not focused on the issue of the voluntariness of the statement, raised by defendant's motion filed after the preliminary examination. It thus appears that the issue was preserved by defendant's lawyer and that the circuit court erred in deciding the voluntariness issue without an evidentiary hearing.

Ray's "waiver." The "admission" or "confession"[2] at issue was made in response to questioning that occurred after the polygraph examination was completed. The "waiver" document states that the questioning before, during, and after the examination "cannot be conducted with a lawyer actually present in the examination room . . . ." Whatever may be the rationale for declaring that Ray's lawyer could not be present for questioning before and during the polygraph examination,[3] there is no apparent rationale for excluding his lawyer from the postpolygraph questioning.

The apparent overbreadth of the "waiver" and ambiguity noted by the Court of Appeals[4] justify its decision to order an evidentiary hearing on the questions whether Ray voluntarily waived his right to remain silent and to have his counsel present at the postpolygraph interrogation.

In all events, there is no need to express an opinion concerning the admissibility of statements made during the polygraph examination itself as no such question is raised by the instant case.

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[2] During the polygraph examination, Ray denied culpability. After the examination, the police sergeant who administered the examination told Ray that she thought that Ray and a friend set the fire. Ray responded, "Right."

[3] The rationale asserted for excluding defense counsel from questioning before and during the polygraph examination is that in both periods the examinee is linked to the machine, and the presence of persons other than the examiner and the examinee may distort the physiological responses monitored by the polygraph device. See Reid & Inbau, Truth and Deception: The Polygraph ("Lie-detector") Technique (2d ed). (Physiological responses would not, however, be distorted by counsel observing through a one-way window.) But see Furedy & Liss, *Countering confessions induced by the polygraph: Of confessionals and psychological rubber hoses,* 29 Crim L Q 91, 103 (1986) (no scientific basis for assertion that the examiner must be alone with the examinee). During postexamination questioning, however, the rationale for exclusion is inapplicable because physiological responses are no longer being monitored.

[4] The Court of Appeals said, "Defense counsel says the polygraph waiver was ambiguous and that the parties never understood defense counsel was waiving his right to be present at a post-polygraph interrogation." *People v Ray,* n 1 *supra,* p 47.

We would affirm the decision of the Court of Appeals.

CAVANAGH, J., concurred with LEVIN, J.

PEOPLE v WRIGHT

Docket No. 78396. Argued October 7, 1987 (Calendar No. 1). Decided September 8, 1988.

Atlee Wright was convicted by a jury in the Detroit Recorder's Court, Warfield Moore, Jr., J., of second-degree murder. The Court of Appeals, MACKENZIE, P.J., and WALSH and SHEPHERD, JJ., affirmed in an unpublished opinion per curiam, holding that a psychiatric examination ordered by the court prior to sentencing to which no objection was raised was properly considered by the court at sentencing (Docket No. 81403). The defendant appeals.

In an opinion by Justice CAVANAGH, joined by Justices LEVIN, BRICKLEY, and ARCHER, the Supreme Court *held:*

A postconviction presentence psychiatric examination of a defendant, ordered by the trial court in the presence of defense counsel without objection and conducted two weeks later outside the presence of counsel, which was referred to by the trial court in imposing sentence, did not violate the defendant's Fifth Amendment right against self-incrimination or his Sixth Amendment right to counsel.

1. Before a trial court may impose sentence on a person convicted of a felony, an inquiry must be made by a probation officer into the antecedents, character, and circumstances of the person. Implicit in the statutory prescription is the option of having a psychiatric examination performed during the presentence investigation. While the Fifth Amendment right against self-incrimination attaches at a court-ordered psychiatric examination used for sentencing purposes, a defendant's right is adequately protected at a postconviction presentence psychiatric examination where, as in this case, although precise *Miranda* warnings are not given, the defendant has had the

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REFERENCES

Am Jur 2d, Criminal Law §§ 936 *et seq.*, 967 *et seq.*

Adequacy of defense counsel's representation of criminal client regarding appellate and post conviction remedies. 15 ALR4th 582.

Right of accused in criminal prosecution to presence of counsel at court-appointed or -approved psychiatric examination. 3 ALR4th 910.

assistance of counsel during trial, acknowledges an understanding that anything said during the examination could be reported to the court, and decides to proceed.

2. A defendant has a right to counsel under the Sixth Amendment at all critical stages of criminal proceedings. In this case, the defendant's right to counsel was adequately protected. The examination was ordered in the presence of the defendant and his counsel without objection, and was held nearly two weeks later, affording the defendant ample opportunity to consult with defense counsel prior to participating in the examination.

Affirmed.

Justice BOYLE, joined by Chief Justice RILEY and Justice GRIFFIN, concurring in part and dissenting in part, while agreeing that the defendant failed to demonstrate a denial of his Fifth or Sixth Amendment rights, disagreed with the assumption that the Fifth Amendment right against self-incrimination is applicable in this case and would not reach the merits of the question whether the Sixth Amendment requires advance notice to counsel of a presentence psychiatric examination.

Whether the Fifth Amendment protection applies depends on the nature of the statement or admission and the exposure its admission into evidence would invite. While Fifth Amendment protection does not disappear merely because statements are uttered in the context of a presentence psychiatric examination, neither are such statements to be automatically included within the purview of the Fifth Amendment. The evaluation in this case served as a neutral psychological profile, limited in purpose and use to assist the trial court in determining the sentence to be imposed. The defendant was not compelled to submit to the examination, and would not have been subjected to any legal sanctions had he chosen to remain silent. In addition, he was afforded ample notice and sufficient time to consult with counsel prior to participation. Assuming, arguendo, that the defendant enjoyed a Sixth Amendment right to advance notice to counsel of the examination, no violation of such right occurred. The defendant and his counsel received actual notice of the examination, and it appears that the Sixth Amendment does not require the presence of counsel at the examination.

1. CONSTITUTIONAL LAW — CRIMINAL LAW — SELF-INCRIMINATION — RIGHT TO COUNSEL — PRESENTENCE PSYCHIATRIC EXAMINATIONS.

A criminal defendant's right against self-incrimination and right

to consult with counsel exist at a postconviction court-ordered presentence psychiatric examination (US Const, Ams V, VI).

2. CONSTITUTIONAL LAW — CRIMINAL LAW — SELF-INCRIMINATION — RIGHT TO COUNSEL — PRESENTENCE PSYCHIATRIC EXAMINATIONS.

A postconviction presentence psychiatric examination of a defendant, ordered by the trial court in the presence of defense counsel without objection and conducted two weeks later outside the presence of counsel, which was referred to by the trial court in imposing sentence, did not violate the defendant's Fifth Amendment right against self-incrimination or his Sixth Amendment right to counsel (US Const, Ams V, VI; MCL 771.14; MSA 28.1144).

*Frank J. Kelley,* Attorney General, *Louis J. Caruso,* Solicitor General, *John D. O'Hair,* Prosecuting Attorney, *Timothy A. Baughman,* Chief, Criminal Division, Research, Training and Appeals, and *Olga Agnello,* Assistant Prosecuting Attorney, for the people.

*Carl Ziemba* for the defendant.

CAVANAGH, J. Defendant asserts that, contrary to *Estelle v Smith,* 451 US 454; 101 S Ct 1866; 68 L Ed 2d 359 (1981), he was not properly informed that he had a Fifth Amendment privilege against self-incrimination and a Sixth Amendment right to counsel at his presentence psychiatric examination. We hold that defendant's Fifth and Sixth Amendment rights were adequately protected by the procedures followed by the trial court and the Detroit Recorder's Court psychiatric clinic. We thus uphold the Court of Appeals affirmance of defendant's conviction.

## BACKGROUND

Following a jury trial in Recorder's Court, defendant was convicted of second-degree murder. At the end of trial in the presence of counsel, the trial judge ordered the defendant to be examined

in the Recorder's Court psychiatric clinic prior to sentencing. Neither defendant nor his counsel objected. The examining psychologist concluded that defendant was assaultive, antisocial, and posed a high risk to the community. At sentencing, the trial judge referred to these findings and sentenced defendant to forty to seventy years' imprisonment. In addition to other issues raised in the Court of Appeals, defendant asserted noncompliance with *Estelle v Smith, supra,* in which the United States Supreme Court held that when the results of a psychiatric examination are used in determining the nature and severity of a convicted defendant's sentence, the defendant's Fifth Amendment right against self-incrimination and Sixth Amendment right to counsel attach. The Court of Appeals affirmed defendant's conviction in an unpublished opinion without discussing *Estelle.*

We granted leave to appeal limited to the issue whether the psychiatric examination was improperly conducted in violation of defendant's Fifth Amendment right against self-incrimination. 426 Mich 864 (1986). Although not included within our order granting leave, we will also discuss the alleged violation of defendant's Sixth Amendment right to counsel, which was briefed by both parties.

Before discussing the *Estelle* holding and the present issues, it is helpful to summarize the three types of psychiatric examinations which are typically performed at forensic psychiatric clinics, and the importance of the one involved here.[1] When a defendant's competency to stand trial is questioned, a competency examination is given to determine his mental state at the time of trial to assure that he understands the charges against

[1] Although this opinion and *Estelle* use the term "psychiatric" examination, our holding also applies to presentence examinations performed by psychologists and other mental health professionals.

him and can knowingly assist in his defense.[2] When a defendant pleads not guilty by reason of insanity, a criminal responsibility or sanity examination is given to determine the defendant's mental state at the time of the offense.[3]

In Michigan, the results of competency examinations may not be used at trial as evidence of a defendant's guilt, obviating Fifth Amendment concerns regarding self-incrimination.[4] Also, a defendant must submit to, and participate in, a criminal responsibility examination before being allowed to present an insanity defense at trial.[5] Statements made during that examination are not admissible on any issue other than the defendant's mental illness or insanity at the time of the alleged offense.[6] The *Estelle* Court confirmed that the Fifth Amendment right to remain silent is not implicated when the results of the competency and sanity examinations are used for their intended purposes:

> [T]he interview with Dr. Grigson [the examining psychiatrist] cannot be characterized as a routine competency examination restricted to ensuring that respondent understood the charges against him and was capable of assisting in his defense. Indeed, if the application of Dr. Grigson's findings had been confined to serving that function, no Fifth Amendment issue would have arisen.
>
> Nor was the interview analogous to a sanity examination occasioned by a defendant's plea of

[2] In Michigan, see MCL 330.2020 *et seq.;* MSA 14.800(1020) *et seq.* See also MCR 6.106.

[3] In Michigan, see MCL 768.20a; MSA 28.1043(1).

[4] MCL 330.2028(3); MSA 14.800(1028)(3).

[5] MCL 768.20a(4); MSA 28.1043(1)(4). See *People v Martin,* 386 Mich 407, 428; 192 NW2d 215 (1971). For the Sixth Circuit's treatment of a Fifth Amendment claim under *Estelle* in the context of a sanity examination, see *Watters v Hubbard,* 725 F2d 381, 384 (CA 6, 1984).

[6] MCL 768.20a(5); MSA 28.1043(1)(5). See, e.g., *People v Jacobs,* 138 Mich App 273, 276; 360 NW2d 593 (1984).

> not guilty by reason of insanity at the time of his offense. When a defendant asserts the insanity defense and introduces supporting psychiatric testimony, his silence may deprive the State of the only effective means it has of controverting his proof on an issue that he interjected into the case. Accordingly, several Courts of Appeals have held that, under such circumstances, a defendant can be required to submit to a sanity examination conducted by the prosecution's psychiatrist. [451 US 465.]

The third type of psychiatric examination is the postconviction presentence evaluation, which is either court-ordered or requested as part of the presentence investigative process to determine the defendant's character traits for purposes of sentencing. In Michigan, the Legislature has expressly provided for the preparation of a presentence investigation report in § 14 of the Code of Criminal Procedure:

> (1) Before sentencing any person charged with a felony, . . . the probation officer shall inquire into the antecedents, character, and circumstances of the person, and shall report in writing to the court. [MCL 771.14(1); MSA 28.1144(1).]

Implicit within § 14 is the option of having a psychiatric examination performed during the presentence investigation. MCL 771.14(7); MSA 28.1144(7). This is the type of examination which was performed in the present case.

Deciding the appropriate sentence for a convicted criminal is perhaps the most critical stage of a successful criminal prosecution. The information gathered during the state's presentence investigation is usually heavily relied on by the sen-

tencing judge, hence its importance cannot be overemphasized.[7]

In *Estelle,* the Supreme Court held that the prosecution's use of certain psychiatric testimony at the sentencing phase of the defendant's murder trial violated his Fifth and Sixth Amendment rights. In that case, the defendant was convicted of first-degree murder in Texas and was sentenced to death. At the time of the defendant's trial, Texas law required two jury proceedings to impose the death penalty: one to decide guilt and one to determine the penalty. Following conviction in the guilt phase, the state had the burden of proof on three questions in the penalty phase. If the jury answered the questions affirmatively, the judge was bound to impose the death penalty. Of these three inquiries, the one at issue in *Estelle* was the defendant's future dangerousness. The examination which produced the objectionable information was a pretrial competency examination which had been routinely ordered by the judge because the defendant faced the death penalty. The examining psychiatrist, however, was also called as a witness

[7] See, generally, 3 ABA Standards for Criminal Justice (2d ed), Sentencing Alternatives and Procedures, 18-5.1 to 18-5.6, pp 18-332 to 18-418.

See also *People v Lee,* 391 Mich 618, 635; 218 NW2d 655 (1974) (the presentence report is widely regarded as an effective method of supplying information essential to an informed sentencing decision); *People v Brown,* 393 Mich 174, 181; 224 NW2d 38 (1974) (a convicted felon may not waive the mandatory use of a presentence report at sentencing); *People v Triplett,* 407 Mich 510, 515; 287 NW2d 165 (1980) (a defendant must be resentenced when a reasonably updated presentence report is not used); *People v Grier,* 152 Mich App 129, 134; 393 NW2d 551 (1986), lv den 425 Mich 878 (1986) (a defendant has a right to be resentenced when his sentence is based upon inaccurate information in the presentence report); *People v Harvey,* 146 Mich App 631, 636; 381 NW2d 779 (1985) (a sentencing court must respond to a defendant's allegations of inaccuracies in a presentence report); *People v McKeever,* 123 Mich App 533, 541; 332 NW2d 596 (1983), lv den 417 Mich 1100.9 (1983) (a defendant may not be sentenced on the basis of the presentence report prepared for another offense).

during the penalty phase where he testified extensively regarding the defendant's sociopathic character and future dangerousness. The jury answered the "future dangerousness" question and the other two questions affirmatively, and the defendant was sentenced to death.

FIFTH AMENDMENT ISSUE

The *Estelle* Court held that because the psychiatric examination was used in determining the nature and severity of defendant's sentence, his Fifth Amendment right attached at the examination:

> The essence of this basic constitutional principle is "the requirement that the State which proposes to convict *and punish* an individual produce the evidence against him by the independent labor of its officers, not by the simple, cruel expedient of forcing it from his own lips." [451 US 462.]

We agree with the defendant in the present case that he, too, had a Fifth Amendment right to remain silent at his presentence psychiatric examination. It is not relevant that the defendant's examination occurred prior to trial in *Estelle* and after trial here. Both examinations were used in determining the severity of the defendant's sentence, which was what the *Estelle* Court focused on:

> Just as the Fifth Amendment prevents a criminal defendant from being made " 'the deluded instrument of his own conviction,' " . . . it protects him as well from being made the "deluded instrument" of his own execution.
>
> We can discern no basis to distinguish between the guilt and penalty phases of respondent's capital murder trial so far as the protection of the

Fifth Amendment privilege is concerned. [451 US 462-463.]

The *Estelle* Court rejected the state's argument that, like voice and handwriting exemplars, lineups, and blood samples, the defendant's statements were not used for their testimonial content:

> Dr. Grigson's diagnosis, as detailed in his testimony, was not based simply on his observation of respondent. Rather, Dr. Grigson drew his conclusions largely from respondent's account of the crime during their interview, and he placed particular emphasis on what he considered to be respondent's lack of remorse. [451 US 464.]

As in *Estelle,* defendant's statements in the present case were testimonial in nature. The examining psychologist relied on the content of defendant's statements to draw several conclusions about him, including that he was prone to act out in an aggressive manner, and that he was a high social risk to the community.[8]

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[8] It has been suggested, in discussing pretrial evaluations, that to consider statements made during clinical evaluations to be nontestimonial is "to deny the reality of the clinical endeavor":

> Certain aspects of the clinical evaluation are clearly "nontestimonial" as that term has been defined by the Supreme Court. For example, part of the clinical assessment may consist of a physical examination. The clinical opinion may also rely, to some extent, on the defendant's mannerisms, facial expressions, attention span, speech patterns, and other behavioral characteristics that manifest themselves during the evaluation. These physical traits are analagous [sic] to writing or voice exemplars, and compelled disclosure would probably not be considered violative of the Fifth Amendment even if they proved incriminating.
>
> The bulk of the typical clinical assessment, however, consists of verbal communication between the evaluator and the defendant.
>
> * * *
>
> [E]ven when his goal is solely to reach conclusions about the

The *Estelle* Court concluded that defendant Smith's Fifth Amendment right had not been adequately protected because the defendant was not advised that the results of the competency examination would be later used by the state in seeking the death penalty:

> The state trial judge, sua sponte, ordered a psychiatric evaluation of respondent for the limited, neutral purpose of determining his competency to stand trial, but the results of that inquiry were used by the State for a much broader objective that was plainly adverse to respondent. [451 US 465.]

Under the above circumstances, the *Estelle* Court held that defendant should have received warnings, pursuant to *Miranda v Arizona,* 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966), that he had a right to remain silent and that any statement he made could be used against him at a sentencing proceeding.

In *Miranda,* the Court was concerned with protecting a suspect's Fifth Amendment right against self-incrimination under "inherently compelling

> defendant's mental state, the clinician depends upon the meaning of the defendant's statements, not upon their form. . . . To use the Court's wording in *Estelle,* almost every clinical evaluation relies heavily on the "substance" of the defendant's statements. To exempt the defendant's verbal disclosures during a pretrial clinical evaluation from Fifth Amendment scrutiny on the ground that they are nontestimonial would be to deny the reality of the clinical endeavor. [Slobogin, Estelle v Smith: *The constitutional contours of the forensic evaluation,* 31 Emory L J 71, 85-87 (1982).]

The above comments are even more apt regarding the type of evaluation in the present case. Examinations used to gather information which will be considered in imposing a sentence are more testimonial and potentially incriminating in nature than statements used solely to evaluate a defendant's mental state.

pressures,"[9] and thus specified mandatory warnings to alert the suspect of his rights. At the time of a suspect's arrest, he is without counsel, usually without knowledge of the precise limits of the potential charges he faces, and without knowledge of the information which the police have to implicate him in criminal activity. In these circumstances, and in light of the history showing frequent abuses of a prisoner's rights, the Supreme Court in *Miranda* adopted a prophylactic rule: precise warnings of specific rights must be given and clear waivers of those rights obtained, before a prisoner can be interrogated. 384 US 475.

Relying on *Miranda,* the *Estelle* Court held:

> [A]bsent other fully effective procedures, a person in custody must receive certain warnings before any official interrogation, including that he has a "right to remain silent" and that "anything said can and will be used against the individual in court."
>
> * * *
>
> The considerations calling for the accused to be warned prior to custodial interrogation apply with no less force to the pretrial psychiatric examination *at issue here.* [451 US 466-467. Emphasis added.]

Defendant asserts that the requirements of *Estelle* must be strictly followed in any psychiatric examination which is considered in determining the severity of a defendant's sentence. However, the emphasized portions of the above quotation, and the following footnote, suggest otherwise:

> Of course, we do not hold that the same Fifth Amendment concerns are necessarily presented by all types of interviews and examinations that

[9] 384 US 467.

might be ordered or relied upon to inform a sentencing determination. [451 US 469, n 13.]

Defendant's examination constituted custodial interrogation in one sense because he was being questioned while in custody. However, such questioning was not tantamount to the custodial interrogation which troubled the *Miranda* Court, where defendants were subjected to "incommunicado interrogation . . . in a police-dominated atmosphere" without being warned of their rights to remain silent or to the assistance of counsel. 384 US 445. In the present case, defendant was questioned by the psychologist after having had the assistance of counsel throughout trial. We can presume that the defendant's attorney had already counseled defendant and informed him of his right against self-incrimination. Similarly, the considerations which led the *Estelle* Court to find that "inherently compelling pressures"[10] were at work on the defendant in that case are absent here.[11]

First, the information in *Estelle* was obtained during a competency examination. That type of examination is ordinarily not used to provide information for sentencing, and in fact the defendant in *Estelle* was not informed that his competency examination would be used for such purpose. Here, the information was obtained from a presentence examination which was clearly conducted to evaluate the defendant's character exclusively for sentencing purposes. Moreover, at the examination the psychologist preceded the evaluation by reading the following information to defendant:

I am one of several examiners of the Psychiatric Clinic of Recorder's Court who will examine and

[10] 451 US 467.

[11] Compare *Jones v Cardwell,* 686 F2d 754, 756 (CA 9, 1982).

> talk to you. We must give to the Court a report of our findings and possibly an option or a recommendation.
>
> The Clinic serves only as an adviser to the Court and cannot determine the outcome of your case.

The examiner then asked defendant whether he understood what he had been told and whether he was willing to proceed. Defendant responded "Yes" to both questions.[12] Thus, unlike the defendant in *Estelle,* defendant here knew as he spoke what his answers would be used for.

Second, the examination in *Estelle* was used by the state to prove one of the three elements required to obtain the death penalty. The *Estelle* Court repeatedly focused on Texas' unique system and the fact that the defendant faced the death penalty.[13] In the present case, the information

[12] There is no tape recording or transcript of the examination. In the appendix to its brief, the people provided a copy of the Recorder's Court psychiatric clinic "Consent to Examination" form, which was used at defendant's evaluation. Defendant has not challenged its accuracy.

[13] A split of authority is developing at the federal level regarding *Estelle*'s applicability to noncapital sentencing proceedings. See n 6 of the dissent. The Sixth Circuit has not yet addressed that question, however. While the fact that the defendant faced the death penalty certainly heightened the *Estelle* Court's concern over his Fifth Amendment right, we conclude that the right against self-incrimination recognized in *Estelle* also exists at noncapital sentencing evaluations. See, e.g., note, *Fifth Amendment and compelled psychiatric examinations: Implications of* Estelle v Smith, 50 Geo Wash L R 275, 295 (1982):

> Although the Supreme Court did not venture beyond the context of a capital sentencing proceeding in *Estelle,* lower courts may justifiably rely upon *Estelle* in applying the fifth amendment to other sentencing procedures. Regardless of the crime committed, the state should be required to warn the defendant that his disclosures to the psychiatrist may lead to a longer sentence. The defendant should not be compelled to acquiesce in the psychiatric examination. Moreover, the sentencing judge should not be able to draw an adverse inference from the defendant's failure to coöperate with the psychiatrist. This limitation on the use of psychiatric examinations is apparent from *Estelle.*

appeared to be used generally to reach a fair prison sentence. There were no elements which the state needed to prove beyond a reasonable doubt, which the examination might have helped it do.

The real teaching of *Miranda,* and *Estelle*'s application of it, is not a rigid formula, but that the Fifth Amendment must be protected.[14] It would exalt form over substance to say under the facts of the present case that defendant's Fifth Amendment right was violated. The examiner's explanation of the purpose and potential use of the examination, and the inquiry whether defendant was willing to proceed, adequately protected that right.

We emphasize that the absence of uncounseled and coercive interrogations of the kind which called for precise warnings in *Miranda* and *Estelle* does not negate the continued existence of a Fifth Amendment right against self-incrimination. For example, no one would deny that, under the Fifth Amendment, a defendant on trial has a right to remain silent. Yet it has never been argued that failure to give explicit *Miranda* warnings before he testifies would require reversal of a testifying defendant's conviction. Therefore, while we conclude that precise *Miranda* warnings were not required in the present case to protect defendant's right against self-incrimination, we nonetheless hold that such right attaches at a court-ordered psychiatric examination used for sentencing purposes.[15]

## SIXTH AMENDMENT ISSUE

As stated earlier, we did not grant leave on the

[14] The warnings mandated by *Miranda* in themselves are not of constitutional dimensions. *Michigan v Tucker,* 417 US 433, 444; 94 S Ct 2357; 41 L Ed 2d 182 (1974).

[15] Our holding today should not be read as diminishing the importance of receiving full *Miranda* warnings in situations which create the "inherently compelling pressures" discussed in *Miranda* and its progeny.

Sixth Amendment issue raised by defendant. Assuming arguendo that the Sixth Amendment right to counsel recognized in *Estelle* applies to the present defendant, we find no violation of that right.

In *Powell v Alabama,* 287 US 45, 57; 53 S Ct 55; 77 L Ed 158 (1932), the United States Supreme Court held that a defendant has a Sixth Amendment right to counsel at all critical stages of criminal proceedings. The *Estelle* Court determined that the defendant had a Sixth Amendment right to the assistance of counsel before submitting to the psychiatric examination:

> [R]espondent's Sixth Amendment right to counsel clearly had attached when Dr. Grigson examined him at the Dallas County Jail, and their interview proved to be a "critical stage" of the aggregate proceedings against respondent. [451 US 470.]

The Court clarified in a footnote that it was not holding that the defendant had a right under the Sixth Amendment to have counsel present during the examination:

> [T]he issue before us is whether a defendant's Sixth Amendment right to the assistance of counsel is abridged when the defendant is not given *prior opportunity* to consult with counsel about his participation in the psychiatric examination. . . .
>
> Respondent does not assert, and the Court of Appeals did not find, any constitutional right to have counsel actually present during the examination. In fact, the Court of Appeals recognized that "an attorney present during the psychiatric interview could contribute little and might seriously disrupt the examination." [*Smith v Estelle*] 602 F2d [694], 708 [CA 5, 1979]. [451 US 470, n 14. Emphasis added.]

The *Estelle* Court held that the defendant was

not afforded his right to counsel[16] because his attorneys were not notified in advance that the pretrial competency examination would also encompass the issue of their client's future dangerousness:

> [R]espondent was denied the assistance of his attorneys in making the significant decision of [sic] whether to submit to the examination and to what end the psychiatrist's findings could be employed. [451 US 471.]

In fact, there was some doubt that counsel had ever been informed of the competency examination itself. 451 US 471, n 15.

In the present case, defendant asserts that he and his counsel were not given sufficient notice of the presentence examination and, hence, that defendant was denied assistance of counsel prior to participating in the examination. Defendant's claim is not supported by the record, however. The trial court ordered the examination in the presence of defendant and his counsel. The examination was held nearly two weeks later. This period of time afforded defendant ample opportunity to consult with his counsel prior to the examination. If defendant did not recognize such opportunity, it can be assumed, at the very least, that his counsel did. The facts which prompted the *Estelle* Court to find that the defendant's Sixth Amendment right was violated are not presented here. Further, we decline to review defendant's vague assertion that he had a right to have counsel present in the examining room. He relies exclusively on *Estelle*

[16] See *Satterwhite v Texas*, 486 US 249; 108 S Ct 1792; 100 L Ed 2d 284 (1988), where the Court adopted the harmless error rule of *Chapman v California*, 386 US 18; 87 S Ct 824; 17 L Ed 2d 705 (1967), for reviewing Sixth Amendment claims under *Estelle*.

in asserting that right, and, as noted above, *Estelle* did not reach that issue.[17]

While we affirm the Court of Appeals result, we do not adopt its rationale.[18] Defendant's conviction is affirmed.

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[17] But see, *People v Martin, supra* at 429, where the Court considered this question in the context of a sanity examination.

[18] In addressing the present issues, the Court of Appeals did not cite *Estelle,* but simply referred to it as one of "the federal cases relied upon by defendant . . . ." The Court relied on three of its cases in contravening *Estelle* and holding that a psychiatric interview is not an adversarial proceeding at which a defendant's Fifth and Sixth Amendment rights attach: *People v Burton,* 44 Mich App 732; 205 NW2d 873 (1973), lv den 389 Mich 795 (1973); *People v Vroman,* 148 Mich App 291; 384 NW2d 35 (1985); *People v Murphy,* 146 Mich App 724; 381 NW2d 798 (1985).

*People v Burton* was decided prior to *Estelle,* and thus the Court of Appeals reliance on it in evaluating defendant's post-*Estelle* claims was of marginal value. To the extent *Burton* conflicts with our holding today, it is overruled.

*People v Vroman* does conflict with *Estelle,* which it fails to cite when rejecting Fifth and Sixth Amendment claims almost identical to the present ones:

> As opposed to a sentencing conference, a defendant's presentence interview is not an adversarial proceeding, but a diagnostic and rehabilitative procedure. Accordingly, *the right against self-incrimination or to have counsel present does not attach.* . . . Likewise, psychiatric evaluation is a diagnostic procedure to which we believe the privilege against self-incrimination is not applicable. The purpose of the privilege is to assure that no one will be convicted upon his own coerced confession. . . . *We do not believe that the privilege should be extended to clinical interviews which take place after a guilty plea has been entered* and which have a purpose quite different from the determination of guilt. [148 Mich App 297. Emphasis added.]

The above language from *Vroman* conflicts with *Estelle* and our present holding, and to that extent it is overruled.

*People v Murphy* supports the Court of Appeals result, but not its analysis. The *Murphy* Court did not reject the notion that a defendant is entitled to his Fifth Amendment right against self-incrimination at a psychiatric examination, as does the Court of Appeals here. In *Murphy,* the defendant was evaluated at a presentence postconviction psychiatric examination in the Recorder's Court, where he was apparently given a consent form similar to the one used in the present case. The *Murphy* Court found that the Fifth Amendment rights existed, that the defendant was adequately informed of them, and that he waived them:

LEVIN, BRICKLEY, and ARCHER, JJ., concurred with CAVANAGH, J.

BOYLE, J. (*concurring in part and dissenting in part*).

I

We are asked to decide in this case whether one who has been convicted of a crime and is remanded to undergo a psychiatric examination as part of the presentence investigation must be given *Miranda*[1] warnings under the rule announced in *Estelle v Smith,* 451 US 454; 101 S Ct 1866; 68 L Ed 2d 359 (1981). While not included in this Court's order granting leave to appeal, we are also asked to decide whether defendant possessed a Sixth Amendment right to the assistance of counsel during the presentence psychiatric examination. The majority concludes that while the Fifth Amendment privilege against self-incrimination attaches at a psychiatric examination when ordered as part of a presentence investigation, the defendant's rights were adequately protected in this case, notwithstanding the absence of *Miranda* warnings.

I agree with the majority that no Fifth Amendment violation is present in this instance, and

> [D]efendant signed a waiver form and agreed to proceed with the full knowledge that the court could be informed of the results of the interview. Considering these facts, we feel that defendant voluntarily waived his rights and that the trial court properly considered the psychiatric report at sentencing. [146 Mich App 728.]

We reject that portion of *Murphy* which distinguished *Estelle* from its facts because Murphy's psychiatric evaluation occurred after he was convicted.

[1] 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

therefore concur in that result.[2] Assuming arguendo that the Sixth Amendment advance notice to counsel requirement applies to presentence post-conviction psychiatric interviews, I agree that the record does not support the claimed violation of that rule.

A

The United States Supreme Court has determined that the applicability of the Fifth Amendment right against self-incrimination turns on two subsidiary questions—the nature of the statement or admission involved, and the exposure to defendant that admission into evidence of the statement or admission would invite. *In re Gault,* 387 US 1, 49; 87 S Ct 1428; 18 L Ed 2d 527 (1967). Foregoing this analysis, however, the majority proceeds on the bare assumption that the defendant possessed a Fifth Amendment right against self-incrimination at a psychiatric examination used for sentencing purposes, while openly acknowledging that the factors prompting the *Smith* Court to find the Fifth Amendment applicable in that case are not present here.

While I agree that a convicted defendant retains a Fifth Amendment privilege not to incriminate himself during a presentence interview with regard to activity unrelated to the crime for which he has been convicted,[3] I cannot agree with the

[2] Defendant has also attempted to raise claims under Const 1963, art 1, §§ 17 and 20. While observing that these claims extend outside this Court's order granting leave to appeal, we also note that defendant has not offered authority to support the argument that a different result should obtain under art 1, §§ 17 and 20 than under the Fifth and Sixth Amendments of the United States Constitution. Thus, we conclude that defendant's appeal lacks an independent state ground and proceed to address his federal claims. *Michigan v Long,* 463 US 1032; 103 S Ct 3469; 77 L Ed 2d 1201 (1983).

[3] In *People v DenUyl,* 318 Mich 645; 29 NW2d 284 (1947), this Court

majority's assumption that the Fifth Amendment applies to the use of a defendant's interview with a psychiatrist bearing only on the potential range of a legislatively determined sentence. Unlike *Smith,* this is neither a situation in which the question of the penalty to be imposed was to be resolved in an evidentiary proceeding, nor a situation in which the defendant was compelled to submit to the psychiatric evaluation. Nor is this a situation like that in *Smith,* where the defendant was unaware that the psychiatrist was obtaining evidence that would be used against him for another purpose and in a different context than the limited function of the psychiatric examination. Indeed, as the Court noted in *Smith,* "if the application of Dr. Grigson's findings had been confined to serving that function, no Fifth Amendment issue would have arisen," *Estelle v Smith, supra,* p 465.

In my view, *Smith* does not compel the conclusion that the Fifth Amendment applies to statements made by a defendant in this context. While in an abstract sense it is correct to state that the Fifth Amendment is always applicable to prohibit "use by the prosecution in its case in chief only of

found that the privilege against self-incrimination under Const 1908, art 2, § 16 protects a witness in a state proceeding from testifying to facts which could lead to incrimination in a pending federal prosecution. Although preceding the United States Supreme Court's decision in *Malloy v Hogan,* 378 US 1; 84 S Ct 1489; 12 L Ed 2d 653 (1964), which ruled the Fifth Amendment privilege against self-incrimination applicable to the states, *DenUyl* has been viewed as establishing that the privilege against self-incrimination applies when an appeal remains pending as to a conviction to which the statement would relate. See *People v Giacalone,* 399 Mich 642, 644, n 3; 250 NW2d 492 (1977); *People v Lindsay,* 69 Mich App 720, 722-723; 245 NW2d 343 (1976); *People v St Onge,* 63 Mich App 16, 18; 233 NW2d 874 (1975); *People v Thomas,* 55 Mich App 368, 370; 222 NW2d 320 (1974).

Counsel for the defendant does not contend that the defendant made statements during the interview regarding the crime he had been convicted of, and we therefore have no occasion to consider whether the defendant retained a Fifth Amendment privilege as to the crime of which he had already been convicted.

compelled testimony," *Oregon v Elstad,* 470 US 298, 306; 105 S Ct 1285; 84 L Ed 2d 222 (1985), the Court's approach in *Smith* illustrates that the relevant inquiry requires an examination of the government's obligation in the circumstances presented. Thus, the Court in *Smith* answered the question "whether the Fifth Amendment privilege is applicable in the circumstances of this case," *id.,* p 461, by looking to the use made of the statements and concluding that if the government uses compulsory examination to gather evidence against a defendant, the government is obligated to advise the defendant that he has "a constitutional right not to answer the question put to him." *Id.,* p 467.

Absent further guidance, the conclusion I draw from *Smith* is that while the protection of the Fifth Amendment privilege does not disappear merely because the respondent's statements were uttered in the context of a presentence psychiatric examination, *id.,* p 465, neither does the fact that defendant made statements during the psychological examination automatically include them within the reach of the Fifth Amendment. Whether the Fifth Amendment applies depends upon the nature of the statement or admission and the exposure which it invites. Thus, if the issue here were whether a psychologist who obtained information at a presentence examination that the defendant had admitted the commission of another crime could testify on the issue of guilt at the defendant's trial for that crime, *Smith* might well compel the answer that the Fifth Amendment is applicable. In my judgment, however, *Smith* does not compel the conclusion that the Fifth Amendment applies to every postconviction interview.

B

In concluding that the Fifth Amendment applied to the facts presented in *Smith,* the Supreme Court looked to several distinct factors. First, the Court assessed the gravity of the decision to be made at the penalty phase of the prosecution and concluded that the Fifth Amendment was applicable at a capital-sentencing hearing.

Next, rejecting the state's claim that defendant's communications to Dr. Grigson were nontestimonial, the *Smith* Court considered the fact that the state, in seeking the death penalty, *used as evidence* detailed descriptions of statements made by defendant to the state's psychiatrist during the course of a pretrial competency examination. These statements were offered to prove to the jury the defendant's future dangerousness during the penalty phase of the proceeding. The Court viewed as dispositive the fact that "Dr. Grigson drew his conclusions largely from respondent's account of the crime during their interview, and he placed particular emphasis on what he considered to be respondent's lack of remorse," 451 US 464. Because the prognosis as to defendant's future dangerousness rested on the defendant's own recitation of the details of the crime, and because these statements were used as direct evidence against the defendant during the penalty phase of the proceeding, the Fifth Amendment was implicated.

Finally, the Court acknowledged "the[ ] distinct circumstances" of the case, 451 US 466, noting that the trial judge, sua sponte, had ordered the psychiatric examination.

By contrast in the instant case, as the majority properly notes, the facts found by the *Smith* Court to mandate the observance of Fifth Amendment rights are simply inapposite to those found here.

First, we do not operate under a bifurcated trial system in which the state must prove certain facts beyond a reasonable doubt to secure a desired

sentence in a contested adversarial context.[4] Thus, it cannot be said that information given by the defendant provided evidence against him that reduced the government's burden to shoulder the load.

Second, the purpose of the instant examination was limited to assistance in the sentencing decision. By contrast, as the Court observed in *Smith,* Dr. Grigson's examination had not been restricted to serving the neutral purpose of determining defendant's competency to stand trial, in which case, "no Fifth Amendment issue would have arisen." *Id.,* p 465. However, "[w]hen Dr. Grigson went beyond simply reporting to the court on the issue of competency and testified for the prosecution at the penalty phase on the critical issue of respondent's future dangerousness, his role changed and became essentially like that of an agent of the State recounting unwarned statements made in a postarrest custodial setting." *Id.,* p 467. In this case, Mr. Crenshaw's examination contained no reference to the details of the instant crime or any other criminal activity by defendant.[5] Rather, his evaluation served only as a neutral psychological profile based on the defendant's family background, school, and work history, and the results of a battery of psychological testing. Mr. Crenshaw did not become an agent for the state securing disclosures to be used against the defen-

[4] Further, we do not have capital punishment in this state, thus distancing the *Smith* rationale. The majority concludes that the *Smith* holding applies to noncapital proceedings. *Ante,* p 294, n 13. The courts have split on whether to limit *Smith* to capital sentencing cases, see, e.g., *Baumann v United States,* 692 F2d 565, 576 (CA 9, 1982); *United States v Jones,* 640 F2d 284, 288 (CA 10, 1981); cf. *United States v Chitty,* 760 F2d 425, 432 (CA 2, 1985).

[5] There has here been no allegation and no showing that the examining psychologist employed statements taken from defendant concerning the details of the crime when he compiled his evaluation for insertion in the presentence report to the trial judge.

dant for a purpose of which the defendant was unaware. His only function was to provide his findings to the trial judge and this was the only use made of his report.

Finally, the defendant was not compelled to submit to this examination, and was not subject to any legal sanctions, such as the threat of contempt, had he chosen to remain silent. The very fact that the defendant was informed of the examination by the trial judge during formal proceedings, was provided with the Recorder's Court "Consent to Examination" form explaining the purpose of the examination and the role of the examiner, and was asked whether he understood and was willing to proceed prior to his participation underscores the noncoercive nature of the examination. The defendant's interview was not compelled and thus is not within the *Smith* proscription that a defendant may not be compelled to respond to a psychiatrist if his statements can be used against him at a capital sentencing proceeding.

Underscoring the importance of the purpose to which compelled disclosures are ultimately put, the Court has recently observed in *Buchanan v Kentucky,* 483 US 402, 425, n 21; 107 S Ct 2906; 97 L Ed 2d 336 (1987), that if upon being adequately advised, a defendant expresses his desire to refuse to answer any questions, a pretrial competency examination can still proceed "upon the condition that the results would be applied solely for that purpose," cf. *Estelle v Smith, supra,* p 468. Thus, as the Court observed in *Smith,* the proper conduct and use of competency examinations are not frustrated, but the state must make its case on future dangerousness in some other way.

The clear import of those statements for the case at hand is that *Smith* precludes the use of

statements "compelled" for one purpose as evidence in another proceeding against the defendant. The Fifth Amendment right in question is the right to decline to undergo a custodial inquiry in which defendant's statements will be used for incriminatory purposes. It should follow that the statements in issue here which were obtained for a valid purpose and used *solely* for that nonevidentiary purpose do not implicate the Fifth Amendment.

It thus appears that the rule of *Smith* that the Fifth Amendment applies to preclude the use of compelled disclosures as evidence against a defendant is simply inapplicable in this instance. The facts leading that Court to conclude that the Fifth Amendment was applicable are not found here. The majority has offered no justification for the conclusion that the defendant had a Fifth Amendment privilege in this circumstance.

An examination of the cases dealing with *Smith* claims resulting from postverdict, presentence interviews or examinations reveals that only in the instance where a state agent sought a confession concerning additional criminal activity for which the defendant might have been prosecuted was the Fifth Amendment privilege deemed applicable. See *Jones v Cardwell,* 686 F2d 754, 756 (CA 9, 1982) (defendant was instructed by the court that he had no choice but to answer a probation officer's questions); *Arnett v Ricketts,* 665 F Supp 1437, 1444 (D Ariz, 1987) (*Miranda* warnings were required before questioning concerning details of other crimes).

It is clear from the record here that the defendant was not questioned concerning other crimes for which he might have been prosecuted. His complaint centers on the trial judge's consideration of the conclusion contained in the psychiatric

report that defendant demonstrated an assaultive personality. The rule found in *Jones* and *Arnett* is, therefore, not applicable to this appeal.[6]

*Smith* does not command us to constitutionalize the sentencing process by applying *Miranda* Fifth Amendment jurisprudence to all presentence information received by the trial judge. In *Smith,* the defendant was examined *only* to determine his competence, but the state later used the psychiatrist's testimony at the penalty phase of the proceedings. The Court held "these distinct circumstances," 451 US 466, which included the fact that the defendant had not raised any issue of competency and had been given no notice that the results could be used against him at the sentencing phase, had denied the defendant his Fifth Amendment rights.

The Court's holding was specific and limited:

> A criminal defendant, who neither initiates a psychiatric evaluation nor attempts to introduce any psychiatric evidence, may not be compelled to respond to a psychiatrist if his statements can be used against him at a capital sentencing proceeding. [*Id.,* p 468.]

Moreover, the Court carefully noted that it was not holding that the same "Fifth Amendment concerns are necessarily presented by all types of

[6] The Ninth Circuit soundly rejected this claim in *Baumann v United States,* 692 F2d 565 (CA 9, 1982). In *Baumann,* the defendant argued that an uncounseled interview with a probation officer for the purpose of constructing a presentence report constituted custodial interrogation requiring *Miranda* warnings. Rejecting the *Smith* analysis as factually inapposite, the *Baumann* court concluded that there was nothing of record to enable the court to find that the presentence interview in that case, or presentence interviews in general, "entail pressures at all similar to those 'which the *Miranda* Court found so inherently coercive as to require its holdings.' " 692 F2d 577. To do so, the court found, "would be to apply a principle 'broader than that required to implement the policy of *Miranda* itself.' " *Id.*

interviews and examinations that might be ordered or relied upon to inform a sentencing determination," *id.*, p 469, n 13.

*Smith* does not dictate the result in this case.

II

Assuming, arguendo, that the defendant enjoyed a Fifth Amendment privilege during the psychiatric evaluation, I cannot agree with the majority conclusion that defendant's rights were not violated. I would not reach the question whether the full panoply of the prophylactic warnings required by *Miranda* must be given in this situation. I would conclude without reaching that question that if the Fifth Amendment is applicable to the use of a postsentence psychological interview for sentencing purposes, defendant would at a minimum, be entitled to a warning of his right to remain silent, failing which a resentence must be ordered.

It is clear on this record that the defendant's statements were not involuntary as that term is historically defined in Fifth Amendment jurisprudence.[7] The defendant was informed by the sen-

[7] In *Michigan v Tucker*, 417 US 433, 441; 94 S Ct 2357; 41 L Ed 2d 182 (1974), the Court explained:

> Before *Miranda* the principal issue in these cases was not whether a defendant had waived his privilege against compulsory self-incrimination but simply whether his statement was "voluntary." In state cases the Court applied the Due Process Clause of the Fourteenth Amendment, examining the circumstances of interrogation to determine whether the processes were so unfair or unreasonable as to render a subsequent confession involuntary. See, e.g., *Brown v Mississippi*, 297 US 278 [56 S Ct 461; 80 L Ed 682] (1936); *Chambers v Florida*, 309 US 227 [60 S Ct 472; 84 L Ed 2d 716] (1940); *White v Texas*, 310 US 530 [60 S Ct 1032; 84 L Ed 1342] (1940); *Payne v Arkansas*, 356 US 560 [78 S Ct 844; 2 L Ed 2d 975] (1958); *Haynes v Washington*, 373 US 503 [83 S Ct 1336; 10 L Ed 2d 513] (1963). See also 3 Wigmore, Evidence (Chadbourn rev), § 815 *et seq.*

tencing judge while in the presence of counsel that he was to undergo a presentence investigation and psychiatric examination. By contrast, in the typical *Miranda* situation, the defendant is not afforded the opportunity to consult with counsel prior to the custodial interrogation. See *United States ex rel Bachman v Hardy,* 637 F Supp 1273 (ND Ill, 1986). It is the inability to seek the advice of counsel, to prepare for the possibility that the examiner may attempt to elicit privileged information, coupled with the pressures of the custodial environment, that triggers the need for the *Miranda* warnings. In this case, however, while defendant was obviously in custody at the time of the presentence examination, he was afforded ample notice and nearly two weeks to consult with counsel prior to his participation. Further, defendant was not under court order to coöperate with the examining psychiatrist, yet freely chose to do so after reviewing the "Consent to Examination" form prior to the examination which explained the purpose of the examination and asked whether he was willing to proceed.

Thus, the defendant was under no threat of legal sanction such as perjury or contempt for his failure to participate. When asked to participate, defendant surely had to weigh the possibility that his statements would aid the examiner in formulating an opinion as to his character, which in turn would become part of the presentence report for the sentencing judge to review. However, when offered the option to forego the examination, defendant freely chose to proceed. Defendant's statements were voluntary and not compelled in viola-

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Where the State's actions offended the standards of fundamental fairness under the Due Process Clause, the State was then deprived of the right to use the resulting confessions in court.

tion of the Fifth Amendment. See *United States v Barragan,* 793 F2d 1255, 1260 (CA 11, 1986); *United States v Jones,* 640 F2d 284, 288 (CA 10, 1981).

This analysis does not end the inquiry, however. If the Fifth Amendment applies and the examination at issue constituted "custodial interrogation,"[8] the question for resolution is whether the failure to provide the prophylactic rules developed to protect the right requires exclusion of the report at sentencing. The majority proceeds, at least implicitly, on the assumption that the psychological examination was custodial interrogation, yet finds no violation of defendant's rights because the "inherently compelling pressures" typical of those prompting *Miranda* warnings are not found in this case. If the majority's assumption is true concerning the custodial character of the psychological examination, I would conclude that defendant's rights were not adequately protected.

To be sure, the United States Supreme Court has observed that *Miranda* warnings are not of constitutional dimension, but rather a means to protect fundamental rights.[9] The Court has, how-

[8] It should be observed that there is an unargued and unresolved issue in this case whether the psychological interview was custodial interrogation and, if so, whether defendant made any inculpatory or exculpatory statements which the prosecution used against him absent *Miranda* warnings.

[9] In *Michigan v Tucker, supra,* pp 438-439, the Court concluded that incomplete *Miranda* warnings did not deprive the defendant of his Fifth Amendment privilege. In reply to custodial police questioning which had not included the required *Miranda* warning that defendant would be furnished counsel free of charge, defendant gave the police the name of an individual he had allegedly been with at the time of the crime. When contacted by the police, this person said defendant had left him earlier in the evening on the night of the rape, and provided the police with admissions made to him by the defendant. At trial defendant's own statements taken during interrogation were excluded, but the witness whose identity had been learned during the interview was allowed to testify that defendant had told him that the scratches on his face had been made by a "widow woman" who lived the next block over. As described by the Court, the issue was whether

ever, albeit in dicta, recently observed in the context of evaluating rights attendant to a competency hearing when the trial judge has doubts about a defendant's mental condition, see *Pate v Robinson,* 383 US 375; 86 S Ct 836; 15 L Ed 2d 815 (1966), that "the Fifth and Sixth Amendments would mandate that [defendant] be allowed to consult with counsel and be informed of his right to remain silent." *Buchanan v Kentucky, supra,* 483 US 402, n 21. In this case it is clear that defendant was afforded the opportunity to consult with counsel, but it is equally clear that he was not told of his right to remain silent. Were I satisfied that the Fifth Amendment applied to the examination at issue and that the examination constituted custodial interrogation, as the majority plainly assumes, it would appear that the defendant's sentence should be vacated notwith-

> proper regard for the privilege against compulsory self-incrimination requires, with limited exceptions not applicable here, that all evidence derived solely from statements made without full *Miranda* warnings be excluded at a subsequent criminal trial. . . . [W]e believe that the question thus presented is best examined in two separate parts. We will therefore first consider whether the police conduct complained of directly infringed upon respondent's right against compulsory self-incrimination or whether it instead violated only the prophylactic rules developed to protect that right. We will then consider whether the evidence derived from this interrogation must be excluded.

The Court noted that the Fifth Amendment right against compelled disclosure had been given broad scope, but concluded that the facts of the case as compared to the historical circumstances underlying the privileges "strongly indicate[ ] that the police conduct here did not deprive respondent of his privilege against compulsory self-incrimination as such, but rather failed to make available to him the full measure of procedural safeguards associated with that right since *Miranda.*" *Id.,* p 444. The Court concluded that the respondent's statements could hardly be termed involuntary as that term had been defined in its decisions and also observed "[a]dditionally, there were no legal sanctions, such as the threat of contempt, which could have been applied to respondent had he chosen to remain silent. He was simply not exposed to 'the cruel trilemma of self accusation, perjury or contempt.' " *Id.,* p 445.

standing the precautions taken prior to the questioning.

III

Defendant further claims that *Estelle v Smith, supra,* requires us to conclude that his Sixth Amendment right to the assistance of counsel was violated. *Estelle v Smith* establishes that defense counsel must be given advance notice of a pretrial competency hearing where the results may be used as evidence on the issue of future dangerousness in a death-penalty proceeding. Defendant in this case acknowledges that counsel was given actual advance notice of the presentence psychiatric interview. Assuming that the Sixth Amendment advance notice holding in *Smith* applies to a postconviction presentence interview, I agree with the majority that defendant has failed to present any Sixth Amendment claim of error on this record.

Specifically, the defendant here contends that the Sixth Amendment mandates a) that the defendant and his trial counsel be informed that "defendant would be *interviewed* by a member of the clinic" and b) that counsel be present during the interview. As to the former contention, the defendant does *not* claim that counsel did not receive actual advance notice that an evaluation would be made. The defendant focuses on the adequacy of notice, asserting that counsel was not advised when the defendant would be interviewed or that the report would be based on a personal interview with the defendant, rather than a profile drawn from other sources. Because the defendant in this case is not claiming that counsel was *not* given advance notice that the examination was to be conducted, but, rather, contests the adequacy of the notice, we have no occasion to resolve the

question as to whether the Sixth Amendment *Smith* holding applies in this case.[10]

I would conclude that, assuming arguendo that defendant enjoyed a Sixth Amendment right to advance notice to counsel of the examination,[11] no violation of such right occurred. The defendant and his counsel received actual notice of the examination, and it appears that the Sixth Amendment does not require counsel's presence during the examination.[12]

## CONCLUSION

I agree with the majority that the defendant has failed to demonstrate a denial of either his Fifth or Sixth Amendment rights. I disagree with the majority to the extent it assumes that the Fifth

[10] The wisdom of the traditional view that the Court does not resolve constitutional issues unnecessary to a decision, *People v Adams,* 430 Mich 679, 699; 425 NW2d 437 (1988), is particularly apropos here; the Sixth Amendment issue was not the subject of the order granting leave, and neither brief undertakes any significant analysis as to whether the *Smith* holding that the defense counsel must be given advance notice of such an examination applies, or whether, if error occurred, it was harmful. *Satterwhite v Texas,* 486 US 249; 108 S Ct 1792; 100 L Ed 2d 284 (1988). The prosecution appears to concede the issue, and the defendant's brief does not dispute that notice was given. Having been informed of the purpose the examination would serve, "It can be assumed—and there are no allegations to the contrary,—" that defense counsel consulted with the defendant about the nature of the examination, *Buchanan v Kentucky, supra,* 483 US 402.

[11] We note that this Court has never held that a criminal defendant enjoys the right to the assistance of counsel during postconviction proceedings. In *People v Gonyea,* 421 Mich 462; 365 NW2d 136 (1984), three members of the Court found that the defendant possessed a right to counsel under Const 1963, art 1, § 20, during postsentencing proceedings.

[12] See *United States v Byers,* 239 US App DC 1; 740 F2d 1104 (1984); *Baumann v United States,* n 6 *supra* at 578; *People v Daniels,* 149 Mich App 602, 609; 386 NW2d 609 (1986); *People v Vroman,* 148 Mich App 291, 297; 384 NW2d 35 (1985); *People v Shively,* 45 Mich App 658, 664-665; 206 NW2d 808 (1973); *People v Burton,* 44 Mich App 732, 734-735; 205 NW2d 873 (1973). See also anno: *Right of accused in criminal prosecution to presence of counsel at court-appointed or -approved psychiatric examination,* 3 ALR4th 910, 920-925.

Amendment right against self-incrimination is applicable in this context. I also agree that we need not reach the merits of the question whether the Sixth Amendment requires advance notice to counsel of a presentence psychiatric examination.

I would affirm the decision of the Court of Appeals.

RILEY, C.J., and GRIFFIN, J., concurred with BOYLE, J.

PEOPLE v CIPRIANO

PEOPLE v DEAN

PEOPLE v HARRISON

Docket Nos. 77682, 77683, 78035, 78446. Argued June 2, 1987 (Calendar Nos. 2-4). Decided September 16, 1988. Rehearing denied in *Cipriano, post,* 1206.

Giovani Cipriano was convicted by a jury in the Otsego Circuit Court, William A. Porter, J., of two counts of first-degree murder. The Court of Appeals, DANHOF, C.J., and MACKENZIE and M. E. DODGE, JJ., affirmed in an unpublished opinion per curiam (Docket No. 64786). On remand, the Court of Appeals, DANHOF, C.J., and MACKENZIE and HOLBROOK, JR., JJ., again affirmed in an unpublished memorandum opinion (Docket No. 85841).

Nathan Dean was convicted by a jury in the Detroit Recorder's Court, Leonard Townsend, J., of three counts of first-degree murder and possession of a firearm during the commission of a felony. The Court of Appeals, BRENNAN, P.J., and KAUFMAN and E. E. BORRADAILE, JJ., affirmed (Docket No. 51849). On remand, the Court of Appeals, BRENNAN, P.J., and BURNS and ALLEN, JJ., again affirmed in an unpublished memorandum opinion (Docket No. 87267).

Dwight A. Harrison was convicted by a jury in the Wayne Circuit Court, Harry J. Dingeman, J., of voluntary manslaughter. The Court of Appeals, BURNS, P.J., and GILLIS and J. P. SWALLOW, JJ., affirmed in an unpublished opinion per curiam (Docket No. 78182).

The defendants appeal, alleging that unnecessary delays in their arraignments rendered confessions made during the prearraignment delays involuntary and thus inadmissible.

In an opinion by Justice GRIFFIN, joined by Chief Justice

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REFERENCES

Am Jur 2d, Evidence §§ 526 *et seq.*, 543 *et seq.*

Admissibility of confession or other statement made by defendant as affected by delay in arraignment—Modern state cases. 28 ALR4th 1121.

RILEY and Justices BRICKLEY and BOYLE, the Supreme Court *held:*

Unnecessary delay prior to arraignment is only one factor to be taken into account in evaluating the voluntariness of a confession. If the totality of the surrounding circumstances indicates that a confession was voluntarily given, it should not be excluded from evidence solely because of prearraignment delay.

1. A person who is arrested must be arraigned without unnecessary delay. Such delay will not render a confession made during the period of delay inadmissible, rather it is only one of the factors that should be considered in evaluating the voluntariness of a confession. The test of voluntariness should be whether, considering the totality of all the surrounding circumstances, the confession is the product of an essentially free and unconstrained choice by its maker or whether the accused's will has been overbourne and the capacity for self-determination critically impaired.

2. An otherwise competent confession should not be excluded solely because of a delay in arraignment. In determining whether a statement is voluntary, a trial court should consider an accused's age, lack of education, and intelligence level; the extent of the accused's previous experience with the police; the repeated and prolonged nature of the questioning; the length of the detention before the statement in question was given; the lack of any advice of constitutional rights; whether there was an unnecessary delay in bringing the accused before a magistrate before the confession was given; whether the accused was injured, intoxicated, drugged, or in ill health when the statement was made; whether the accused was deprived of food, sleep, or medical attention, or was physically abused or threatened with abuse. The absence or presence of any one of these factors is not necessarily conclusive on the issue of voluntariness. The ultimate test of admissibility is whether the totality of the circumstances surrounding the making of the confession indicates that it was freely and voluntarily made. Unnecessary delay in arraignment is but one factor to consider in reaching this conclusion, the focus being not just on the length of delay, but rather on what occurred during the delay and its effect on the accused. However, a prolonged, unexplained delay prior to arraignment should be a signal to the court that the voluntariness of a confession may have been impaired.

3. In *Cipriano,* considering the totality of the circumstances, there was no indication on the record of a coercive atmosphere

during the prearraignment delay, leading to the conclusion that his confessions were voluntary and admissible. In *Dean,* the voluntariness of the defendant's confession was conceded by the defendant and supported by the evidence; thus the confession was admissible. In *Harrison,* the defendant was arrested for a cognizable offense, larceny of an automobile, not merely for investigation of a murder. Thus, his arrest was lawful. The delay between his arrest and arraignment was a result of attempts by police to verify the defendant's progression through four different explanations as to how he came to possess the decedent's automobile. There was no evidence that his confession was involuntary; rather, his statements were the products of a voluntary decision based on his knowledge of his constitutional rights and of his failure of a polygraph examination, and thus admissible.

Affirmed.

Justice CAVANAGH, joined by Justices LEVIN and ARCHER, dissenting, stated that a person arrested without a warrant is required to be brought before a judicial officer without unnecessary delay for prompt arraignment. Where a confession or statement is obtained by the police by exploitation of a violation of the prompt arraignment statute, exclusion is appropriate. However, the majority rejects exclusion solely on the basis of violations of the prompt arraignment statute, and instead substitutes inquiry regarding the voluntariness of a confession under the totality of the surrounding circumstances, with prearraignment delay being only one consideration, thereby improperly equating the requirement of prompt arraignment with other factors which the Legislature has not seen fit to codify as a statutory right.

In these cases, the defendants were arrested without warrants, and their arraignments were delayed for two days or more in clear violation of the prompt arraignment statute. In *Dean,* the statement obtained from the defendant after the reverse-writ proceeding may have added significantly to other evidence tending to show that he was the killer, requiring reversal and remand for a new trial. In *Cipriano,* although the evidence, other than the statements obtained after the search warrant proceeding, was overwhelming, the statements may have added significantly to other evidence showing that the killings were premeditated, requiring a reduction of the defendant's conviction to second-degree murder and a remand for resentencing. In *Harrison,* the delay did not deprive the defendant of legal representation or otherwise impede his right to counsel. Thus, his conviction should be affirmed.

1. CRIMINAL LAW — EVIDENCE — CONFESSIONS — VOLUNTARINESS — PREARRAIGNMENT DELAY.

   Unnecessary delay prior to arraignment is only one factor to be taken into account in evaluating the voluntariness of a confession; if the totality of the surrounding circumstances indicates that a confession was voluntarily given, it should not be excluded from evidence solely because of prearraignment delay (MCL 764.13, 764.26; MSA 28.871[1], 28.885).

2. CRIMINAL LAW — EVIDENCE — CONFESSIONS — VOLUNTARINESS — PREARRAIGNMENT DELAY.

   A confession should be determined to be voluntary where, considering the totality of the circumstances, it is the product of an essentially free and unconstrained choice by its maker; in determining voluntariness, a trial court should consider an accused's age, lack of education, and intelligence level; the extent of the accused's previous experience with the police; the repeated and prolonged nature of the questioning; the length of the detention before the statement in question was given; the lack of any advice of constitutional rights; whether there was an unnecessary delay in bringing the accused before a magistrate before the confession was given; whether the accused was injured, intoxicated, drugged, or in ill health when the statement was made; whether the accused was deprived of food, sleep, or medical attention, or was physically abused or threatened with abuse; the absence or presence of any one of these factors is not necessarily conclusive on the issue of voluntariness (MCL 764.13, 764.26; MSA 28.871[1], 28.885).

*Frank J. Kelley,* Attorney General, *Louis J. Caruso,* Solicitor General, *Norman R. Hayes,* Prosecuting Attorney, and *Thomas C. Johnson,* Assistant Attorney General, for the people in *Cipriano.*

*Frank J. Kelley,* Attorney General, *Louis J. Caruso,* Solicitor General, *John D. O'Hair,* Prosecuting Attorney, *Timothy A. Baughman,* Chief, Criminal Division, Research, Training and Appeals, and *Larry L. Roberts,* Assistant Prosecuting Attorney, for the people in *Dean,* and *Jeffrey Caminsky,* Assistant Prosecuting Attorney, for the people in *Harrison.*

*William R. Stackpoole* for defendant Cipriano.

*Hoffa, Chodak & Robiner* (by *Norman R. Robiner* and *Robert F. Harrington*) for defendant Dean.

State Appellate Defender (by *Susan M. Meinberg*) for defendant Harrison.

GRIFFIN, J. Michigan statutory law requires that an arrested person be brought before a magistrate for arraignment "without unnecessary delay." MCL 764.13, 764.26; MSA 28.871(1), 28.885.[1] In each of these three cases, consolidated on appeal, we must determine the effect of this statutory requirement upon the admissibility of a confession obtained during a period of prearraignment delay. We hold that "unnecessary delay" prior to arraignment is only one factor to be taken into account in evaluating the voluntariness of a confession. If the totality of the surrounding circumstances indicates that a confession was voluntarily given, it shall not be excluded from evidence solely because of prearraignment delay.

[1] MCL 764.13; MSA 28.871(1) provides:

> A peace officer who has arrested a person for an offense without a warrant shall without unnecessary delay take the person arrested before a magistrate of the judicial district in which the offense is charged to have been committed, and shall present to the magistrate a complaint stating the charge against the person arrested.

MCL 764.26; MSA 28.885 states:

> Every person charged with a felony shall, without unnecessary delay after his arrest, be taken before a magistrate or other judicial officer and, after being informed as to his rights, shall be given an opportunity publicly to make any statement and answer any questions regarding the charge that he may desire to answer.

I

More than three decades ago, the United States Supreme Court addressed the evidentiary consequences of illegal prearraignment detention in two landmark cases, *McNabb v United States,* 318 US 332; 63 S Ct 608; 87 L Ed 819 (1943), reh den 319 US 784 (1943), and *Mallory v United States,* 354 US 449; 77 S Ct 1356; 1 L Ed 2d 1479 (1957). In those cases, the Court determined that the right of a suspect to prompt arraignment should be enforced by automatically excluding from evidence any incriminating statement obtained during a period of "unnecessary delay," even though the confession was not the result of physical or psychological coercion. This rule of exclusion became known as the "*McNabb-Mallory* rule."[2]

The *McNabb-Mallory* rule was not applied with enthusiasm by all of the federal courts,[3] and it became the subject of much criticism in Congress.[4] Finally, in 1968, Congress took aim at the *McNabb-Mallory* rule, along with other concerns, when it enacted the Omnibus Crime Control and Safe Streets Act of 1968, 18 USC 3501.[5] The act

[2] For a general discussion of the *McNabb-Mallory* rule, see Keene, *The ill-advised state court revival of the* McNabb-Mallory *rule,* 72 J Crim L & Criminology 204 (1981); note, *18 USC § 3501 and the admissibility of confessions obtained during unnecessary prearraignment delay,* 84 Mich L R 1731 (1986); 1 LaFave & Israel, Criminal Procedure, § 6.3, p 451.

[3] See, e.g., *Ruhl v United States,* 148 F2d 173, 175 (CA 10, 1945); *United States v Haupt,* 136 F2d 661, 671 (CA 7, 1943).

[4] See 1 Wright, Federal Practice and Procedure, § 72, p 63.

[5] Section 3501 of the act provides:

> (a) In any criminal prosecution brought by the United States or by the District of Columbia, a confession, as defined in subsection (e) hereof, shall be admissible in evidence if it is voluntarily given. Before such confession is received in evidence, the trial judge shall, out of the presence of the jury, determine any issue as to voluntariness. If the trial judge determines that the confession was voluntarily made it shall be

reflected a strong reaction on the part of Congress to what it regarded as illogical and unrealistic court decisions resulting from the application" of

admitted in evidence and the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances.

(b) The trial judge in determining the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confession, including (1) the time elapsing between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment, (2) whether such defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession, (3) whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him, (4) whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel; and (5) whether or not such defendant was without the assistance of counsel when questioned and when giving such confession.

The presence or absence of any of the above-mentioned factors to be taken into consideration by the judge need not be conclusive on the issue of voluntariness of the confession.

(c) In any criminal prosecution by the United States or by the District of Columbia, a confession made or given by a person who is a defendant therein, while such person was under arrest or other detention in the custody of any law-enforcement officer or law-enforcement agency, shall not be inadmissible solely because of delay in bringing such person before a magistrate or other officer empowered to commit persons charged with offenses against the laws of the United States or of the District of Columbia if such confession is found by the trial judge to have been made voluntarily and if the weight to be given the confession is left to the jury and if such confession was made or given by such person within six hours immediately following his arrest or other detention: *Provided,* That the time limitation contained in this subsection shall not apply in any case in which the delay in bringing such person before such magistrate or other officer beyond such six-hour period is found by the trial judge to be reasonable considering the means of transportation and the distance to be traveled to the nearest available such magistrate or other officer.

(d) Nothing contained in this section shall bar the admission in evidence of any confession made or given voluntarily by any person to any other person without interrogation by anyone, or at any time at which the person who made or gave such confession was not under arrest or other detention. [Emphasis in original.]

the *McNabb-Mallory* rule.[6] 90th Cong (2d Sess), 1968 US Code Cong & Admin News 2124.

Since then, most federal courts have interpreted § 3501 as allowing the admission of a voluntary confession even though it is given during a period of prearraignment delay—in effect, overruling *McNabb-Mallory*. A majority of federal courts have followed the route taken by the Ninth Circuit in *United States v Halbert,* 436 F2d 1226, 1231 (CA 9, 1970), wherein it explained,

> [I]t is obvious that the prime purpose of Congress in the enaction of § 3501 was to ameliorate the effect of the decision in *Mallory v United States* (1957), 354 US 449; 77 S Ct 1356; 1 L Ed 2d 1479, to remove delay alone as a cause for rejecting admission into evidence of a confession and to make the voluntary character of the confession, the real test of its admissibility.[7]

The *Halbert* court quoted from the legislative history of § 3501, which reflected overwhelming congressional opinion that the admissibility of a confession should turn on its voluntariness:

> "This title would restore the test for the admissi-

[6] For instance, in *Alston v United States,* 121 US App DC 66; 348 F2d 72 (1965), the court held that a five-minute delay constituted an unnecessary delay; in *Spriggs v United States,* 118 US App DC 248; 335 F2d 283 (1964), a thirty-minute delay was held to require suppression.

[7] See also *United States v Beltran,* 761 F2d 1 (CA 1, 1985); *United States v Jackson,* 712 F2d 1283 (CA 8, 1983); *United States v Rubio,* 709 F2d 146 (CA 2, 1983); *United States v Manuel,* 706 F2d 908 (CA 9, 1983); *United States v Van Lufkins,* 676 F2d 1189 (CA 8, 1982); *United States v Killian,* 639 F2d 206 (CA 5, 1981); *United States v Gorel,* 622 F2d 100 (CA 5, 1980); *United States v Corral-Martinez,* 592 F2d 263 (CA 5, 1979); *United States v Gaines,* 555 F2d 618 (CA 7, 1977); *United States v Mayes,* 552 F2d 729 (CA 6, 1977); *United States v Edwards,* 539 F2d 689 (CA 9, 1976), cert den 429 US 984 (1976); *United States v Shoemaker,* 542 F2d 561 (CA 10, 1976), cert den 429 US 1004 (1976); *United States v Hathorn,* 451 F2d 1337 (CA 5, 1971); *United States v Marrero,* 450 F2d 373 (CA 2, 1971), cert den 405 US 933 (1972).

bility of confessions in criminal cases to that time-tested and well-founded standard of voluntariness. It would avoid the inflexible rule of excluding such statements *solely* on technical grounds such as delay or failure to warn the accused as to his rights to silence or to counsel. We have not nullified, however, the rights of defendants to the safeguards of federal law or the Constitution. On the contrary, we have provided a more reasonable rule in that the judge shall consider all the defendant's rights (speedy arraignment, silence, counsel, knowledge of offense charged) and their possible violation in deciding as to the voluntariness of the confession and thus its admissibility."[8] [*Id.,* p 1236, n 6, quoting from 1968 US Code Cong & Admin News 2282.]

The *McNabb-Mallory* rule was formulated by the United States Supreme Court "[i]n the exercise of its supervisory authority over the administration of criminal justice in the federal courts . . . ." *McNabb, supra,* 318 US 341. Because it was not constitutionally mandated, the rule was never applicable to criminal proceedings in state courts.[9] However, as is true in Michigan,

[8] A minority of federal courts has held that subsection 3501(c) establishes a limited version of the *McNabb-Mallory* rule, permitting the suppression of otherwise voluntary confessions if made more than six hours after arrest and during an unnecessary delay in arraignment. See, e.g., *United States v Perez,* 733 F2d 1026 (CA 2, 1984); *United States v Fouche,* 776 F2d 1398 (CA 9, 1985); *United States v Khan,* 625 F Supp 868 (SD NY, 1986). For an annotation discussing federal cases dealing with the interpretation of § 3501, see 12 ALR Fed 377.

[9] In *Culombe v Connecticut,* 367 US 568, 600-601; 81 S Ct 1860; 6 L Ed 2d 1037 (1961), the Court observed:

> The *McNabb* case was an innovation which derived from our concern and responsibility for fair modes of criminal proceeding in the federal courts. The States, in the large, have not adopted a similar exclusionary principle. And although we adhere unreservedly to *McNabb* for federal criminal cases, we have not extended its rule to state prosecutions as a requirement of the Fourteenth Amendment. [Citations omitted.]

most states require by statute that an arrested person must be arraigned "without unnecessary delay."[10] In interpreting such statutes, the "vast majority of state courts [like their federal counterparts] have rejected *McNabb-Mallory* outright, opting instead for a traditional due process voluntariness test of the admissibility of confessions." *Johnson v State,* 282 Md 314, 324; 384 A2d 709 (1978). Under the view adopted in most states, a confession obtained from a suspect in violation of his statutory right to prompt arraignment is not ipso facto inadmissible; rather, arraignment delay is taken into account as one relevant factor in evaluating the overall voluntariness of the confession.[11] See, for example, *State v Newnam,* 409 NW2d 79 (ND, 1987); *Ferry v State,* 453 NE2d 207 (Ind, 1983); *People v Goree,* 115 Ill App 3d 157; 70 Ill Dec 869; 450 NE2d 342 (1983); *People v Harris,* 28 Cal 3d 935; 171 Cal Rptr 679; 623 P2d 240 (1981); *State v Wiberg,* 296 NW2d 388 (Minn, 1980); *State v Wyman,* 97 Idaho 486; 547 P2d 531 (1976), overruled on other grounds *State v McCurdy,* 100 Idaho 683; 603 P2d 1017 (1979).[12]

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See also *Stroble v California,* 343 US 181, 197; 72 S Ct 599; 96 L Ed 872 (1952). The statutory right to prompt arraignment without unnecessary delay should not be confused with the Fourth Amendment requirement of a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest without a warrant. *Gerstein v Pugh,* 420 US 103, 114; 95 S Ct 854; 43 L Ed 2d 54 (1975).

[10] For a comprehensive list of state statutes dealing with prearraignment delay, see 72 J Crim L & Criminology, n 2 *supra,* pp 209-210, ns 33-34.

[11] Anno: *Admissibility of confession or other statement made by defendant as affected by delay in arraignment—Modern state cases,* 28 ALR4th 1121, reviews the status of the *McNabb-Mallory* rule on a state-by-state basis. See also Weldele-Wade, *The* McNabb-Mallory *rule: Is the benefit worth the burden?,* 44 Mont L R 137 (1983).

[12] The reasoning underlying this approach has been explained as follows:

> Rules of evidence should aid the court in correctly determin-

By contrast, in *People v Hamilton,* 359 Mich 410; 102 NW2d 738 (1960), Michigan, in 1960, became the first state to adopt the *McNabb-Mallory* rule.[13]

However, a split on the issue appeared within the Court in *People v Ubbes,* 374 Mich 571; 132 NW2d 669 (1965). Although the Court unanimously condemned the use at trial of confessions coerced through delays in arraignments, only half of the *Ubbes* Court would have held the confession, obtained after a delay of sixteen and one-half hours, inadmissible on the ground that "confessions however obtained during such periods of illegal detention must be excluded from evidence in courts of law." *Id.,* pp 586-587 (opinion of SOURIS, J.). The remainder of the Court, while noting that "[m]ere lapse of time, without arraignment, *can* render a confession obtained during such detention illegally obtained and hence inadmissible," *id.,* p 577 (emphasis in original), concluded nonetheless that the proper question is one, not of delay, but of coercion:

> Time of detention alone, without arraignment, is

ing the facts in the case. . . . Excluding a confession because made while the maker was in custody and not promptly taken before a magistrate would greatly hinder rather than aid the court in correctly determining the facts, for there is nothing about being in custody in the absence of coercion which would show any reason or motive for fabricating a confession. [*State v Gardner,* 119 Utah 579, 588-589; 230 P2d 559 (1951).]

[13] The *Hamilton* Court held:

> [A]n unnecessary and so unlawful delay of compliance with [the statute], when done for prolonged interrogatory purposes and without proven justification of the delay, renders involuntary and so inadmissible whatever confessional admissions the detained person may have made while so unlawfully detained. [*Hamilton, supra,* p 417. See also *People v McCager,* 367 Mich 116; 116 NW2d 205 (1962), and *People v Walker,* 371 Mich 599; 124 NW2d 761 (1963).]

not the test. If for the same 16½ hours defendant had been held without appearance before a magistrate and he had been "sweated," i.e., questioned unremittingly for the purpose of extracting a confession, we would not hesitate to strike down the practice and withhold from jury consideration his alleged confession. Here the totality of the circumstance indicates bona fide questioning to determine the immediate issue of release, or complaint, and complaint for what offense. We believe this is the meaning of the rule announced in *People v Hamilton,* 359 Mich 410. [*Id.,* p 576 (opinion of O'HARA, J.).]

In *People v Farmer,* 380 Mich 198; 156 NW2d 504 (1968), this Court focused on a lack of coercive circumstances in holding that a seventy-two hour prearraignment delay did not render a confession inadmissible.

Then, in *People v White,* 392 Mich 404; 221 NW2d 357 (1974), cert den 420 US 912 (1975), this Court unanimously ruled that a confession was admissible even though it had been obtained after a thirty-four hour prearraignment delay. The Court found that the most damaging statement made by the defendant was "not the product of a police interrogation," and held the exclusionary rule to be applicable "[o]nly when the delay has been employed as a tool to extract a statement . . . ." *Id.,* p 424. The *White* Court took note of the fact that the defendant had been repeatedly warned of his constitutional rights and also had an opportunity to consult with his lawyer.

Thereafter, at least for a period of time, the Court of Appeals interpreted *Hamilton* and *White* to mean that "the question is not one of delay, but of whether the statement was voluntary or coerced." *People v Johnson,* 85 Mich App 247, 251; 271 NW2d 177 (1978). See also *People v*

*Wallach,* 110 Mich App 37, 59; 312 NW2d 387 (1981), vacated and remanded on other grounds 417 Mich 937 (1983); *People v Dean,* 110 Mich App 751, 755; 313 NW2d 100 (1981).

However, in the 1984 decision of *People v Bladel (After Remand),* 421 Mich 39; 365 NW2d 56 (1984), aff'd sub nom *Michigan v Jackson,* 475 US 625; 106 S Ct 1404; 89 L Ed 2d 631 (1986), this Court divided four to three in finding inadmissible several incriminating statements obtained by police during a twenty-six and one-half hour prearraignment delay. The majority dismissed with a footnote the argument that admissibility should turn on voluntariness or coercion:

> Plaintiff suggests that even if an unnecessary prearraignment delay occurred, the ultimate test for purposes of the exclusionary rule is whether the statement obtained was voluntary or coerced. See, e.g., *People v Wallach,* 110 Mich App 37, 59, n 5; 312 NW2d 387 (1981), vacated and remanded on other grounds 417 Mich 937; 331 NW2d 730 (1983); *People v Antonio Johnson,* 85 Mich App 247, 252-253; 271 NW2d 177 (1978). Although earlier decisions of this Court could be interpreted in this manner, see, e.g., *People v Farmer,* 380 Mich 198; 156 NW2d 504 (1968); *People v Ubbes,* 374 Mich 571; 132 NW2d 669 (1965); *People v Harper,* 365 Mich 494; 113 NW2d 808 (1962); *Hamilton, supra,* an examination of *White, supra,* 392 Mich 424-425, reveals that this Court now treats the question of prearraignment delay apart from the issue of voluntariness. If voluntariness were the only relevant inquiry, there would be no reason to analyze whether a prearraignment delay occurred and was used as a tool, since involuntary statements have always been held inadmissible regardless of when they are obtained. Prompt arraignment serves several important functions apart from preventing

improper custodial interrogations. [*Bladel, supra,* p 74, n 27.][14]

In another case, decided the same day, *People v Mallory,* 421 Mich 229; 365 NW2d 673 (1984), this Court expanded what it referred to as the "*White* exclusionary rule" beyond confessions to include physical evidence. The Court said, "If the physical evidence would not have been discovered but for the exploitation by the police of the illegal prearraignment delay, suppression is required." *Mallory, supra,* p 240. It added this caveat:

> Obviously, not all evidence acquired directly or indirectly from a detainee during a statutorily unlawful detention will be procured by exploiting that detention, e.g., a statement volunteered absent police prompting or questioning, *White, supra,* pp 424-425, a *voluntary* statement made shortly after a lawful arrest, *People v Stinson,* 113 Mich App 719, 730-731; 318 NW2d 513 (1982);

[14] Three of the justices (RYAN, BRICKLEY, and BOYLE) dissented from this portion of the *Bladel* decision:

> In my judgment, it is mere appellate speculation to conclude that the failure to arraign defendant Jackson during the morning of August 1 was "unnecessary prearraignment delay and that the delay was employed as a tool to extract these statements." That conclusion carries with it the implicit charge that the Livonia police contrived to lawlessly delay the defendant's arraignment on the mere pretext of completing unnecessary "paperwork," but for the actual purpose of extracting more confessions from him knowing that procedure to be improper. In my judgment, that conclusion is unsupported by the record.
>
> * * *
>
> It is equally plausible, on the record before us, that the officers honestly believed that they were insufficiently prepared to request and obtain a warrant in this major "murder for hire" case until the statutorily required warrant request was properly completed and approved, the previously scheduled polygraph examination was completed, and the defendant was afforded the opportunity to reconcile, if he wished to, the conflicts it revealed. See *United States v Lovasco,* 431 US 783, 791; 97 S Ct 2044; 52 L Ed 2d 752 (1977) . . . . [*Id.,* pp 75-76.]

> *People v Ricky Smith,* 85 Mich App 32, 46-47; 270 NW2d 697 (1978); *People v William Turner,* 26 Mich App 632, 638-639; 182 NW2d 781 (1970) . . . or any evidence obtained by means sufficiently distinguishable to be purged of the taint of the unlawful detention. The exclusionary rule will not bar the admission at trial of evidence which has been acquired absent exploitation of a statutorily unlawful detention. [*Id.,* p 241. Emphasis supplied.]

Perhaps it is not surprising then that the Michigan version of the *McNabb-Mallory* rule,[15] sometimes referred to as the "causation form," has been described as a "schizophrenic rule," i.e., "[o]n the one hand, an exclusionary rule based solely on delay is adopted, while on the other exclusion applies only when the defendant proves a causal connection between the delay and the challenged confession." Keene, *The ill-advised state court revival of the* McNabb-Mallory *rule,* 72 J Crim L & Criminology 204, 212 (1981).[16] Beginning with the *Hamilton* decision, a dichotomy has been constructed which cannot be fully harmonized—a confession is inadmissible if involuntary, but even if voluntary, a court must exclude it if it finds a causal nexus between a delay and the confession. As this Court recognized in *Bladel, supra,* the

[15] Only half a dozen states have adopted the *McNabb-Mallory* rule, some utilizing a rule of suppression which requires only that the defendant show a violation per se of the prompt arraignment statute or court rule. *Commonwealth v Davenport,* 471 Pa 278; 370 A2d 301 (1977); *Johnson v State,* 282 Md 314; 384 A2d 709 (1978). Several other states require a showing of a causal connection between the illegal delay and the challenged confession. *Phillips v State,* 29 Wis 2d 521; 139 NW2d 41 (1966); *State v Richardson,* 295 NC 309; 245 SE2d 754 (1978); *People v Hamilton, supra.* Yet other states employ a variation of the *McNabb-Mallory* rule which evaluates the "reasonableness" of the delay. *Webster v State,* 59 Del 54; 213 A2d 298 (1965).

[16] A similar point of view is espoused in the discussion regarding the *McNabb-Mallory* rule in 44 Mont L R, n 11 *supra.*

causal nexus standard has generated confusion, leading to contradictory appellate decisions.[17]

In light of the history of *McNabb-Mallory* and recent developments in constitutional law, it has been suggested by one court that application today of the *McNabb-Mallory* rule has the effect of "burning the barn to get rid of the mice . . . ." *Shope v State,* 41 Md App 161, 171; 396 A2d 282 (1979). Concerns which troubled the *McNabb* Court in 1943 have been addressed and remedied for the most part by subsequent changes in constitutional doctrines.[18] For example, *Miranda v Arizona,* 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966), reduced the significance of one basis for the *McNabb* decision—that a delay in an initial hearing represented a potential delay in informing a suspect of his rights by a judicial officer.[19] Nowadays the fact of police custody triggers a number of rights, including the right to counsel, which the police dare not ignore. *Miranda v Arizona, supra; Edwards v Arizona,* 451 US 477; 101 S Ct 1880; 68 L Ed 2d 378 (1981); *Michigan v Jackson, supra.* The Supreme Court has, through the Fourth

[17] Variations of the *McNabb-Mallory* rule which have been adopted by other state courts (see note 15) are equally deficient when put to the test of practical application. Enforcing the rule by means of a standard of "unnecessary" or "unreasonable" delay causes confusion for courts and law enforcement officials alike. These criteria are not capable of precise definition, as illustrated by *Mallory v United States, supra,* pp 454-455, wherein the Court held that arraignment should take place "as quickly as possible" yet also stated that "[c]ircumstances may justify a brief delay between arrest and arraignment . . . ." Time-based standards arbitrarily dictate the behavior of the law enforcement community without regard to reasons for delay. See *Johnson v State, supra,* p 333 (dissent of Orth, J.).

[18] See, generally, 72 J Crim L & Criminology, n 2 *supra,* pp 226-232; 1 LaFave & Israel, n 2 *supra,* § 6.3, p 457.

[19] Indeed, some courts have held that a valid waiver of a suspect's *Miranda* rights also constitutes a waiver of the right to arraignment without unnecessary delay. *United States v Barlow,* 693 F2d 954 (CA 6, 1982), cert den 461 US 945 (1983); *United States v Mandley,* 502 F2d 1103 (CA 9, 1974); *Bliss v United States,* 445 A2d 625 (DC App, 1982), and 452 A2d 172 (DC App, 1982), cert den 459 US 1117 (1983).

Amendment, restricted pickup for questioning. For instance, in *Brown v Illinois,* 422 US 590; 95 S Ct 2254; 45 L Ed 2d 416 (1975), the Court held that despite the giving of warnings required by the *Miranda* decision, the Fourth and Fourteenth Amendments require the exclusion from evidence of statements obtained as the fruit of an illegal arrest. In *Dunaway v New York,* 442 US 200; 99 S Ct 2248; 60 L Ed 2d 824 (1979), custodial questioning on less than probable cause was held to be violative of the Fourth Amendment. Moreover, although a voluntary statement obtained in violation of *Miranda* is admissible for impeachment purposes, *Harris v New York,* 401 US 222, 224-226; 91 S Ct 643; 28 L Ed 2d 1 (1971), the use of an involuntary statement in a criminal trial, either for impeachment purposes or in the prosecution's case in chief, violates due process. *Mincey v Arizona,* 437 US 385; 98 S Ct 2408; 57 L Ed 2d 290 (1978); *Blackburn v Alabama,* 361 US 199; 80 S Ct 274; 4 L Ed 2d 242 (1960).[20]

Such constitutional developments have substantially eliminated the reasons for the *McNabb-Mallory* rule, thereby diminishing its significance and limiting its application to a small class of defendants:

> *McNabb-Mallory* affects only voluntary confessions by persons arrested upon probable cause who knowingly and voluntarily waive their rights to silence and counsel after being warned of the consequences of such a waiver.
>
> * * *
>
> The only remaining target for the rule today is prearraignment delay by itself, unrelated to consti-

[20] Moreover, a writ of habeas corpus to inquire into the cause of detention, as well as an order to show cause why the writ should not issue, may be brought on behalf of a person imprisoned "under any pretense whatsoever." MCL 600.4307; MSA 27A.4307.

tutional rights of an arrestee or the validity of his confession. [72 J Crim L & Criminology, *supra,* pp 229, 231.][21]

As noted above, the prompt-arraignment requirement was never elevated by the United States Supreme Court to the level of a constitutional right.[22] The automatic application today of the *McNabb-Mallory* exclusionary rule to statements voluntarily given during a prearraignment delay would exact a heavy toll on our system of justice.

The raison d'être of the exclusionary rule is the deterrence of official misconduct. *United States v Janis,* 428 US 433, 458-459, n 35; 96 S Ct 3021; 49 L Ed 2d 1046 (1976); *Mapp v Ohio,* 367 US 643, 656; 81 S Ct 1684; 6 L Ed 2d 1081 (1961).[23] However, the United States Supreme Court recently observed that

"[j]urists and scholars uniformly have recognized

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[21] One of the ironies of *McNabb-Mallory* is that a rule premised upon a fear of "secret interrogation" and a solicitude for the inherent coercion of custodial interrogation, *McNabb, supra,* 318 US 344, provides no protection at all for the defendant who is properly arrested, and promptly arraigned, but who cannot make bail. See 1 LaFave & Israel, n 2 *supra,* p 452. And as Justice BOYLE notes in her dissent in *People v Mallory, supra,* p 257, whether a given defendant "would have been able to make bail and what it would have been are matters of pure supposition . . . ."

[22] While this Court "is certainly free to interpret the Michigan Constitution to require a higher standard for the protection of our citizens than that which the United States Constitution grants to citizens by virtue of its commands," *Mallory, supra,* p 256 (dissent of BOYLE, J.), and appears to have done so in the past, see, e.g., *Hamilton, supra,* p 411, and *Mallory, supra,* p 239, our decision today would be inconsistent if we on the one hand read the relevant provisions of the Michigan Constitution (Const 1963, art 1, § 17) to require enforcement of a "right" to immediate arraignment and on the other hand relegated prearraignment delay to its status as one factor to be considered in determining the voluntariness of a confession. We therefore do not give constitutional import to the statutory mandate of arraignment "without unnecessary delay."

[23] The effectiveness of the exclusionary rule has been the subject of debate since its inception. See, e.g., *Bivens v Six Unknown Named Agents,* 403 US 388, 416; 91 S Ct 1999; 29 L Ed 2d 619 (1971) (dissent of Burger, C.J.).

> that the exclusionary rule imposes a substantial cost on the societal interest in law enforcement by its proscription of what concededly is relevant evidence." *United States v Janis,* 428 US 433, 448-449 (1976). See also *United States v Havens,* 446 US 620, 627 [100 S Ct 1912; 64 L Ed 2d 559] (1980); *United States v Calandra,* 414 US 338 [94 S Ct 613; 38 L Ed 2d 561] (1974). . . .
>
> We have previously cautioned against expanding "currently applicable exclusionary rules by erecting additional barriers to placing truthful and probative evidence before state juries . . . ." *Lego v Twomey,* 404 US 477, 488-489 [92 S Ct 619; 30 L Ed 2d 618] (1972). We abide by that counsel now. "[T]he central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence," *Delaware v Van Arsdall,* 475 US 673, 681 [106 S Ct 1431, 1436; 89 L Ed 2d 674] (1986), and while we have previously held that exclusion of evidence may be necessary to protect constitutional guarantees, both the necessity for the collateral inquiry and the exclusion of evidence deflect a criminal trial from its basic purpose. [*Colorado v Connelly,* 479 US 157, 166; 107 S Ct 515; 93 L Ed 2d 473 (1986).]

We note that Michigan's prearraignment delay statutes have never included a directive by the Legislature that failure to comply will render inadmissible a confession voluntarily given. Of course, the Legislature could provide sanctions for violations, and it could define more specifically the parameters of "unnecessary delay."

In accordance with the approach taken by the federal courts and a majority of the states, we believe "unnecessary delay" in arraignment is only one of the factors that should be considered in evaluating the voluntariness of a confession. The test of voluntariness should be whether, considering the totality of all the surrounding circum-

stances, the confession is "the product of an essentially free and unconstrained choice by its maker," or whether the accused's "will has been overborne and his capacity for self-determination critically impaired . . . ." *Culombe, supra,* 367 US 602. The line of demarcation "is that at which governing self-direction is lost and compulsion, of whatever nature or however infused, propels or helps to propel the confession." *Id.*

In determining whether a statement is voluntary, the trial court should consider, among other things, the following factors: the age of the accused; his lack of education or his intelligence level; the extent of his previous experience with the police; the repeated and prolonged nature of the questioning; the length of the detention of the accused before he gave the statement in question; the lack of any advice to the accused of his constitutional rights; whether there was an unnecessary delay in bringing him before a magistrate before he gave the confession; whether the accused was injured, intoxicated or drugged, or in ill health when he gave the statement; whether the accused was deprived of food, sleep, or medical attention; whether the accused was physically abused; and whether the suspect was threatened with abuse. See *Culombe, supra; United States ex rel Mattox v Scott,* 372 F Supp 304, 309-310 (ND Ill, 1974), aff'd in part and rev'd in part 507 F2d 919 (CA 7, 1974). See also *Schneckloth v Bustamonte,* 412 US 218; 93 S Ct 2041; 36 L Ed 2d 854 (1973).

The absence or presence of any one of these factors is not necessarily conclusive on the issue of voluntariness. The ultimate test of admissibility is whether the totality of the circumstances surrounding the making of the confession indicates that it was freely and voluntarily made. Unnecessary delay is one factor to consider in reaching

this conclusion, the focus being not just on the length of delay, but rather on what occurred during the delay and its effect on the accused.

In relegating prearraignment delay to its status as one of several factors to be considered in judging the voluntariness of a confession, we do not condone the failure of the police to comply with the statutes. An arrested suspect should not be subjected to prolonged, unexplained delay prior to arraignment; and such delay should be a signal to the trial court that the voluntariness of a confession obtained during this period may have been impaired. However, we hold that an otherwise competent confession should not be excluded solely because of a delay in arraignment.

We move now to the application of these principles to the cases at hand.

II

At issue in *People v Dean* is the admissibility of a confession which provided a basis for the defendant's 1980 conviction by a jury of three counts of first-degree murder and possession of a firearm during the commission of a felony.

On November 20, 1979, the police were called to a Detroit address and discovered the bodies of two men and one woman. All three victims had been bound and shot in the head. There were no eyewitnesses to the killings. Information gathered during the next ten days, however, implicated the defendant.

A child of one of the victims described a man fitting defendant's description who had been present in the home when she went to bed on the evening of the murders. A similar description was given by an individual who was walking by the house when the shots were fired. He observed a

man with defendant's characteristics emerge from the residence and drive off in an orange Cougar automobile. A third witness identified the defendant from photographs as being present in the house with the three victims earlier in the evening before the shootings occurred. A fourth individual, the defendant's neighbor, identified the defendant by name, confirmed that the defendant frequently drove his girl friend's orange Cougar, and added that he had introduced the defendant to one of the victims a few days previously for the purpose of a narcotics transaction.

At 1:00 P.M. on November 30, 1979, the defendant was arrested without a warrant while driving an orange Cougar. He was advised of his rights through the use of a standard form. Defendant indicated that he understood each right by putting his initials and signature on the form. He never indicated that he did not wish to talk to police or that he wished to speak with an attorney. The defendant was then interrogated by an investigating officer for three or four hours. The questioning ceased while the police attempted to verify his exculpatory version of events. The defendant was then interviewed by another officer for approximately two hours.

On the following morning, defendant was readvised of his *Miranda* rights and questioned until 1:00 P.M. The police then took defendant before a magistrate and obtained a "reverse writ," which purported to give the police until 2:00 P.M. the next day either to conclude the investigation or to release the defendant. Defendant was returned to the police station and advised again of his *Miranda* rights. He initialed and signed the rights form. Defendant was confronted with the fact that his statement was not consistent with that of a purported alibi witness. At 3:35 P.M., twenty-six

hours after his arrest, the defendant gave a signed confession. In the confession, defendant admitted binding and shooting the victims as a result of a dispute over the defendant's demand for a refund for some poor quality heroin sold to him by two of the victims.

Defendant was subsequently identified by witnesses at three separate corporeal line-ups held on the evening of December 1, 1979. On December 2, defendant was taken before a magistrate and arraigned.

A separate *Walker* hearing was conducted (*People v Walker* [*On Rehearing*], 374 Mich 331; 132 NW2d 87 [1965]). The lower court determined that the defendant's confession was voluntary and admissible in his trial. The Court of Appeals affirmed his conviction by a jury, stating, in pertinent part:

> [T]he sequence of events in this case indicates that defendant's statements were voluntarily given, without threats or other oppressive police behavior, and that the delay in arraignment was not used to extract a confession. [Unpublished memorandum opinion of the Court of Appeals on remand, decided January 17, 1986 (Docket No. 87267).]

Defendant admits in his argument to this Court that his confession was voluntarily made and was not the product of coercion during the prearraignment detention. Rather, he contends that his confession should be excluded under the Search and Seizure Clause, US Const, Am IV, and Const 1963, art 1, § 11, because the confession was the product of an unlawful detention. Relying on *People v Casey,* 411 Mich 179; 305 NW2d 247 (1981), defendant maintains:

> Quite simply, in this case the Detroit Police

> illegally seized the Defendant's person (by the "reverse writ"), and as a direct result of this illegal seizure obtained incriminating evidence against the Defendant (his confession). This is a search and seizure case. It is not a case challenging the voluntariness of Defendant's confession.

In *People v Casey, supra,* this Court had occasion to review what had come to be known colloquially in Detroit as a "reverse writ."[24] In lieu of granting leave to appeal, this Court held that such a proceeding was a "nullity. Its constitutional and statutory bases cannot be examined for it has none." *Casey, supra,* p 181. The Court "held only that the reverse writ had no effect on the legality of the detention." *Mallory, supra,* p 252 (dissent of BOYLE, J.). The conviction in *Casey* was reversed because of an illegal arrest based on insufficient evidence, not because of the reverse-writ procedure. *Casey* merely held that the reverse writ could not be used to justify an otherwise illegal arrest and detention.

By contrast, the police in the instant case had probable cause to arrest the defendant. *People v Shabaz,* 424 Mich 42, 58; 378 NW2d 451 (1985); *People v Oliver,* 417 Mich 366, 374; 338 NW2d 167 (1983). The defendant had been identified as the last person seen with the victims. He matched the description of the suspect seen leaving the residence immediately after the shooting and driving off in an orange Cougar. Therefore, *Casey* is inapplicable to the present facts.

The inquiry must be whether, given the totality of the circumstances, the defendant's confession

[24] In *People v Johnson, supra,* p 250, n 5, the Court explained that a "reverse writ proceeding is informal and without any documentation. It is the local police method of seeking judicial approval for extended detention of an arrestee without benefit of a warrant."

was voluntarily given. This point has been conceded by the defendant and is supported by the evidence. Defendant, an individual whose prior record indicates an awareness of *Miranda* and a familiarity with police interrogation, was apprised of his rights at least twice and did not express an unwillingness to talk with the police. Upon an independent examination of the record, we do not find that the court's determination at the *Walker* hearing was clearly erroneous, *People v Hummel,* 19 Mich App 266, 270; 172 NW2d 550 (1969). We "give deference to the trial court's findings, especially where the demeanor of the witnesses is important, as where credibility is a major factor." *People v Terlisner,* 96 Mich App 423, 431; 292 NW2d 223 (1980); *People v White, supra,* p 425; *People v Robinson,* 386 Mich 551, 557; 194 NW2d 709 (1972). We therefore confirm the admissibility of defendant's confession and affirm his conviction.

III

Defendant Dwight Harrison appeals from his conviction, following a jury trial, of voluntary manslaughter, MCL 750.321; MSA 28.553.

On March 17, 1981, a witness observed a Cadillac automobile parked in front of her home in Inkster, Michigan, with two men inside. She later observed the decedent lying on the ground and the Cadillac driving off at a high rate of speed. The decedent eventually died from a gunshot wound apparently inflicted at the scene.

At 5:00 P.M. on April 29, 1981, defendant was arrested by the Detroit police while driving the decedent's car. The Inkster police were notified. Officer James Horne, a detective from Inkster in charge of the homicide case, came to Detroit. He advised defendant of his *Miranda* rights. Defen-

dant initialed and signed the rights form, and Horne proceeded to question him. Defendant told the detective he had purchased the Cadillac from his employer and that his girl friend had a copy of the receipt. At the conclusion of the interview, at approximately 1:00 or 2:00 A.M. on April 30, 1981, defendant was transported to the Inkster Police Department where he was held for "investigation of homicide."

At 10:30 A.M. on April 30, defendant was again advised of his *Miranda* rights. He signed and initialed the rights form and did not request an attorney. Defendant was interviewed a second time. His girl friend was contacted, but she was unable to verify the defendant's original statement. Defendant subsequently gave two separate exculpatory statements. The interview ended at 1:20 P.M. Detective Horne suggested that defendant take a polygraph examination because Horne "didn't believe his statements." Defendant agreed. Arrangements were made for a polygraph examination to be administered on the morning of Saturday, May 2, 1981, the earliest available time.

No further contact was had with defendant until he requested an audience with Detective Horne on the following day, May 1. Defendant gave the detective further information which purportedly verified his exculpatory version of events. Meanwhile, the defendant's father had contacted an attorney. During the evening of May 1, the attorney went to the jail where he conferred with the defendant. The defendant told his attorney about the planned polygraph examination. After a brief discussion, the attorney advised his client to take the polygraph test.

On May 2, defendant was transported to the Dearborn Police Department to take the polygraph examination. Once again, he was advised of his

*Miranda* rights. Defendant's retained attorney was present in Dearborn prior to the polygraph examination and conferred with defendant. The attorney then left and returned after the examination was completed. Defendant failed the examination.

Defendant then gave a fourth explanation as to how he came to possess the victim's car. In this statement, the defendant said he was hitchhiking and was picked up by the decedent. The decedent parked the car and attempted to solicit sexual favors from the defendant. When defendant resisted, the decedent produced a pistol. According to defendant, the two men struggled over the pistol and the gun discharged during the struggle.

Defendant's attorney reviewed the written statement, and the defendant then signed it in his attorney's presence. Defendant was arraigned the next day, ninety-six hours after his arrest.

Prior to trial, a *Walker* hearing was held, and the trial court found that defendant's statements had been voluntarily made.

Defendant's jury conviction was initially reversed by the Court of Appeals due to instructional error. However, upon rehearing, the Court of Appeals vacated its earlier order and remanded the cause to the trial court to conduct an evidentiary hearing to determine the legality of defendant's four-day detainment. On remand, the trial court found:

> The testimony presented clearly indicated that during the detainment each of the questionings of the defendant was preceded by *Miranda* warnings, and the testimony of the officers further indicated that defendant offered various statements to them which necessitated separate investigative pursuits.
>
> It is the determination of this court that the delay between defendant's arrest and arraign-

ments was not used to extract a confession and that the detainment was not illegal.

The Court of Appeals subsequently affirmed the trial court's findings.

As noted above, application of the prompt-arraignment statutes to a particular situation presupposes a lawful arrest. In the instant case defendant asserts that he was arrested for "investigation of homicide" without probable cause, that his arrest was illegal, and his statements, therefore, were inadmissible under the Fourth and Fourteenth Amendments.

The defendant was arrested by the Detroit police while driving the missing car of the crime victim. Within a few hours of his arrest, defendant was transferred to the custody of the Inkster police, whose sole interest in the case was the homicide. The testifying officers from the Inkster Police Department frankly admitted that they detained the defendant for "investigation of homicide" and for no other purpose.

However, the terminology used to effectuate an arrest is not determinative. See, e.g., *People v Hamoud,* 112 Mich App 348, 351; 315 NW2d 866 (1981); *People v Cook,* 153 Mich App 89, 91; 395 NW2d 16 (1986); *People v Simmons,* 134 Mich App 779, 783; 352 NW2d 275 (1984), lv den 421 Mich 860 (1985). An arresting officer's subjective characterization of the circumstances surrounding an arrest does not determine its legality. Rather, probable cause to justify an arrest has always been examined under a standard of objective reasonableness without regard to the underlying intent or motivation of the officers involved. *Michigan v DeFillippo,* 443 US 31, 37; 99 S Ct 2627; 61 L Ed 2d 343 (1979); *Beck v Ohio,* 379 US 89; 85 S Ct 223; 13 L Ed 2d 142 (1964); *Henry v United States,* 361

US 98; 80 S Ct 168; 4 L Ed 2d 134 (1959); *Brinegar v United States,* 338 US 160; 69 S Ct 1302; 93 L Ed 1879 (1949).

In the present case, the record indicates, and the defendant admits, that there was probable cause for the Detroit police to arrest defendant for receiving and concealing stolen property. He was driving the decedent's missing car, but the Cadillac bore license plates registered to a Plymouth owned by the defendant. When the Inkster police took custody of the defendant from the Detroit Police Department, they had probable cause to hold him and a second arrest was not required upon his transfer from the Detroit police. See *Garionis v Newton,* 827 F2d 306, 310 (CA 8, 1987).

Moreover, the record supports the fact that the Inkster police had probable cause to hold defendant for larceny of the decedent's automobile. Thus, the defendant was arrested for a cognizable offense, not merely for "investigation of murder."[25]

The question remains whether defendant's statements were the involuntary products of his prearraignment detention.

Ninety-six hours elapsed between defendant's arrest and his arraignment. However, "[d]elay does not mean mere passage of time; it means passage of time during which that which should and could be done is not done." *Metoyer v United States,* 102 US App DC 62, 65; 250 F2d 30 (1957).

Given defendant's association with the missing car of the crime victim and the fact that the car was observed at the scene of the murder, we begin with the premise that the Inkster police were entitled to question the defendant about the murder of the decedent. As explained by a federal

[25] Of course, we do not address the civil liability implications which might be raised by a prolonged detention. See, e.g., *Trejo v Perez,* 693 F2d 482 (CA 5, 1982).

court in *Heideman v United States,* 104 US App DC 128, 130-131; 259 F2d 943 (1958):

> At the outset, the police, assuming they have probable cause for arrest, are entitled to ask the arrested suspect what he knows about a crime. If he denies knowledge, they are entitled to state to him what evidence they have and ask whether he cares to comment upon it. A strong circumstantial case which would satisfy the U.S. Commissioner, prima facie, might well be explained away by a suspect who knew what information the police relied on—hence leading to no charge being made. If the suspect continues to deny knowledge, the police are entitled to conclude the interview by saying, in effect, "Do you have anything further to tell us, or do you just want to let it stand the way it is?" . . . Such questions as these the police may ask—indeed *should* ask; it is only when the questioning crosses into what can be termed "grilling," or is continued beyond the brief period allowed, that the resulting confession may be held inadmissible.

In the instant case, the Inkster police asked the defendant if he knew anything about the homicide. He quickly offered an exculpatory statement. The police immediately checked out the defendant's version of events by talking to his girl friend and found that not only could it not be verified, but that probably it was not true. The defendant then gave two differing exculpatory statements. Suspicion escalated to the point that the police, the defendant, and his attorney agreed to a polygraph examination. Defendant failed the polygraph examination, leading to the confession which became the grounds for securing a warrant.

The ninety-six hour time period which elapsed between defendant's arrest and his arraignment may be accounted for by the defendant's progres-

sion through four different explanations as to how he came to possess the decedent's automobile. The police correspondingly attempted to verify each statement—an entirely appropriate course of conduct.

There is not the slightest evidence that the defendant's confession was involuntarily extracted by the police. The defendant was apprised of his rights on at least three occasions and spoke willingly with the police after waiving his rights. He was not subjected to continuous interrogation or to intimidating police misconduct. There is no evidence of coercion which would have overwhelmed the defendant's free will. Indeed, during the period of his detention and prior to giving his incriminating statement, defendant conferred with an attorney retained by his family. His attorney reviewed the statement, and the defendant then signed it in his attorney's presence. The defendant, who agreed following consultation with his attorney to take a polygraph examination, implicated himself in the homicide immediately after learning of the unsatisfactory results of the examination. We conclude that defendant's statements were the products of a voluntary decision based not only on a knowledge of his constitutional rights, but also on the results of the polygraph examination. We therefore uphold the admissibility of defendant's statements at trial and affirm his conviction.[26]

IV

Defendant Giovani Cipriano was convicted by a jury in the Otsego Circuit Court of two counts of first-degree murder.

[26] Defendant's claim of ineffective assistance of counsel is not properly before this Court. *People v Ginther*, 390 Mich 436, 443-444; 212 NW2d 922 (1973).

Defendant was tried for the shooting deaths of Robert Ellis and Doris Haskell. Defendant had lived with the decedents for some months in Detroit prior to moving to the Gaylord area. The trio then moved to a house in the country outside of Gaylord. The murders occurred at the house a few weeks after the move.

The landlady, who lived next door, testified that during the early afternoon of May 7, 1980, she heard what sounded like firecrackers. Moments later, Doris Haskell ran from her house to the landlady's house and told the landlady that John was shooting Bob. Haskell then returned to the house. The police were called. When they arrived, defendant was apprehended fleeing from the back door. The bodies of Ellis and Haskell were found lying together on the kitchen floor.

Defendant was arraigned two days later. In the interim, defendant was interviewed several times and gave several statements. Two of these statements were taped and introduced into evidence at trial, and a third statement, which consisted of the defendant's conversation with another jail inmate over a period of several days, was also entered into evidence.

On the day of his arrest, defendant identified himself as "John Dale." Defendant was read his *Miranda* rights, but did not request an attorney and was eager to talk to the police. Defendant told the police that a person named "Rick" entered the premises looking for drugs and shot the victims, and that defendant was trying to chase him at the time he was apprehended by the police. The police terminated the interview in the evening against defendant's wishes. Defendant wanted to resume the questioning the next day. After the session ended, the police obtained three search warrants, one for the defendant's blood sample, one for

defendant's clothes, and one for the trunk of defendant's car.

On the next day, May 8, 1980, the police learned the defendant's real name, Giovani Cipriano, and conducted a forty-five minute interview with the defendant after advising him of his *Miranda* rights. He adhered to his story that he was chasing the killer when arrested. Cipriano was then taken to the scene of the crime, in order to provide support for his statement. Later that afternoon, defendant gave a taped statement in which he claimed that he killed Ellis in self-defense and admitted that he shot Haskell, but was not able to remember how or why. Defendant agreed to take a polygraph test.

On the third day, Thursday, May 9, the defendant was apprised of his rights and given a polygraph test. After the test, the police informed the defendant that he had not told the "complete" truth. *Miranda* warnings were repeated, and the defendant gave a second taped statement that was incriminating and was admitted into evidence against him. Defendant was arraigned on the afternoon of May 9, 1980, forty-six hours after his arrest.

Defendant challenged the admissibility of the statements made during the period of May 7 to May 9 on the ground that they were the product of an illegal prearraignment detention. A *Walker* hearing was held during the preliminary examination. The district court judge found all of the defendant's statements to be admissible. The defendant then filed a motion to suppress the statements in circuit court on the basis of the length of his detention before arraignment. Defense counsel did not challenge the voluntariness of the statements. After a hearing, the circuit court denied the defendant's motion to suppress his confessions.

Defendant's subsequent convictions were affirmed by the Court of Appeals.

Defendant continues to maintain that the prearraignment detention was used to extract his incriminating statements. Defendant also asserts, for the first time, that his statements were not voluntarily made. He cites the presence of Valium in his system at the time of his arrest, an alleged suicide attempt, the fact that he never saw a lawyer during the period of interrogation, and the prolonged detention as coercive factors which precluded the exercise of independent judgment in rendering his statements.

However, the record demonstrates that defendant's statements were voluntary. Defendant was given *Miranda* warnings five times between his arrest and his confession. He neither requested counsel nor refused at any time to speak with the investigating officers. On the contrary, after the initial questioning on May 7, the defendant asked the officers to return in order to "get this thing straightened out." He was, in short, a talkative suspect. The defendant was in telephone contact with a family member during his detention. He volunteered to take a polygraph test. The fact that the defendant confessed after he was told that he had failed the polygraph test does not vitiate the voluntariness otherwise shown by the record. See *Wyrick v Fields,* 459 US 42, 47; 103 S Ct 394; 74 L Ed 2d 214 (1982).

The blood sample taken from the defendant on the evening following his arrest indicated only a small amount of Valium in his system. The defendant did not complain of illness or discomfort, and he was described as relaxed and coherent during the questioning. While the blood sample was being taken at the hospital, defendant requested Valium

from the attending physician. The request was denied by the doctor, not the police. According to the doctor, the defendant showed no signs of drug withdrawal. Thus, defendant's assertion that the police withheld needed medication is without basis in the record.

On the second evening of defendant's detention, he slashed his wrists and was briefly hospitalized. This act, according to the defendant's fellow inmate, was an attempt at escape, not suicide.

Given the absence of any factors which would indicate a coercive atmosphere during the prearraignment delay, we conclude that defendant's statements were voluntarily made and were properly admitted at trial. Under the totality of the circumstances, we conclude that the prearraignment delay did not interfere with or critically impair the exercise of defendant's free will during that period.

V

Accordingly, for the reasons stated, the decision of the Court of Appeals in each of these cases is affirmed.

RILEY, C.J., and BRICKLEY and BOYLE, JJ., concurred with GRIFFIN, J.

CAVANAGH, J. (*dissenting*).

I

MCL 764.13; MSA 28.871(1) commands police officers who arrest a person without a warrant to take that person "without unnecessary delay" before a judicial officer, at which time a complaint shall be made stating the charges against the person arrested. In the vulgate of our profession,

this is called the prompt-arraignment statute.[1] The statute, first enacted as 1927 PA 175,[2] is not a departure from prior practice. It codifies a venerable common-law rule which has existed in England for centuries[3] and which is enforced by most of the fifty states.[4] In *Oxford v Berry,* 204 Mich 197, 212-213; 170 NW 83 (1918), this Court described the requirement of prompt arraignment as an "elementary" principle of common law:

> It is elementary that, even in criminal cases, when the officer has made the arrest it is his duty, as soon as possible, to bring the party before the court according to the import of the warrant; and if the officer be guilty of unnecessary delay in so doing, it is a breach of his duty; and his duty is the same whether the arrest was made with, or without process. He must take him before the court as soon as he reasonably can.

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[1] MCL 764.13; MSA 28.871(1) provides:

> A peace officer who has arrested a person for an offense without a warrant shall without unnecessary delay take the person arrested before a magistrate of the judicial district in which the offense is charged to have been committed, and shall present to the magistrate a complaint stating the charge against the person arrested.

See also MCL 764.26, 780.581; MSA 28.885, 28.872(1), where the command is repeated as to felony arrests with warrants and arrests of misdemeanor offenders.

[2] Specifically, ch IV, § 13 of Act 175.

[3] In *Gerstein v Pugh,* 420 US 103, 114; 95 S Ct 854; 43 L Ed 2d 54 (1975), the Court noted:

> At common law it was customary, if not obligatory, for an arrested person to be brought before a justice of the peace shortly after arrest. 2 M Hale, Pleas of the Crown 77, 81, 95, 121 (1736); 2 W Hawkins, Pleas of the Crown 116-117 (4th ed, 1762).

See also *Gerstein* at 114-115, n 14.

[4] *McNabb v United States,* 318 US 332, 342, n 7; 63 S Ct 608; 87 L Ed 819 (1943), collected the prompt arraignment statutes of the states.

As the majority notes, in *People v Hamilton,* 359 Mich 410; 102 NW2d 738 (1960), this Court became the first state to adopt the rule of exclusion for violations of the prompt-arraignment statute which the United States Supreme Court promulgated in *McNabb v United States,* 318 US 332; 63 S Ct 608; 87 L Ed 819 (1943), and refined in *Mallory v United States,* 354 US 449; 77 S Ct 1356; 1 L Ed 2d 1479 (1957). In *People v White,* 392 Mich 404; 221 NW2d 357 (1974), cert den sub nom *Michigan v White,* 420 US 912 (1975), this Court clarified that not every confession or statement obtained during an unreasonable delay in violation of the statute is excluded:

> Only when the delay has been employed as a tool to extract a statement has an exclusionary rule been imposed under these sections. [392 Mich 424.]

In both *People v Bladel (After Remand),* 421 Mich 39, 73; 365 NW2d 56 (1984), aff'd sub nom *Michigan v Jackson,* 475 US 625; 106 S Ct 1404; 89 L Ed 2d 631 (1986), and *People v Mallory,* 421 Mich 229, 241-243; 365 NW2d 673 (1984), we found that several statements had been obtained through exploitation of an unreasonable delay and thus were inadmissible at trial. In *People v Mallory,* we explained:

> These statements are excluded, even if they were given voluntarily, because they might never have been made by the detainee but for the illegal prearraignment delay. [421 Mich 240.]

Court-imposed sanctions are useful to encourage police officers to respect the rights of citizens with whom they come in contact in the course of their profession. The common sanction imposed is exclusion of evidence obtained in violation of a defendant's right. When exclusion is appropriate, it is done not to allow a guilty person to go free, but

"to deter future unlawful police conduct . . . ."[5] Before adopting an exclusionary rule, a court must carefully consider the social cost of such a rule and balance it against the social cost of not enforcing the underlying protected interest, whether it be freedom from unlawful search, the right to counsel, the right against self-incrimination, or, as in the present cases, the right to be free from extended and unnecessary detention without a warrant.

In Michigan, we have already weighed these concerns and have determined that exclusion is appropriate where a confession or statement is obtained by the police by exploiting their violation of the prompt-arraignment statute. *People v Hamilton, People v Bladel,* and *People v Mallory, supra.* The majority has accepted the people's invitation to overrule *Hamilton* and its progeny. It rejects an exclusionary rule which is based solely on violations of the prompt-arraignment statute, no matter how long the delay. The majority instead limits its inquiry to whether the confession was voluntary. We do not join the majority for several reasons, the first of which is respect for the principles of stare decisis.

A

Adherence to sound judicial precedent gives continuity and predictability to the law. It assures that judicial decisions will be the result of reason rather than the whim of the judge before whom a case is tried. Only compelling reasons justify a court in disregarding longstanding precedent.[6] Our nearly thirty-year experience with *Hamilton* does

[5] *United States v Calandra,* 414 US 338, 347; 94 S Ct 613; 38 L Ed 2d 561 (1974).

[6] See, e.g., *Miller v Fenton,* 474 US 104, 115; 106 S Ct 445; 88 L Ed 2d 405 (1985).

not persuade us that holding the police to the requirements of the prompt-arraignment statute has "exact[ed] a heavy toll on our system of justice." *Ante,* p 332.

The three cases we decide today demonstrate the need for judicial firmness on this point. *Hamilton* was decided in 1960, and its rule has been reaffirmed in this Court several times since. Yet in all three cases before us, defendants were arrested without warrants and their arraignments were delayed for two days or more. While this Court is divided on whether *Hamilton* should survive today, we all agree that the police clearly violated the command of the prompt-arraignment statute.

In rejecting the *McNabb-Mallory* rule, on which *Hamilton* was founded, the majority asserts that the "rule was not applied with enthusiasm by all of the federal courts." *Ante,* p 320. In support of that assertion, however, it cites but two cases, both of which were decided more than ten years before *Mallory.* Only one, *United States v Haupt,* 136 F2d 661 (CA 7, 1943), expressed disagreement with *McNabb.*[7] The persuasiveness of such early criticism of a new rule dims with time. For example, *Weeks v United States,* 232 US 383, 392; 34 S Ct 341; 58 L Ed 652 (1914), a landmark decision, directed that all evidence seized in violation of the Fourth Amendment be excluded from evidence. Despite the initial reaction of some who saw the rule as saying that "[t]he criminal is to go free because the constable has blundered,"[8] the *Weeks*

[7] The *Haupt* court also noted that the prearraignment delay which resulted in the confession occurred prior to announcement of the *McNabb* decision. 136 F2d 668.

[8] *People v Defore,* 242 NY 13, 21; 150 NE 585 (1926). In *Defore,* Justice Cardozo observed that of the forty-five states which had considered *Weeks* (it was not binding on the states under the constitutional doctrine of that day), thirty-one states had rejected the opinion while only fourteen followed it.

rule of exclusion is now widely recognized as an effective deterrent of Fourth Amendment violations by the police.[9]

B

In the Omnibus Crime Control and Safe Streets Act of 1968, specifically 18 USC 3501(c), Congress modified[10] the *McNabb-Mallory* rule with the following language:

> [*A*] *confession* made or given by a person who is a defendant . . . *shall not be inadmissible* solely because of delay in bringing such person before a magistrate . . . if such confession is found by the trial judge to have been made voluntarily and if the weight to be given the confession is left to the jury and *if such confession was made or given by such person within six hours immediately follow-*

[9] In *Mapp v Ohio,* 367 US 643; 81 S Ct 1684; 6 L Ed 2d 1081 (1961), the Supreme Court held that the *Weeks* exclusionary rule was applicable to the states through the Fourteenth Amendment. The Court observed that prior to its holding, states which previously had not been bound to apply the *Weeks* rule and had been reluctant to do so, later adopted the rule voluntarily:

> While in 1949, prior to the *Wolf* [*v Colorado,* 338 US 25; 69 S Ct 1359; 93 L Ed 1782 (1949)] case, almost two-thirds of the States were opposed to the use of the exclusionary rule, now, despite the *Wolf* case, more than half of those since passing upon it, by their own legislative or judicial decision, have wholly or partly adopted or adhered to the *Weeks* rule. See *Elkins v United States,* 364 US 206, Appendix, pp 224-232 [80 S Ct 1437; 4 L Ed 2d 1669 (1960)]. Significantly, among those now following the rule is California, which, according to its highest court, was "compelled to reach that conclusion because other remedies have completely failed to secure compliance with the constitutional provisions . . . ." *People v Cahan,* 44 Cal 2d 434, 445; 282 P2d 905, 911 (1955). [367 US 651.]

[10] The federal statute was the result of the political process and twice was rejected by Congress. There were amendments offered on the floor substantially altering § 3501, and some were adopted immediately, thus resulting in inexact language. See, e.g., note, *18 USC § 3501 and the admissibility of confessions obtained during unnecessary prearraignment delay,* 84 Mich L R 1731, 1732, n 7 (1986); note, *Admissibility of confessions in the federal courts and the Hobbs bill,* 38 J Crim L & Criminology 136, 137 (1947).

*ing his arrest or other detention:* Provided, That the time limitation contained in this subsection shall not apply in any case in which the delay in bringing such person before such magistrate or other officer beyond such six-hour period is found by the trial judge to be reasonable . . . . [Emphasis added.]

It is not accurate to say that through § 3501(c) either Congress or most federal courts "in effect, overrul[ed] *McNabb-Mallory.*" (*Ante,* p 322.)[11] *McNabb-Mallory* is still alive in federal courts, despite the confusion surrounding the modifying language of § 3501(c).[12] Even an authority relied on by the majority concluded that § 3501(c) affects the *McNabb-Mallory* rule only for delays which last six hours or less:

> *Mallory* continues to govern the admissibility of confessions obtained more than six hours after arrest and, therefore, a post-sixth-hour confession will be inadmissible if it follows a period of unnecessary prearraignment delay. Section 3501 only prohibits the application of *Mallory*'s exclusionary rule to confessions obtained within six hours of arrest.[13]

Similarly, we are not persuaded by the significance the majority places on § 3501(c):

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[11] Of course, lower federal courts cannot overrule the United States Supreme Court.

[12] Compare, for example, *United States v Halbert,* 436 F2d 1226, 1232-1234 (CA 9, 1970), with *United States v Perez,* 733 F2d 1026, 1032-1033 (CA 2, 1984). Since § 3501(c) regulates only federal practice, we need not decide whether *Halbert* or *Perez* represents the better view of congressional intent in enacting 18 USC 3501(c). Suffice it to say that we would not adopt the standard within that provision for Michigan practice even if we understood it because we want the police to understand it as well.

[13] Note, *18 USC § 3501 and the admissibility of confessions,* n 10 *supra,* p 1734.

> The act reflected a strong reaction on the part of Congress to what it regarded as "illogical and unrealistic court decisions resulting from the application" of the *McNabb-Mallory* rule. [*Ante,* pp 320-322.]

If § 3501(c) represented an adverse congressional reaction to *McNabb-Mallory,* it was only to the extent that even brief delays in arraignment resulted in exclusion of evidence. The majority presents examples of the "illogical and unrealistic court decisions" in two cases where a five-minute and a thirty-minute delay each were held to violate the prompt-arraignment statute. *Ante,* p 322, n 6. We agree that those two federal cases have gone to the extreme in enforcing *McNabb-Mallory* and that they should not be incorporated into Michigan jurisprudence. However, more instances of such rigid application of the rule are rare.

In Michigan, we have advised the police that they may take the time to "book" the defendant and briefly delay arraignment as circumstances may require in order to determine whether to release the defendant or make a complaint. *Hamilton,* 359 Mich 416-417; *Bladel,* 421 Mich 69-70. We have never held that the suspect must be brought to the judicial officer on a drop-everything-else basis.

C

The majority asserts that Michigan's prompt-arraignment statute is ambiguous and difficult to follow:

> Enforcing the rule by means of a standard of "unnecessary" or "unreasonable" delay causes confusion for courts and law enforcement officials

alike. These criteria are not capable of precise definition . . . . [*Ante,* p 330, n 17.]

Even if we were to agree with the majority's criticism, we could not change the standard because we did not create it; it was given to us by the Legislature. Moreover, the phrase "without unnecessary delay" has credentials too impressive to be rejected as causing confusion or lacking precision. It is the language used in the Federal Rules of Criminal Procedure;[14] the phrase is also used in the Model Penal Code's Uniform Rules of Criminal Procedure;[15] it is likewise found in the ABA Standards for Criminal Justice;[16] and it is the language of the common law. By now, any police officer should comprehend within narrow limits what constitutes unnecessary delay.[17]

Citing *Culombe v Connecticut,* 367 US 568; 81 S

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[14] An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available federal magistrate . . . . [FR Crim P 5(a).]

[15] Rule 311 of the Uniform Rules of Criminal Procedure provides:

> An arrested person who is not sooner released shall be brought before a [magistrate] without unnecessary delay. [10 ULA 62.]

[16] Unless the accused is released on citation or in some other lawful manner, the accused should be taken before a judicial officer without unnecessary delay. [2 ABA Standards for Criminal Justice (2d ed), Pretrial Release, 10-4.1, p 10-43.]

[17] In many areas of the law, both civil and criminal, courts adopt standards having no bright line, leaving the limits to be set case by case. That is the beauty of the common law and the reason it excels over the rigidity of code systems of jurisprudence. For example, 2 Restatement Contracts, 2d, §§ 205, 208, pp 99, 107, does not define good faith or unconscionable contract. Also, criminal sentences which shock the judicial conscience continue to be defined case by case. *People v Coles,* 417 Mich 523; 339 NW2d 440 (1983).

Ct 1860; 6 L Ed 2d 1037 (1961),[18] the majority proposes a substitute criterion: whether the confession is voluntary in "the totality of all the surrounding circumstances." (*Ante,* pp 333-334.) This indeed is an amorphous standard, as acknowledged in 3 Wigmore, Evidence (Chadbourn rev), § 826, p 348:

> Mr. Justice Frankfurter, in his extensive opinion in *Culombe v Connecticut,* sums up by pointing to the "ultimate test . . . established . . . in Anglo-American courts for two hundred years: the test of voluntariness."
>
> Of course, the learned Justice does not intend to suggest, nor is it true, that "voluntariness" in this context is either a simple idea or one capable of exact definition.

Wigmore then quotes from the American Law Institute, Model Code of Pre-Arraignment Procedure 166-167 (Tentative Draft No 1, 1966), p 349, which also highlighted the confusion surrounding a "voluntariness" standard:

> "To the extent 'voluntariness' has made a determination of the state of an individual's will the crucial question, it has not assisted analysis. Except where a person is unconscious or drugged or otherwise lacks capacity for conscious choice, all incriminating statements—even if made under brutal treatment—are 'voluntary' in the sense of representing a choice between alternatives."

Likewise, in *Miller v Fenton,* 474 US 104, 116, n 4; 106 S Ct 445; 88 L Ed 2d 405 (1985), the Supreme Court noted:

> The voluntariness rubric has been variously con-

[18] The majority derives this standard from the opinion of Justice Frankfurter, in which only one other justice joined.

demned as "useless," . . . "perplexing," . . . and "legal 'double-talk . . . .'"

Voluntariness is not only a difficult standard to apply, it is a quality essential to every confession admitted in evidence. Nonetheless, the majority argues that the concerns which troubled the *McNabb* Court in 1943 have been addressed and remedied for the most part by subsequent changes in constitutional doctrine, beginning with *Miranda v Arizona,* 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966). *Ante,* p 330. However, even the *Miranda* Court clarified that the giving of the *Miranda* warnings does not excuse an unnecessary delay in arraignment:

> Our decision today does not indicate in any manner, of course, that [the requirement of prompt arraignment] can be disregarded. When federal officials arrest an individual, they must as always comply with the dictates of the congressional legislation and cases thereunder. [384 US 463, n 32.]

Thus, the command of prompt arraignment is not served sufficiently by the majority's limited inquiry regarding whether the prisoner acted voluntarily even though illegally detained. We discussed this point in *Bladel, supra,* 421 Mich 74, n 27:

> If voluntariness were the only relevant inquiry, there would be no reason to analyze whether a prearraignment delay occurred and was used as a tool, since involuntary statements have always been held inadmissible regardless of when they are obtained. Prompt arraignment serves several important functions apart from preventing improper custodial interrogations.

It is telling that in creating an exclusionary rule

for violations of other rights, the United States Supreme Court has distinguished voluntariness from the right allegedly violated. In *Taylor v Alabama,* 457 US 687; 102 S Ct 2664; 73 L Ed 2d 314 (1982), for instance, the Court excluded the petitioner's confession because it was the fruit of his illegal arrest. The Court explained why the confession was invalid notwithstanding the three *Miranda* warnings which the petitioner received prior to confessing:

> In *Brown* [*v Illinois,* 422 US 590; 95 S Ct 2254; 45 L Ed 2d 416 (1975)] and *Dunaway* [*v New York,* 442 US 200; 99 S Ct 2248; 60 L Ed 2d 824 (1979)], this Court firmly established that the fact that the confession may be "voluntary" for purposes of the Fifth Amendment, in the sense that *Miranda* warnings were given and understood, is not by itself sufficient to purge the taint of the illegal arrest. In this situation, a finding of "voluntariness" for purposes of the Fifth Amendment is merely a threshold requirement for Fourth Amendment analysis. The reason for this approach is clear: "[t]he exclusionary rule, . . . when utilized to effectuate the Fourth Amendment, serves interests and policies that are distinct from those it serves under the Fifth" Amendment. If *Miranda* warnings were viewed as a talisman that cured all Fourth Amendment violations, then the constitutional guarantee against unlawful searches and seizures would be reduced to a mere " 'form of words.' " [457 US 690. Citations omitted.]

We perceive no functional difference between suppressing a confession made during unlawful detention following an illegal arrest and suppressing a confession obtained during a detention made illegal because of unnecessary delay in arraignment.

The majority asserts that "the prompt-arraignment requirement was never elevated by the

United States Supreme Court to the level of a constitutional right." (*Ante,* p 332.) That Court has determined, however, that the right to prompt arraignment is significant enough to warrant an exclusionary rule to enforce it. Furthermore, the majority's substitute standard, voluntariness under the totality of the surrounding circumstances (with prearraignment delay being only one consideration), improperly equates the requirement of prompt arraignment with other factors which the Legislature has not seen fit to codify as a statutory right.

D

The majority contends that the *McNabb-Mallory* rule "provides no protection at all" for the defendant who was properly arrested and promptly arraigned, but who cannot post bail. *Ante,* p 332, n 21. In drawing such a conclusion, the majority overlooks at least three important purposes of prompt arraignment.

First, there is a vast difference between the temporary facilities of a police precinct where the suspect is kept prior to arraignment and the facilities of a county jail where the unbonded defendant resides after arraignment. The police station typically is ill-equipped to serve food, provide adequate sleeping facilities, or allow any movement outside the jail cell itself. A county jail, on the other hand, is designed for longer-term detention. It has adequate food and bedding facilities, and allows movement at least within the block of cells.[19]

Second, even if a defendant is unable to post bail, he will receive from a judicial officer an

[19] See the regulations implemented by the Department of Corrections, Bureau of Correctional Facilities, Jails, Lockups, and Security Camps, 1979 AC, R 791.501 *et seq.*

enumeration of his constitutional rights in clear and easily understandable language. He will be told the exact nature and details of the charges against him, and will have an opportunity to make a statement or explain his conduct in open court.[20] All of this will be done on the record by a judicial officer, rather than perfunctorily and perhaps incompletely by a police officer in the station house.

Finally, and most importantly, an attorney will be appointed for the defendant at or shortly after the arraignment. Delaying the arraignment necessarily delays the appointment of counsel. Once counsel is appointed, the defendant has a right not to be interrogated without notice of his counsel. *Massiah v United States,* 377 US 201, 206; 84 S Ct 1199; 12 L Ed 2d 246 (1964); *Brewer v Williams,* 430 US 387, 400-401; 97 S Ct 1232; 51 L Ed 2d 424 (1977).[21]

Having expressed our disagreement with the majority's abandonment of the *McNabb-Mallory* exclusionary rule, we now consider the three cases before us.

II

A

The majority sufficiently reviews the facts of each case, and we need not repeat them. In *People v Dean,* it appears that during the twenty-six hours from arrest to confession, defendant was

[20] See *People v Mallory,* 421 Mich 239. See also 2 ABA Standards for Criminal Justice (2d ed), Pretrial Release, 10-4.2, p 10-50.

[21] In *People v Green,* 405 Mich 273; 274 NW2d 448 (1979), the police interrogated the defendant without notifying his appointed counsel, and obtained a confession. The Court was divided in rationale with respect to whether exclusion was a proper remedy (no opinion bore more than two signatures), but was in total agreement that the prosecution acted improperly. Further, the case was decided under the Code of Professional Responsibility and not on the basis of the Sixth Amendment right to counsel.

interrogated on four separate occasions, totaling approximately fourteen hours. The defendant was detained under a "reverse writ" issued in the Recorder's Court. The prosecutor argues that the writ was necessary to further investigate the case. However, the reverse writ procedure does not negate or suspend the requirement of a prompt arraignment. In *People v Casey,* 411 Mich 179, 181-182; 305 NW2d 247 (1981), the Court held that a reverse writ proceeding has no validity:

> It is a nullity. Its constitutional and statutory bases cannot be examined for it has none.
>
> * * *
>
> The principles governing the detention of a citizen may be located in a host of constitutional, statutory, and judicial sources; whether a citizen is being legally or illegally held is a determination which must be made by reference to those principles. We today neither add to nor subtract from that body of law. A detention which is otherwise illegal is not cleansed of its illegality by the issuance of a reverse writ or by the pendency of such proceedings.

The statute provides that a police officer who arrests a person "without a warrant shall without unnecessary delay take the person arrested before a magistrate . . . and shall present to the magistrate a complaint stating the charge against the person arrested." MCL 764.13; MSA 28.871(1).

A court rule provides that at the arraignment on the complaint, the court shall advise the defendant that he is entitled to the assistance of an attorney and that if he is financially unable to provide an attorney and wants an attorney, the court will appoint one at public expense. MCR 6.101(C)(1); GCR 1963, 785.4.

Dean was in court during the reverse-writ pro-

ceeding. Thus, as required by the statute, the police did take him before a magistrate without unnecessary delay. They did not, however, as also required by the statute, present to the magistrate a complaint stating a charge against Dean.

Prior to obtaining the reverse writ—and, a few hours later, a confession—the police had sufficient circumstantial evidence to arraign Dean. It appears from the length of the delay that the police sought to obtain something more concrete—Dean's admission. Before the reverse-writ proceeding, Dean had been identified as the last person seen with the victims, and matched the description of the person who was seen leaving the residence immediately after the shootings and driving away in an orange Cougar. Dean had admitted being with the victims and to frequently driving his girl friend's orange Cougar.

We have not been provided with a transcript of the reverse-writ proceeding. It does not appear whether the magistrate was made aware of the evidence the police had already obtained or whether there was any discussion of whether Dean desired representation by counsel. If, when the reverse writ was granted by the magistrate, the gist of the *Miranda* warnings was not repeated, what occurred in that proceeding may have led Dean, contrary to the spirit of *Miranda,* to believe that he was expected to coöperate with the police during the additional time granted by the magistrate for further investigation.

B

Cipriano was subjected to multiple interrogations on the day he was arrested and on two succeeding days. Eight hours after Cipriano's arrest, a magistrate opened court (located in the

same building as the jail) at 11:00 P.M. and issued three search warrants. A transcript of the hearing on the issuance of the search warrants established that by that time the police had obtained ample evidence, as the officer in charge conceded at the preliminary examination, to charge Cipriano with having murdered the victims. That officer testified at the search warrant hearing that earlier in the day, at 2:00 P.M., a woman arrived at the home of neighbors and informed them that Cipriano had just shot her husband. They overheard her telephone the state police. They observed her returning to a dwelling contrary to their advice. They observed no one enter or leave the dwelling except that Cipriano ran from the rear of the dwelling when police officers arrived. He was immediately apprehended. Both the husband and the wife had been shot and killed. No one else was on the premises. There was blood on Cipriano's right pants leg. There was a cut on his right forearm. On the basis of this evidence, the officer sought and obtained from the magistrate search warrants to obtain blood samples from Cipriano and at the scene.

C.

In *Dean* and *Cipriano,* it appears, on the basis of *proceedings in magistrate's courtrooms,* that the police failed to comply with the requirements of the statute and were delaying arraigning the defendants before magistrates on complaints—when the magistrates would have been obliged by the court rule to advise the defendants of their rights to counsel and to inquire whether they desired the appointment of counsel if financially unable to obtain counsel on their own.

In both *Dean* and *Cipriano,* the defendants

sought and obtained the appointment of counsel when they were eventually arraigned on complaints. Had this occurred at the reverse-writ proceeding in *Dean* or the search warrant proceeding in *Cipriano,* the police could not have initiated further interrogation of Dean or Cipriano. See *People v Paintman,* 412 Mich 518; 315 NW2d 418 (1982).

Statements obtained from Dean after his courtroom appearance during the reverse-writ proceeding and from Cipriano after the 11:00 P.M. search warrant proceeding should be suppressed because magistrates were available to arraign Dean and Cipriano on complaints and they thus could and should have been arraigned when those proceedings took place.

We would reverse and remand for a new trial in *Dean* because the statement obtained from him after his courtroom appearance during the reverse-writ proceeding,[22] at which he should have been arraigned and offered an opportunity to obtain counsel, may have significantly added to the other evidence tending to show that he was the killer.

In *Cipriano,* we would reduce the conviction to second-degree murder and remand for resentencing with an option on the part of the prosecutor to retry him for first-degree murder. The evidence tending to show that Cipriano was the killer, other than the statements obtained from him after the search warrant proceeding, was overwhelming. The statements obtained from him after the

[22] We recognize that the Sixth Amendment right to counsel may not attach until a complaint is filed. *Moran v Burbine,* 475 US 412; 106 S Ct 1135; 89 L Ed 2d 410 (1986).

search warrant proceeding, at which he should have been arraigned and offered an opportunity to obtain counsel, may, however, have significantly added to other evidence tending to show that the killings were premeditated and deliberate.

D

In *Harrison,* we agree with the majority that Harrison's conviction of manslaughter should be affirmed. Harrison had engaged private counsel before he made the statement sought to be suppressed. He underwent the polygraph examination with the consent of his counsel. The delay in arraigning Harrison did not deprive him of legal representation, nor was his right to counsel otherwise impeded by the police.

E

We would affirm the decision of the Court of Appeals in *People v Harrison.*[23] In *People v Dean,* we would reverse the decision of the Court of Appeals and remand for a new trial. In *People v Cipriano,* we would reduce the conviction to second-degree murder with an option on the part of the prosecutor to retry the defendant for first-degree murder.[24]

LEVIN and ARCHER, JJ., concurred with CAVANAGH, J.

[23] In agreeing with the majority in affirmance, we do not adopt the analyses employed therein.

[24] *Id.*

STOREY v MEIJER, INC

Docket No. 81136. Argued April 5, 1988 (Calendar No. 6). Decided September 19, 1988.

William F. Storey was denied unemployment compensation by the Michigan Employment Security Commission on the ground that he had been discharged for theft connected with his employment with Meijer, Inc. A hearing referee's conclusion that neither theft nor misconduct had been established was reversed by the MESC Board of Review. The Calhoun Circuit Court, Paul Nicolich, J., affirmed, and the Court of Appeals, GRIBBS, P.J., and WAHLS and HOOD, JJ., denied leave to appeal (Docket No. 89250).

While the case was pending before the Board of Review, the plaintiff brought a wrongful discharge action in the Calhoun Circuit Court against Meijer. Meijer moved for summary disposition on the ground that the affirmation by the circuit court of the board's findings of fact regarding the plaintiff's disqualification for unemployment benefits collaterally estopped the plaintiff from relitigating the factual issues. The court, James C. Kingsley, J., granted summary disposition for the defendant. The Court of Appeals, MAHER, P.J., and SAWYER and R. L. TAHVONEN, JJ., affirmed, holding that a factual determination of the MESC collaterally estops a party from relitigating the issue in a subsequent circuit court action (Docket No. 89904).

In an opinion by Justice CAVANAGH, joined by Chief Justice RILEY and Justices LEVIN, BRICKLEY, ARCHER, and GRIFFIN, the Supreme Court *held:*

Determinations by the Michigan Employment Security Commission of factual issues regarding eligibility for unemployment compensation may not be used to collaterally estop the litigation of the issues in a subsequent civil action.

1. The doctrine of collateral estoppel must be applied so as to

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REFERENCES

Am Jur 2d, Judgments §§ 446 *et seq.*

Am Jur 2d, Unemployment Compensation §§ 91 *et seq.*

Doctrine of res judicata or collateral estoppel as barring relitigation in state criminal proceedings of issues previously decided in administrative proceedings. 30 ALR4th 856.

strike a balance between the need to eliminate repetitious and needless litigation and the interest in affording litigants a full and fair adjudication of the issues involved in their claims. The extent to which the doctrine is applied is dependent upon the nature of the forum in which the initial determination was rendered. Where the rendering forum is an administrative agency, the general principles of collateral estoppel are to be applied only when the procedures are adjudicatory in nature, a method of appeal is provided, and it is clear that the Legislature intended to make the determination final in the absence of an appeal.

2. Section 11(b)(1) of the Employment Security Act providing for the use of information and determinations regarding eligibility for unemployment compensation clearly and unambiguously prohibits the use of such information and determinations in subsequent civil proceedings unless the MESC is a party or complainant in the action. According preclusive effect to these determinations would be incompatible with the legislative policy to provide relief from the hardship caused by involuntary unemployment.

Reversed and remanded.

Justice BOYLE, concurring, stated that the doctrine of collateral estoppel should not apply in this case. Proceedings before the MESC are and should remain summary in nature. Full litigation of any one issue is neither contemplated nor encouraged. Viewed as a whole, the statute was not intended to make determinations regarding eligibility for unemployment compensation final for all purposes.

160 Mich App 589; 408 NW2d 510 (1987) reversed.

UNEMPLOYMENT COMPENSATION — ADMINISTRATIVE DETERMINATIONS — COLLATERAL ESTOPPEL.

Determinations by the Michigan Employment Security Commission of factual issues regarding eligibility for unemployment compensation may not be used to collaterally estop the litigation of the issues in a subsequent civil action (MCL 421.11[b][1]; MSA 17.511[b][1]).

*Garbrecht & Hentchel* (by *Theodore P. Hentchel*) for the plaintiff.

*Jeffrey S. Rueble* for the defendant.

Amici Curiae:

*Erwin B. Ellmann* and *Eli Grier* for American Civil Liberties Union Fund of Michigan.

*White, Beekman, Przybylowicz, Schneider & Baird, P.C.* (by *Thomas A. Baird*), for Michigan Education Association.

*Sachs, Nunn, Kates, Kadushin, O'Hare, Helveston & Waldman, P.C.* (by *Theodore Sachs*), for Michigan State AFL-CIO.

*Stark & Gordon* (by *Sheldon J. Stark*) and *Jordan Rossen,* General Counsel, and *Richard W. McHugh,* Associate General Counsel, International Union, UAW, for Michigan Trial Lawyers Association.

CAVANAGH, J. This case presents the issue whether an administrative adjudication of disqualification for unemployment compensation benefits may be used to preclude the litigation of issues in a subsequent civil suit for wrongful discharge or breach of employment contract. We conclude that the application of collateral estoppel to the administrative determinations of the MESC would be contrary to legislative intent and considerations of public policy. An MESC proceeding designed to determine eligibility for unemployment benefits is not an adequate substitute for full access to the circuit court with the full range of remedies available. Consequently, issue preclusion is not available for determinations of the MESC.

## FACTS

William Storey was employed by defendant as the manager of a gas station located at defendant's store in Battle Creek. One of the duties connected with his employment was to check the price of gas

and other products at competing gas stations in the area. Storey used his personal vehicle for this purpose, and he was reimbursed for the mileage driven in order to complete this task. In June, 1982, defendant discharged Storey from his employment for allegedly having submitted expense account vouchers claiming reimbursement for more mileage than was actually driven.

Storey applied for unemployment compensation benefits the day after he was discharged. The MESC determined that he was ineligible for benefits under MCL 421.29(1)(j); MSA 17.531(1)(j) because he had been discharged for theft connected with his work. After a redetermination by the MESC affirming that decision, Storey appealed the denial of benefits to a hearing referee.

A hearing was held on December 2, 1982, and plaintiff appeared with counsel. In direct contrast to both the initial determination and the redetermination by the MESC, the referee concluded that plaintiff's failure to complete his expense vouchers according to the proper procedures established by defendant was a good-faith error in judgment. The referee found insufficient evidence on the record to establish that plaintiff sought reimbursement for expenses that were not legitimate. He concluded that neither employee theft nor misconduct had been established.

The defendant employer appealed this decision to the Board of Review. The board reversed the referee's determination as to benefit rights and found that plaintiff was ineligible for benefits because of employee theft. After the board denied plaintiff's application for rehearing, plaintiff filed an appeal in the circuit court. The circuit court affirmed the decision of the board, and the Court of Appeals denied plaintiff's application for leave to appeal.

On February 2, 1984, while the case was pending before the Board of Review, plaintiff filed the present wrongful discharge action in the circuit court. After the board's finding of disqualification for employee theft was affirmed, the employer filed a motion for summary disposition on the ground that collateral estoppel barred plaintiff from relitigating the issue whether his discharge was for employee theft. MCR 2.116(C)(7). Meijer alleged there was no genuine issue of fact regarding whether it had just cause to terminate plaintiff's employment, since the finding of employee theft had been fully adjudicated in the administrative proceeding and had been reviewed by the circuit court. The circuit court granted defendant's motion, and plaintiff's claim was dismissed.

The Court of Appeals affirmed the dismissal of plaintiff's claim and held that a factual determination of the MESC collaterally estops a party from relitigating that factual issue in a subsequent circuit court action. *Storey v Meijer, Inc,* 160 Mich App 589, 591; 408 NW2d 510 (1987). We granted leave[1] to consider this issue of first impression.

## ANALYSIS

The doctrine of collateral estoppel must be applied so as to strike a balance between the need to eliminate repetitious and needless litigation and the interest in affording litigants a full and fair adjudication of the issues involved in their claims.

[1] 429 Mich 885 (1987).

We also granted leave in *Moody v Westin Renaissance Co,* 162 Mich App 743; 413 NW2d 96 (1987), lv gtd 429 Mich 886 (1987), to consider whether a determination made by the MESC on a claim for wrongful discharge is binding upon the parties in a subsequent suit alleging employment discrimination. *Moody* and the present case were to be argued and submitted together to resolve a conflict in the Court of Appeals. However, the *Moody* case was dismissed on a stipulation of the parties on April 11, 1988.

*Howell v Vito's Trucking & Excavating Co,* 386 Mich 37, 48; 191 NW2d 313 (1971). The extent to which the doctrine is applied is also dependent upon the nature of the forum in which the initial determination was rendered.[2] We have previously determined that when the rendering forum is an administrative agency, the general principles of collateral estoppel[3] are to be applied only when the procedures are adjudicatory in nature, when a method of appeal is provided, and when it is clear that the Legislature intended to make the determination final in the absence of an appeal. *Senior Accountants, Analysts & Appraisers Ass'n v Detroit,* 399 Mich 449, 457-458; 249 NW2d 121 (1976); *Roman Cleanser Co v Murphy,* 386 Mich 698, 703-704; 194 NW2d 704 (1972).[4]

Our analysis begins with an examination of the governing statute in order to determine whether the Legislature intended the determinations of the MESC to be conclusive in subsequent civil litigation. It is this inquiry which has led to a conflict in the Court of Appeals.

The parties have focused on § 11(b)(1) of the Employment Security Act which provides in part:

> Information obtained from any employing unit

[2] See, generally, *The preclusive effect of unemployment decisions in subsequent litigation,* 4 Labor Lawyer 69 (1988); 4 Davis, Administrative Law (2d ed), §§ 21:1-21:5, pp 47-68.

[3] For collateral estoppel to apply, a question of fact essential to the judgment must have been actually litigated and determined by a valid and final judgment. In addition, the same parties must have had a full opportunity to litigate the issue, and there must be mutuality of estoppel. See *Senior Accountants, Analysts & Appraisers Ass'n v Detroit,* 399 Mich 449, 458; 249 NW2d 121 (1976); *Howell v Vito's Trucking & Excavating Co,* 386 Mich 37, 41-42; 191 NW2d 313 (1971).

[4] See also *United States v Utah Construction & Mining Co,* 384 US 394, 422; 86 S Ct 1545; 16 L Ed 2d 642 (1966), wherein the Supreme Court held that collateral estoppel may be applied to administrative decisions when the administrative agency (1) acts in a judicial capacity; (2) resolves disputed issues of fact properly before it; and (3) affords the parties a full and fair opportunity to litigate.

> or individual pursuant to the administration of this act, and determinations as to the benefit rights of any individual shall be held confidential and shall not be disclosed or open to public inspection other than to public employees in the performance of their official duties pursuant to this act in any manner revealing the individual's or the employing unit's identity. However, any information in the commission's possession that may affect a claim for benefits or a charge to an employer's rating account shall be available to interested parties. *Except as provided in this act, such information and determinations shall not be used in any action or proceeding before any court or administrative tribunal unless the commission is a party to or a complainant in the action or proceeding, or unless used for the prosecution of fraud, civil proceeding, or other legal proceeding pursuant to subdivision (2).* Any report or statement, written or verbal, made by any person to the commission, any member of the commission, or to any person engaged in administering this law shall be a privileged communication, and a person, firm, or corporation shall not be held liable for slander or libel on account of a report or statement. Such records and reports in the custody of the commission shall be available for examination by the employer or employee affected. [Emphasis added. MCL 421.11(b)(1); MSA 17.511(b)(1).]

The Court of Appeals in the present case dismissed § 11(b)(1) as inapplicable, reasoning that the present defendant did not seek to use the MESC determination of ineligibility for unemployment benefits but, instead, sought to use the MESC's finding of fact that plaintiff's discharge was due to employee theft.

In *Moody v Westin Renaissance Co,* 162 Mich App 743, 748; 413 NW2d 96 (1987), however, another panel of the Court of Appeals expressly rejected that analysis and concluded that § 11(b)(1)

is a clear and unambiguous expression of the Legislature's intent "to isolate MESC determinations within the narrow confines of eligibility for benefits, leaving resolution of labor disputes, civil rights violations and contract disputes to forums more uniquely adapted to resolution of those disputes."

The Court of Appeals for the Sixth Circuit has also considered this issue. In *Polk v Yellow Freight System, Inc,* 801 F2d 190 (CA 6, 1986),[5] the court held that an MESC determination that the employee was ineligible for unemployment benefits because she was discharged for misconduct precluded her subsequent action in circuit court for breach of contract. The court rejected the employee's statutory argument in a footnote, and concluded that § 11(b)(1) refers only to internal determinations. The court found support for this conclusion in MCL 421.33(3), 421.36(3); MSA 17.535(3), 17.538(3) which mandate compliance with Michigan's Freedom of Information Act,[6] and reasoned that "no presumption of confidentiality, such as that found in section 421.11(b)(1), attaches to decisions by MESC referees or the review board." 801 F2d 194, n 6.[7]

We disagree with the Sixth Circuit's conclusion that § 11(b)(1) refers only to "internal determinations." As the *Moody* Court stated, "[w]e do not see

[5] See also *Pilarowski v Macomb Co Health Dep't,* 841 F2d 1281 (CA 6, 1988).

[6] MCL 15.231 *et seq.;* MSA 4.1801(1) *et seq.*

[7] Another panel of the Court of Appeals recently adopted this reasoning in *Weiler v New Century Bank,* 168 Mich App 354; 423 NW2d 664 (1988). The extent to which provisions of the FOIA and § 11(b)(1) interact is not presently before this Court. We note, however, that the availability of public information under the FOIA is not without limitation. See MCL 15.243; MSA 4.1801(13); *Kestenbaum v Michigan State Univ,* 414 Mich 510; 327 NW2d 783 (1982). Furthermore, facilitating public access to information cannot be equated with according preclusive effect to administrative findings in subsequent civil litigation.

the word internal in the statute . . . ." 162 Mich App 749. We also note that the Sixth Circuit failed to cite its earlier decision in *Herman Bros Pet Supply, Inc v NLRB,* 360 F2d 176 (CA 6, 1966), in which it upheld the quashing of a subpoena duces tecum served on the MESC to obtain records of unemployment compensation claims. The court relied on § 11(b), even though the predecessor statute in effect at the time made no specific reference to legal proceedings. The court noted that the Michigan Legislature had amended the statute so as to prohibit the use of information and determinations " 'in any action or proceeding before any court or administrative tribunal unless the commission is a party or claimant therein.' " 360 F2d 180. The court then concluded that this amendment made the statute "crystal clear for the future . . . ." *Id.* at 180.[8]

We agree with this conclusion of the *Herman Bros* court and with the statutory analysis of the Court of Appeals in *Moody.* When construing statutory provisions, the task of this Court is to discover and give effect to the intent of the Legislature. *State Treasurer v Wilson,* 423 Mich 138, 143; 377 NW2d 703 (1985); *Karl v Bryant Air Conditioning,* 416 Mich 558, 567; 331 NW2d 456 (1982). Legislative intent is to be derived from the actual language of the statute, and when the language is clear and unambiguous, no further interpretation is necessary. *Hiltz v Phil's Quality Market,* 417 Mich 335, 343; 337 NW2d 237 (1983). We find that § 11(b)(1) clearly and unambiguously prohibits the use of MESC information and determinations in subsequent civil proceedings unless the MESC is a party or complainant in the action.

Furthermore, our decision in this case advances

[8] See also *Wojciechowski v General Motors Corp,* 151 Mich App 399, 407; 390 NW2d 727 (1986).

the legislative purpose of the unemployment compensation system and is supported by considerations of public policy that underlie the exceptions to the application of collateral estoppel.[9] Whether or not the rules of claim or issue preclusion should be given their ordinary effect when the adjudicative determination is made by an administrative tribunal is the subject of 2 Restatement Judgments, 2d, § 83, p 267, which provides in part:

> (4) An adjudicative determination of an issue by an administrative tribunal does not preclude relitigation of that issue in another tribunal if according preclusive effect to determination of the issue would be incompatible with a legislative policy that:
>
> (a) The determination of the tribunal adjudicating the issue is not to be accorded conclusive effect in subsequent proceedings; or
>
> (b) The tribunal in which the issue subsequently arises be free to make an independent determination of the issue in question.

The Employment Security Act was intended to provide relief from the hardship caused by involuntary unemployment and is entitled to liberal interpretation. *Noblit v The Marmon Group,* 386 Mich 652; 194 NW2d 324 (1972); MCL 421.2; MSA 17.502. The system is designed to get "money into the pocket of the unemployed worker at the earliest point that is administratively feasible." *California Dep't of Human Resources Development v Java,* 402 US 121, 135; 91 S Ct 1347; 28 L Ed 2d

[9] See *Nathan v Rowan,* 651 F2d 1223, 1226 (CA 6, 1981) ("Res judicata is applied if it does not offend public policy or result in manifest injustice."); *Garner v Giarrusso,* 571 F2d 1330, 1336 (CA 5, 1978), reh den 575 F2d 300 (CA 5, 1978) ("Even when the prior decision is made in a judicial, rather than an administrative, forum neither res judicata nor collateral estoppel is rigidly applied. Both defenses must be qualified or rejected when their use would contravene an overriding public policy or result in manifest injustice.").

666 (1971). According preclusive effect to determinations made in this forum would be incompatible with this legislative policy.

Due to the full range of remedies available in a civil action, the parties have a greater incentive to fully litigate the civil claim than the claim for unemployment benefits. If collateral estoppel is applied to determinations of the MESC, both claimants and employers will be forced to fully litigate the administrative claim, potentially delaying the determination of benefit rights and burdening the unemployment compensation system.[10]

The authors of the Restatement addressed this consideration, stating:

> The scheme of remedies may intend that the proceedings in an administrative tribunal be determinative only for the purposes of the controversy immediately before the agency. For example, the scheme may contemplate that the agency proceedings be as expeditious as possible. One aspect of assuring expeditiousness is to confine the stakes to the matter immediately in controversy. Thus, issue preclusion may be withheld so that the parties will not be induced to dispute the administrative proceeding in anticipation of its effect in another proceeding. [2 Restatement Judgments, 2d, § 83, comment h, pp 279-280.]

There is also a substantial risk that the potential application of collateral estoppel will cause a qualified claimant to forego a claim for unemployment compensation in order to protect the right to pursue a civil claim with its full range of benefits. Conversely, the application of collateral estoppel may penalize an unemployed worker who, un-

[10] See *Mack v South Bay Beer Distributors*, 798 F2d 1279, 1284 (CA 9, 1986); *Ferris v Hawkins*, 135 Ariz 329, 333; 660 P2d 1256 (1983); *McClanahan v Remington Freight Lines*, 517 NE2d 390, 395 (Ind, 1988); 4 Labor Lawyer, n 2 *supra*, pp 71-74.

aware of the consequences and perhaps not represented by counsel, pursued a claim for unemployment benefits. This would unquestionably frustrate the legislative purpose of the act. As we stated in *Reed v Employment Security Comm,* 364 Mich 395, 397; 110 NW2d 907 (1961), "[t]he purpose of the act is to benefit unemployed in financial straits, not to penalize them for being in that condition."

## CONCLUSION

Accordingly, to give effect to the Legislature's intent as expressed in §§ 11(b)(1) and to further the purposes of the Employment Security Act, we hold that MESC determinations are not to be used to collaterally estop the litigation of issues in a subsequent civil suit. Determinations made by the MESC are limited to the purpose of determining a claimant's eligibility for benefits.

The decision of the Court of Appeals is reversed, and this case is remanded to the circuit court for further proceedings consistent with this opinion.

RILEY, C.J., and LEVIN, BRICKLEY, ARCHER, and GRIFFIN, JJ., concurred with CAVANAGH, J.

BOYLE, J. I concur in the result reached today because I do not believe that the doctrine of collateral estoppel should apply in this instance. Proceedings before the MESC are and should remain summary in nature. Full litigation of any one issue is neither contemplated nor encouraged. Whether or not the parties before the MESC have a full and fair opportunity to litigate all issues, *United States v Utah Construction & Mining Co,* 384 US 394, 422; 86 S Ct 1545; 16 L Ed 2d 642 (1966), my review of the statute as a whole

persuades me that it was not the purpose of the Legislature to make these determinations final for all purposes. *Senior Accountants, Analysts & Appraisers Ass'n v Detroit,* 399 Mich 449; 249 NW2d 121 (1976); *Roman Cleanser Co v Murphy,* 386 Mich 698; 194 NW2d 704 (1972). For this reason I agree with today's holding that collateral estoppel does not preclude the litigation of a claim for wrongful discharge or breach of employment contract filed subsequently to an administrative disqualification for unemployment compensation benefits.[1] I find it unnecessary to reach the question whether MCL 421.11(b)(1); MSA 17.511(b)(1) also precludes application of the doctrine in this instance.

[1] Of course, I express no opinion on the possible evidentiary use of such information and determinations. See *Sias v General Motors Corp,* 372 Mich 542; 127 NW2d 357 (1964); *Wojciechowski v General Motors Corp,* 151 Mich App 399; 390 NW2d 727 (1986). See also *Plummer v Western Int'l Hotels Co, Inc,* 656 F2d 502 (CA 9, 1981).

PEOPLE v ARTERBERRY

Docket No. 79382. Argued January 6, 1988 (Calendar No. 1). Decided September 27, 1988.

Richard D. Arterberry was charged in the 36th District Court with five counts of possession of a controlled substance with intent to deliver. At the preliminary hearing, the court, Longworth D. Quinn, J., granted the defendant's motion to dismiss, finding that the warrant to search a specific premises and a specific person for heroin and other controlled substances did not authorize the search of other unnamed persons on the premises, including the defendant, and that the search which uncovered a key in the defendant's pocket, which fit a padlocked toolbox that already had been opened and found to contain controlled substances, exceeded the scope of the warrant. The Recorder's Court of Detroit, Clarice Jobes, J., affirmed. The Court of Appeals, HOLBROOK, JR., P.J., and BURNS and W. J. CAPRATHE, JJ., affirmed (Docket No. 79424). The people appeal.

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

The police acted properly in searching the occupants of the residence, whom they had probable cause to arrest and whom they then could have searched incident to arrest, for the key.

1. The police acted within the scope of the warrant when they opened the toolbox containing the controlled substances. Upon discovering the controlled substances, the police had probable cause to arrest all seven occupants for loitering in a place of illegal occupation or business. The police reasonably could have believed that the seven occupants of the private residence knew that the residence was being operated as a site for the distribution of controlled substances. Although the officers did not assert and may not have had in mind the offense of loitering in a place of illegal occupation or business

REFERENCES

Am Jur 2d, Arrest §§ 44 *et seq.*

Am Jur 2d, Searches and Seizures §§ 35 *et seq.*

Lawfulness of nonconsensual search and seizure without warrant, prior to arrest. 89 ALR2d 715.

when they searched the defendant and the other occupants, the fact that an officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action.

2. Since the officers had probable cause to arrest the defendant and the other occupants, the search was proper: had the occupants been arrested, they could have then been searched incident to the arrest. The validity of the search is not negated by the failure of the officers to arrest the remaining occupants. Where officers have probable cause to arrest a group of persons and, instead of arresting them all, search them and then arrest only some of the group, they act properly.

Reversed and remanded.

154 Mich App 1; 397 NW2d 198 (1986).

SEARCHES AND SEIZURES — PRIOR TO ARREST — PROBABLE CAUSE TO ARREST.

The discovery of controlled substances pursuant to a warrant to search a private residence provided probable cause to arrest the occupants of the residence, and the search of an occupant prior to arrest was proper because the occupant could have been searched incident to arrest (US Const, Am IV).

*Frank J. Kelley,* Attorney General, *Louis J. Caruso,* Solicitor General, *John D. O'Hair,* Prosecuting Attorney, *Timothy A. Baughman,* Chief, Criminal Division, Research, Training and Appeals, and *Rosemary A. Gordon,* Assistant Prosecuting Attorney, for the people.

LEVIN, J. Detroit police officers, acting with an informant, purchased heroin at a residence suspected of serving as a drug distribution site. The same day, during a thirty-minute period of surveillance, police observed seven persons make short visits to the site. On the basis of this information, the police the next day obtained a search warrant authorizing them to search the residence and "Doug," the man who had sold the heroin.

The police knocked on the door and announced

themselves. They heard someone running away and forced the door open. Inside they found seven persons, who were subjected to a *Terry* weapons patdown. Search of the site disclosed a locked toolbox. The police forced the box open and discovered inside a quantity of controlled substances. The police then searched the occupants for the key to the box, finding it in Arterberry's possession. Arterberry was arrested, and the other six occupants were apparently released.

Arterberry was charged with possession with intent to deliver various controlled substances. At Arterberry's preliminary examination, the district judge granted his motion to dismiss the charges on the basis that the search of his person for the key exceeded the scope of the warrant. The Detroit Recorder's Court and the Court of Appeals affirmed. We reverse and remand for trial.

I

The police acted within the scope of the warrant when they opened the toolbox containing the controlled substances. Upon discovering the controlled substances, the police had probable cause to arrest all seven occupants for loitering in a place of illegal occupation or business.[1] The police could reasonably have believed[2] that the seven occupants of this private residence knew that the residence was being operated as a site for the distribution of controlled substances.[3]

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[1] MCL 750.167(j); MSA 28.364(j). See also *People v Morris,* 66 Mich App 514; 239 NW2d 649 (1976).

[2] See *Hammitt v Straley,* 338 Mich 587; 61 NW2d 641 (1953), and the cases quoted therein.

[3] While the information available—that the residence was being operated as an illegal drug distribution site, that controlled substances were found in the residence, and that at least one occupant ran from the door when the police announced themselves—consti-

To be sure, the officers did not assert and may not have had in mind the offense of loitering in a place of illegal occupation or business when they searched Arterberry and the other occupants. The United States Supreme Court has said, however:

> [T]he fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action. [*Scott v United States,* 436 US 128, 138; 98 S Ct 1717; 56 L Ed 2d 168 (1978).]

Since the officers had probable cause to arrest Arterberry and the other occupants, the search was proper: had the occupants been arrested, they could have then been searched incident to the arrest.[4] The validity of the search is not negated by the failure of the officers to arrest the occupants. Where officers have probable cause to arrest a group of persons and, instead of arresting them all, search them and then arrest only some of the group, they act properly. Those searched could have been arrested and then searched incident to the arrest. As explained in *Peters v New York,* 392 US 40, 77; 88 S Ct 1889; 20 L Ed 2d 917 (1968) (Harlan, J., concurring):

> If the prosecution shows probable cause to arrest prior to a search of a man's person, it has met its total burden. There is *no* case in which a defendant may validly say, "Although the officer had a right to arrest me at the moment when he seized me and searched my person, the search is invalid

tuted probable cause to arrest the occupants for loitering in a place of illegal occupation or business, this information alone might be insufficient to convict the occupants of the offense.

[4] *People v Chapman,* 425 Mich 245; 387 NW2d 835 (1986).

because he did not in fact arrest me until afterwards." [Emphasis in the original.][5]

The police acted properly in searching the seven occupants for the key.

II

The Recorder's Court and the Court of Appeals relied on the United States Supreme Court's decision in *Ybarra v Illinois,* 444 US 85; 100 S Ct 338; 62 L Ed 2d 238 (1979), in affirming the district judge's dismissal of the charges. In *Ybarra,* on the basis of the information that a bartender at a public bar possessed heroin, the police obtained a warrant permitting them to search the bartender, identified as "Greg," and the premises of the bar. The police searched "Greg" and the bar and conducted a *Terry* weapons patdown of everyone else in the bar. The search of the bar and of "Greg" did not disclose any illegal substances. The officers then searched one of the patrons, Ybarra, again, this time finding heroin in a cigarette packet.

[5] The California Supreme Court similarly declared in *People v Simon,* 45 Cal 2d 645, 648; 290 P2d 531 (1955):

> Thus, if the officer is entitled to make an arrest on the basis of information available to him before he searches, and as an incident to that arrest is entitled to make a reasonable search of the person arrested . . ., there is nothing unreasonable in his conduct if he makes the search before instead of after the arrest. In fact, if the person searched is innocent and the search convinces the officer that his reasonable belief to the contrary is erroneous, it is to the advantage of the person searched not to be arrested. On the other hand, if he is not innocent or the search does not establish his innocence, the security of his persons, house, papers, or effects suffers no more from a search preceding his arrest than it would from the same search following it.

See also *People v Cook,* 153 Mich App 89, 92; 395 NW2d 16 (1986); see, generally, 2 LaFave, Search and Seizure (2d ed), §§ 5.4(a)-(b), pp 515-527.

There was no basis for this search[6] other than Ybarra's presence in the bar. There was "no reason to believe that [Ybarra] had committed, was committing, or was about to commit any offense under state or federal law." *Ybarra,* 444 US 91. The Court held the search invalid for lack of probable cause.

In contrast to the instant case, the police in *Ybarra* did not have probable cause to arrest the defendant before engaging in the challenged search. In *Ybarra,* the police did not, while searching pursuant to the warrant, discover controlled substances. In *Ybarra,* the police had no information that the bar itself was a dope house. In *Ybarra,* the site of the search was a public bar open to everyone, not a restricted-entry private residence.[7] In *Ybarra,* no one ran away when the police announced themselves. In *Ybarra,* there was no reason to believe that the patrons of the bar were involved in criminal activity.

In the instant case, because the police had probable cause to arrest all the occupants, who could then have been searched incident to arrest, they acted properly in searching Arterberry for the key.

Reversed and remanded for trial.

RILEY, C.J., and BRICKLEY, CAVANAGH, BOYLE, ARCHER, and GRIFFIN, JJ., concurred with LEVIN, J.

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[6] Nor, because there was no reasonable belief that the patrons were armed and presently dangerous, was there a basis for the *Terry* weapons patdown. *Ybarra,* 444 US 92.

[7] Professor LaFave observed:

> Without suggesting that the probable cause required by *Ybarra* is inevitably present when the warrant *is* for private premises and the requisite notice is given prior to entry, it is fair to say that such a case does necessitate a somewhat different assessment than was permissible on the facts of *Ybarra.* [2 LaFave, Search and Seizure (2d ed), § 4.9(c), p 296. Emphasis in the original.]

## WHITE v GENERAL MOTORS CORPORATION

Docket No. 79194. Argued October 7, 1987 (Calendar No. 4). Decided September 27, 1988.

Frederick White retired on March 31, 1980, from General Motors Corporation and received a nondisability pension. Thereafter, he sought and was awarded workers' compensation benefits on the ground that he had retired early because of a work-related chronic respiratory condition. While the case was pending, 1980 PA 357 amended § 373 of the Workers' Disability Compensation Act, effective January 1, 1982, creating a new standard of disability which an employee who retires and receives a nondisability pension must meet to receive workers' compensation benefits. The Workers' Compensation Appeal Board affirmed the award of benefits, declining to apply the new standard after determining that § 373 affected substantive rights and was intended to be applied prospectively. The Court of Appeals, GILLIS, P.J., and GRIBBS and SULLIVAN, JJ., ordered the board's decision vacated and remanded the case to the WCAB for reconsideration in light of *Wojciechowski v General Motors Corp,* 151 Mich App 399 (1986), which had applied § 373 retroactively on the ground that it was a rule of procedure and applied to cases pending which arose out of injuries that preceded the statute's effective date (Docket No. 92867). The plaintiff appeals, limited to the issue whether § 373 should be given retroactive effect.

In opinions by Chief Justice RILEY, joined by Justices CAVANAGH and BOYLE, and by Justice BRICKLEY and Justice ARCHER, the Supreme Court *held:*

Section 373 of the Workers' Disability Compensation Act applies prospectively to employees injured on or after January 1, 1982.

Chief Justice RILEY, joined by Justices CAVANAGH and BOYLE would hold that § 373 of the Workers' Disability Compensation Act affected substantive rights of employees and, thus, applies prospectively to those employees injured on or after January 1, 1982.

Statutes which affect substantive rights are presumed to operate prospectively unless a contrary intent is clearly manifested or unless they are remedial in nature. While the work-

ers' compensation act, as a whole, is remedial legislation, § 373 affected the substantive rights of employees by changing the standard of disability. In addition, no reference to the retroactivity of § 373 appears in 1980 PA 357, and the act provides a future effective date.

Justice BRICKLEY, concurring, while agreeing that § 373 should apply prospectively, stated that the date of the plaintiff's termination of his employment and receipt of nondisability benefits should determine the applicability of the section. Because these events occurred prior to the enactment and effective date of the section, the amendment should not apply to the plaintiff's claim.

Justice ARCHER, concurring, stated that in light of existing case law determining prospective or retrospective application of statutory amendments, the absence of clear legislative intent with respect to the application of § 373(1), and the statute's predominant substantive effect upon a claimant's entitlement to benefits, § 373(1) of the Workers' Disability Compensation Act should apply prospectively to employees injured on or after January 1, 1982.

Reversed.

Justice GRIFFIN, joined by Justice LEVIN, dissenting, stated that the presumption provided in 1980 PA 357, § 373, that an employee who retires and receives a nondisability pension has not suffered a loss of earning capacity as a result of a compensable injury or disease, should apply with respect to workers' compensation benefits payable after January 1, 1982, without regard to when an employee was injured or disabled.

Statutes are presumed to operate prospectively unless a contrary intent is clearly manifested or the statute is remedial or procedural. A statute is not regarded to operate retrospectively merely because it relates to an antecedent event. Section 373 of the act is both procedural and substantive in its wording and effect. It refers both to a presumption and a standard of disability. Its language makes clear that its disability standard is different than that which would otherwise apply under the act. When viewed as a whole, § 373 reflects a purpose on the part of the Legislature to change the disability standard with respect to an employee who terminates active employment and is receiving benefits under either a private or a governmental pension or retirement program.

A remedial statute may operate retrospectively if it does not take away vested rights. Section 373 does not abolish or take away vested rights. In addition, the Legislature did not indicate a retrospective or prospective intention. Rather, the legislative

history subsequent to enactment tends to confirm an intent that § 373 should apply to all employees who terminate active employment and are receiving nondisability pension or retirement benefits regardless of when they were injured. In the absence of an express contrary intent, a reasonable construction requires that a statute which contains a specific future effective date should be applied from and after that date to all who come within the scope of its terms.

*Meklir, Schreier, Nolish & Friedman, P.C.* (by *Matthew A. Tyler*), for the plaintiff.

*Plunkett, Cooney, Rutt, Watters, Stanczyk & Pedersen* (by *Jonathan T. Kopit* and *Paul F. Paternoster*), *Evans, Nelson, Pletkovic & Hays, P.C.* (by *John J. Hays* and *William Nole Evans*), and *Willard W. Wallace* for the defendant.

Amicus Curiae:

*Sachs, Nunn, Kates, Kadushin, O'Hare, Helveston & Waldman, P.C.* (by *Theodore Sachs*), for Michigan State AFL-CIO.

RILEY, C.J. In this case, we are asked to decide whether MCL 418.373(1); MSA 17.237(373)(1)[1] of the Workers' Disability Compensation Act has retroactive application. We would hold that § 373 affects substantive rights and, thus, applies prospectively to those employees injured on or after January 1, 1982, the amendment's effective date. Accordingly, we would reverse the judgment of the Court of Appeals and reinstate the decision of the Workers' Compensation Appeal Board.

## I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff White was employed for thirty-seven

[1] The Legislature enacted 1980 PA 357, including § 373, as an amendment of the Workers' Disability Compensation Act of 1969. See MCL 418.101 *et seq.*; MSA 17.237(101) *et seq.*

years by defendant. On March 31, 1980, plaintiff retired under defendant's "thirty and out" nondisability, early retirement plan. On May 29, 1980, plaintiff filed a claim with the Workers' Compensation Bureau, alleging that he was disabled as of the date of his early retirement by chronic bronchitis and pulmonary emphysema, arising out of prolonged exposure to dust, smoke, paint, and other irritants. The hearing referee, finding that plaintiff had a work-incurred disability and had retired early because of his respiratory condition, awarded plaintiff weekly benefits effective from his retirement date, payable until further notice from the bureau. Defendant appealed to the WCAB, arguing that plaintiff was not disabled.

While the case was pending before the WCAB, the Michigan Legislature enacted 1980 PA 357, effective January 1, 1982. MCL 418.373; MSA 17.237(373), which provides:

> (1) *An employee who terminates active employment and is receiving nondisability pension* or retirement benefits under either a private or governmental pension or retirement program, including old-age benefits under the social security act, 42 USC 301 to 1397f, that was paid by or on behalf of an employer from whom weekly benefits under this act are sought *shall be presumed not to have a loss of earnings or earning capacity as the result of a compensable injury or disease* under either this chapter or chapter 4. This presumption may be rebutted only by a preponderance of the evidence that the employee is unable, because of a work related disability, to perform work suitable to the employee's qualifications, including training or experience. *This standard of disability supersedes other applicable standards* used to determine disability under either this chapter or chapter 4.
>
> (2) This section shall not be construed as a bar to an employee receiving medical benefits under

> section 315 upon the establishment of a causal relationship between the employee's work and the need for medical treatment. [Emphasis added.]

On May 2, 1986, the WCAB affirmed the referee's award and declined to apply the presumption set forth in § 373, stating that defendant was not entitled to assert § 373(1) because it concerned substantive rights and that the Legislature intended the amendment to apply prospectively to employees injured after its effective date.

The Court of Appeals remanded the action to the WCAB to be reconsidered in light of *Wojciechowski v General Motors Corp,* 151 Mich App 399; 390 NW2d 727 (1986).

This Court then granted leave to appeal, limited to the issue whether § 373 of 1980 PA 357 should be given retrospective application. 428 Mich 873 (1987).

## II. ANALYSIS

This Court has addressed the issue of retroactive versus prospective application of amendments of the WDCA in several recent cases. First, in *Selk v Detroit Plastic Products,* 419 Mich 1, 9; 345 NW2d 184 (1984), we stated that as a general rule, "statutes are presumed to operate prospectively unless the contrary intent is clearly manifested." A year later, in *Franks v White Pine Copper Div,* 422 Mich 636; 375 NW2d 715 (1985), this Court recognized an exception to the general rule for statutes which are remedial or procedural in nature. Most recently, in *Hurd v Ford Motor Co,* 423 Mich 531, 534; 377 NW2d 300 (1985), this Court considered another provision of the same public act, § 301(2), and concluded that it "was enacted to invalidate this Court's decision in *Deziel v Difco Laboratories,*

*Inc (After Remand),* 403 Mich 1; 268 NW2d 1 (1978), thus effecting a substantial change in the law and that the provisions of this amendment have prospective application."

A

It is against this backdrop that this Court must examine § 373. Defendant characterizes § 373 as procedural.[2] However, careful analysis of this section reveals that it is not procedural. Section 373(1) provides in pertinent part:

> An employee who terminates active employment and is receiving nondisability pension or retirement benefits . . . shall be *presumed* not to have a loss of earnings or earning capacity as the result of a compensable injury or disease under either this chapter or chapter 4. This *presumption* may be rebutted only by a preponderance of the evidence that the employee is unable, because of a work related disability, to perform work suitable to the employee's qualifications, including training or experience. [Emphasis added.]

Relying upon the language highlighted above, defendant argues that § 373 creates a rebuttable

[2] The dissent relies upon a quote from an article written by Justice MOODY. Although the dissent properly asserts that the procedural-substantive dichotomy is often difficult to distinguish, the passage addresses retroactivity in a criminal case. In fact, later in the article, Justice MOODY specifically discusses the differences between retroactivity in criminal and civil cases:

> In the civil area, the cases reflect both greater consistency in result and more severe limitations upon retrospective reach. In a sense, this can be explained by the fact that in civil cases, the range of alternatives is narrower than in the criminal arena; concepts such as res judicata and statutes of limitation operate to cut off the backward effect of law-changing decisions. Thus, the full retroactivity occasionally accorded in criminal cases is essentially unknown in civil litigation . . . . [Moody, *Retroactive application of law-changing decisions in Michigan,* 28 Wayne L R 439, 483-484 (1982).]

presumption of law and is, therefore, procedural in nature. However, Michigan law specifically provides:

> The function of a presumption is solely to place the burden of producing evidence on the opposing party.
>
> "It is a procedural device which allows a person relying on the presumption to avoid a directed verdict, and it permits that person a directed verdict if the opposing party fails to introduce evidence rebutting the presumption." [*McKinstry v Valley Obstetrics-Gynecology Clinic, PC,* 428 Mich 167, 180; 405 NW2d 88 (1987) (quoting *Widmayer v Leonard,* 422 Mich 280, 289; 373 NW2d 538 [1985]).]

Section 373 does not shift the claimant's burden of producing evidence. Therefore, it does not create a "presumption." Rather, we conclude that the "presumption" language in § 373 merely classifies those persons entitled to benefits under § 373.

B

In reiterating the general rule that statutes which affect substantive rights should be applied prospectively, the *Hurd* Court noted that prior to enactment of § 301(2),[3] the eligibility of an employee with a mental disorder for workers' compensation was determined by the "honest perception" standards set forth in *Deziel, supra.* Section 301(2) changed the standard of disability;[4] thus, the Court concluded that the change affected sub-

[3] MCL 418.301(2); MSA 17.237(301)(2) was also enacted as part of 1980 PA 357.

[4] Section 301(2) provides:

> Mental disabilities and conditions of the aging process, including but not limited to heart and cardiovascular conditions, shall be compensable if contributed to or aggravated or acceler-

stantive rights of the employee. Emphasizing the fact that the Legislature had not indicated whether § 301(2) should be applied retrospectively, the *Hurd* Court held that the amendment must be applied prospectively for injuries occurring on or after January 1, 1982. We find *Hurd* indistinguishable. As the *Hurd* Court stated:

> "In accordance with the rule applicable to original acts, it is presumed that provisions added by the amendment affecting substantive rights are intended to operate prospectively. Provisions added by the amendment that affect substantive rights will not be construed to apply to transactions and events completed prior to its enactment unless the legislature has expressed its intent to that effect or such intent is clearly implied by the language of the amendment or by the circumstances surrounding its enactment." [*Hurd, supra* at 535.]

Similarly, in the present case, prior to enactment of § 373, a claimant need only prove an impairment of wage-earning capacity within his field of employment. *Kaarto v Calumet & Hecla, Inc,* 367 Mich 128; 116 NW2d 225 (1962). Section 373 changed this standard.[5] Specifically, § 373 provides that "[t]his standard of disability supersedes other applicable standards used to determine disability under either this chapter or chapter 4." The effect of § 373 on claimants is similar to the effect on claimants under § 301(2) in *Hurd.* Both

ated by the employment in a significant manner. Mental disabilities shall be compensable when arising out of actual events of employment, not unfounded perceptions thereof. [MCL 418.301(2); MSA 17.237(301)(2).]

[5] Section 373 requires a claimant to prove he or she is eligible for compensation benefits by showing "the employee is unable, because of a work related disability, to perform work suitable to the employee's qualifications, including training or experience."

§§ 301(2) and 373(1) changed a standard of disability. Thus, in accordance with *Hurd,* § 373 should be applied prospectively for injuries occurring on or after January 1, 1982, the effective date of the statute.

Cases relied upon by defendant are distinguishable from *Hurd* and the present case. The statutory amendment in *Selk, supra,* affected the amount of interest an individual was entitled to receive after it was already determined that compensation was due. As we noted in *Franks, supra,* "[i]n *Selk,* we found the interest rate on overdue compensation payments related to a remedy or mode of procedure and was 'but an incident and not the essence of a right or liability.' " *Franks, supra* at 672. Unlike the provision in *Selk,* § 373 involves the question whether a retired employee has a substantive right to compensation under § 373, thus directly affecting the essence of his right, and not merely calculating the amount of compensation which he may eventually receive.

Similarly, in *Karl v Bryant Air Conditioning,* 416 Mich 558; 331 NW2d 456 (1982), this Court held that the newly enacted comparative negligence statute[6] applied retroactively to a pending products liability action. However, actions under the WDCA are, by their very nature, different than products liability actions.[7]

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[6] See MCL 600.2949 *et seq.;* MSA 27A.2949 *et seq.*

[7] Assuming, however, that *Karl* is applicable in this case, it is more closely related to *Selk* than to the present case. In *Karl,* the jury returned a special verdict in favor of plaintiff for $52,000, finding that the manufacturer had breached its implied warranty. The factfinder also determined that the plaintiff was ninety-five percent negligent. While *Karl* was pending in the trial court, the Legislature enacted the comparative negligence statute which provided for its immediate effect. On appeal, the *Karl* Court held that the statute should be applied retroactively, stating that "[w]hile the total damages which plaintiff could have received were significantly reduced by [the statute], plaintiff's cause of action was not legally barred or taken away."

C

Defendant argues that even if § 373 is substantive, it is remedial and, therefore, should be applied retroactively. While we agree that the WDCA is remedial, in the broad sense, we believe that such a characterization of the act, as a whole, provides no further insight into whether this particular amendment should be applied retroactively or prospectively.

It is well recognized that the WDCA, as a whole, is remedial legislation. *McAvoy v H B Sherman Co,* 401 Mich 419, 457; 258 NW2d 414 (1977); *Van Dorpel v Haven-Busch Co,* 350 Mich 135, 154; 85 NW2d 97 (1957); *DeKind v Gale Mfg Co,* 125 Mich App 598, 609; 337 NW2d 252 (1983). Therefore, characterization of a WDCA provision as remedial should not be dispositive. Otherwise, any statutory amendment of the WDCA could be characterized as remedial and applied retroactively.

The problem with this broad meaning of "remedial" has been explained as follows:

> Generally, remedial statutes are those which provide a remedy, or improve or facilitate remedies already existing for the enforcement of rights and the redress of injuries. They also include

*Karl, supra* at 577. Like the statute in *Selk,* the amendment in *Karl* was "not a matter of substance going to the individual's right to compensation." *Franks, supra* at 672. Thus, the *Karl* holding might be explained by the distinction drawn between the "amount" of benefits and the "entitlement" to benefits. *Karl, supra* at 577. This Court has recognized the distinction drawn between "amount" of benefits and "entitlement" to benefits in workers' compensation cases involving a claimant's earning capacity. See *Leskinen v MESC,* 398 Mich 501, 508-509; 247 NW2d 808 (1976). See also *Medacco v Campbell, Wyant & Cannon Foundry Co,* 48 Mich App 217, 226; 210 NW2d 360 (1973). Similarly, we also recognize that *Karl* might be explained because it has both remedial and procedural aspects. See *Douglas v Robbins & Meyers, Inc,* 505 F Supp 765 (WD Mich, 1980).

> statutes intended for the correction of defects, mistakes and omissions in the civil institutions and the administration of the state.
>
> Every statute that makes any change in the existing body of law, excluding only those enactments which merely restate or codify prior law, can be said to "remedy" some flaw in the prior law or some social evil. The mere fact that a statute is characterized as "remedial," therefore, is of little value in statutory construction unless the term "remedial" has for this purpose a more discriminate meaning. [3 Sands, Sutherland Statutory Construction (4th ed), § 60.02, p 60.]

At times, Michigan cases have used the broad meaning of "remedial" to apply arguably substantive amendments to the WDCA retrospectively. See, e.g., *Lahti v Fosterling,* 357 Mich 578, 588; 99 NW2d 490 (1959) (retroactively applying 1955 PA 250, repealing a two-year maximum on medical and hospital expenses); *Spencer v Clark Twp,* 142 Mich App 63; 368 NW2d 897 (1985) (retroactively applying the provisions of 1980 PA 357, § 1, allowing volunteer ambulance drivers to obtain benefits as if a county, city or village employee at the maximum rate). However, in this context, we prefer the narrower meaning, in which "[t]he term 'remedial' is often employed to describe legislation which is procedural in nature, i.e., it does not affect substantive rights." 3 Sands, Sutherland Statutory Construction (4th ed), § 60.02, p 60. See, e.g., *Rookledge v Garwood,* 340 Mich 444; 65 NW2d 785 (1954) (applying retroactively the 1952 PA 155 provision allowing an injured worker to proceed in tort against a defendant tortfeasor) and *Selk, supra* (applying retroactively the 1981 PA 194 provision increasing the amount of interest on a workers' compensation award from five to twelve

percent).[8] As we have previously noted, § 373 is substantive in nature. We, therefore, conclude that, in this context, it is not remedial and the statute should be applied prospectively.

D

We also find it significant that the Legislature omitted any reference to the retroactivity of § 373. For example, in *Selk,* the Court noted that the Legislature made no reference to the retroactivity of 1981 PA 194 and, in fact, provided a specific future date for its application. In resolving the retroactivity issue, the Court reasoned:

> When one carefully examines how the Legislature utilizes effective dates, however, it is clear that we have accorded that respect which is properly due.
>
> Effective dates are inserted by the Legislature in all kinds of statutes. When it wishes to address the question of retroactivity, the Legislature has specifically done so *in addition to* providing for an effective date.
>
> For example, when the Legislature passed the new rule for a claim and delivery action, in 1976 PA 79, it provided in enactment § 2 that "[t]his amendatory act shall apply to all actions pending or commenced on or after the effective date of this act." Enactment § 3 of the same statute provided: "This amendatory act shall take effect July 1, 1975." Because the Legislature in connection with other statutes in enactment sections has specifi-

[8] Alternatively, Sands indicates that "remedial" may be limited to "legislation which is not penal or criminal in nature." 3 Sands, Sutherland Statutory Construction (4th ed), § 60.02, p 60. In the context of construing an amendment of the WDCA as either retroactive or prospective, we find this meaning to be of no more value than the general meaning outlined by Sands. However, we note that it may have some value in distinguishing statutes which must be strictly construed. See 3 Sands, Sutherland Statutory Construction (4th ed), § 60.01, pp 55-56.

cally addressed retroactivity in addition to providing an effective date, we are unable to agree that the mere insertion of an effective date, standing alone, is dispositive of the prospective/retroactive effect of 1981 PA 194. [*Selk, supra* at 35, n 2.]

Therefore, we are persuaded that providing a specific, future effective date and omitting any reference to retroactivity supports our holding that § 373 is prospective in application.

### III. CONCLUSION

We would hold that *Hurd* controls in the present case. Section 373 should apply prospectively only for injuries occurring on or after January 1, 1982, the effective date of the statute. Thus, we would reverse the judgment of the Court of Appeals and reinstate the decision of the WCAB.

CAVANAGH and BOYLE, JJ., concurred with RILEY, C.J.

BRICKLEY, J. I concur with the result of the opinion of the Chief Justice, but write separately to say that while *Hurd v Ford Motor Co,* 423 Mich 531; 377 NW2d 300 (1985), adopted the date of injury as the controlling date for the application of the amendment at issue in that case, I am less sure that that date would necessarily be controlling in this case.

In *Hurd,* the amendment provided a new definition of personal injury. We based our decision in *Hurd* on the admonition that "[p]rovisions added by the amendment that affect substantive rights will not be construed to apply to transactions and events completed prior to its enactment . . . ." 1A Sands, Sutherland Statutory Construction (4th ed), § 22.36, pp 300-301. *Hurd, supra,* 535.

Here, the "transactions and events" to which § 373(1) applies are the employee's termination of active employment and the receipt of nondisability pension or retirement benefits. The date on which these events are completed and the date of injury may, but need not, coincide.

Although the amendment in question was enacted and became effective prior to the determination of the WCAB, the plaintiff terminated his employment prior to the amendment and therefore should not be subjected to the new standard.

ARCHER, J. (*concurring*). This Court granted leave to consider whether MCL 418.373(1); MSA 17.237(373)(1)[1] of the Workers' Disability Compensation Act should be applied retroactively. I would hold that the provision applies prospectively to those employees injured on or after January 1, 1982, the amendment's effective date. I would affirm the May 2, 1986, decision of the Workers' Compensation Appeal Board and vacate the peremptory reversal of the Court of Appeals.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff Frederick White was employed for

[1] An employee who terminates active employment and is receiving nondisability pension or retirement benefits under either a private or governmental pension or retirement program, including old-age benefits under the social security act, 42 USC 301 to 1397f, that was paid by or on behalf of an employer from whom weekly benefits under this act are sought shall be presumed not to have a loss of earnings or earning capacity as the result of a compensable injury or disease under either this chapter or chapter 4. This presumption may be rebutted only by a preponderance of the evidence that the employee is unable, because of a work related disability, to perform work suitable to the employee's qualifications, including training or experience. This standard of disability supersedes other applicable standards used to determine disability under either this chapter or chapter 4.

thirty-seven years by defendant GMC Truck & Bus Group as a painter and sander. Plaintiff retired on March 31, 1980, under defendant's "thirty and out" early retirement plan. On May 29, 1980, plaintiff filed a petition for hearing with the Workers' Compensation Bureau asserting that he was disabled as of his early retirement date by chronic respiratory problems arising from lengthy exposure to paint and other toxic agents. The hearing referee awarded plaintiff weekly benefits effective from his retirement date and payable until further notice by the bureau. The referee further attributed plaintiff's condition to lengthy exposure to toxic fumes in the work place:

> IT IS FURTHER FOUND that the plaintiff who retired at age 59 after 37 years exposure to paint fumes, paint mist and other pollutants, has proved that he has a work incurred disabling chronic obstructive lung disease. He was not a cigaret smoker and had an excellent work record. It is believed that he retired early because of his respiratory condition.

Defendant appealed to the WCAB, arguing that the plaintiff was not disabled.[2] However, in the interim between defendant's July 13, 1981, filing and the WCAB's eventual decision, the Michigan Legislature enacted 1980 PA 357, effective Janu-

[2] At the time of plaintiff's injury and defendant's WCAB filing, the standard for benefit eligibility was well settled:

> The test of an injured employee's right to compensation is his inability by reason of the accident to work and earn wages in the employment at which he was engaged when injured. [*Levanen v Seneca Copper Corp,* 227 Mich 592, 601; 199 NW 652 (1924).]

See also *Kaarto v Calumet & Hecla, Inc,* 367 Mich 128; 116 NW2d 225 (1962); *Kidd v General Motors Corp,* 414 Mich 578; 327 NW2d 265 (1982).

ary 1, 1982, MCL 418.373(1); MSA 17.237(373)(1), which instituted a rebuttable presumption of nondisability as to the plaintiff's class of retirees.

On May 2, 1986, the WCAB affirmed plaintiff's benefit award. However, in reliance upon this Court's decision in *Hurd v Ford Motor Co,* 423 Mich 531; 377 NW2d 300 (1985), the board further commented that the defendant was not entitled to assert § 373(1)'s rebuttable presumption as it concerned substantive rights and was intended by the Legislature to apply prospectively to employees injured after its effective date.

Defendant filed a motion for peremptory reversal in the Court of Appeals arguing that § 373(1) governed two claimant classes: (1) the prospective class identified by the WCAB, and (2) a retroactive class of those injured prior to January 1, 1982, yet who were entitled to benefits after that date.[3] On July 10, 1986, the Court of Appeals vacated plaintiff's award and remanded the action to the WCAB to be reconsidered in light of its decision in *Wojciechowski v General Motors Corp,* 151 Mich App 399; 390 NW2d 727 (1986).[4]

[3] The terms "retroactive" and "retrospective" are synonymous in judicial usage and may be employed interchangeably. They describe acts which operate on transactions which have occurred or rights and obligations which existed before passage of the act. Although court opinions often designate statutes as either prospective or retrospective, the statutes in fact are often not susceptible to such clear characterization. Many statutes are both prospective and retrospective. Characterization thus may do nothing more than reflect a judgment concerning validity or interpretation, arrived at on other grounds. For example, it has been held that a statute is not rendered retroactive merely because the facts upon which its subsequent action depends are drawn from a time antecedent to its effective date. [2 Sands, Sutherland Statutory Construction (4th ed), § 41.01, pp 337-338.]

[4] In *Wojciechowski,* the Court of Appeals construed § 373(1) to be procedural in nature and therefore *retrospectively* applicable to claimants injured prior to its effective date.

Plaintiff filed for leave to appeal to this Court. We granted leave upon the issue whether § 373(1) should be applied retroactively. 428 Mich 873 (1987).

I

Retrospective application of a statute is disfavored in the absence of explicit legislative intent to the contrary. *McQueen v Great Markwestern Packing Co,* 402 Mich 321; 262 NW2d 820 (1978); *Harrison v Metz,* 17 Mich 377, 378 (1868):

> Courts will construe no law to have a retroactive effect, unless the legislative intent, that it shall so operate, expressly and clearly appears upon the face of the statute itself, and if a construction of any statute which shall limit it to a prospective effect only can be found, that is at the same time consistent with the express letter of such statute, such construction will universally be adopted.

Despite the general prohibition against retroactivity, procedural or remedial provisions which fail to unduly impair vested or accrued rights have been given retrospective application. *Hansen-Snyder Co v General Motors Corp,* 371 Mich 480; 124 NW2d 286 (1963). However, this oft-cited exception favoring retroactive application, frequently belies the difficulty inherent in balancing an uncertain legislative intent against ambiguous statutory provisions:

> In dealing with the problem of retroactivity, it is extremely difficult to establish definite criteria upon which court decisions can be foretold. A statute must not act unreasonably upon the rights of those to whom it applies. What is reasonable and what is unreasonable is difficult to state in advance of actual decisions. ". . . [T]he method to

be pursued is not the unerring pursuit of a fixed legal principle to an inevitable conclusion. Rather it is the method of intelligently balancing and discriminating between reasons for and against." [2 Sands, Sutherland Statutory Construction (4th ed), § 41.05, p 364.]

Section 373(1)'s legislative history is silent upon the Legislature's intent regarding the applicability of this rebuttable presumption. Therefore, I find the provision presents three probable constructions: (1) § 373(1) extends prospectively to claimants injured after its effective date, (2) the presumption extends to all benefits received after its effective date regardless of the retiree's injury date, and (3) the provision governs all benefits received both prior to and after its effective date.

Our task is to thus balance these criteria against our own precedent in order to discern the construction which strikes the intended balance between the policies underlying § 373(1) and the WDCA itself.

CASE LAW ANALYSIS

The question of the prospective versus retrospective application of several recent amendments of the WDCA has been a recurrent one before the Court. Initially, in *Selk v Detroit Plastic Products (On Resubmission)*, 419 Mich 32; 348 NW2d 652 (1984), the Court deemed the Legislature's increase in interest per annum upon unpaid workers' compensation benefits effective January 1, 1982,[5] was a remedial act applicable retroactively, limited to any claimant regardless of their date of injury, who was either awarded or entitled to receive compensation after the provision's effective date.

One year later, in *Franks v White Pine Copper*

[5] See MCL 418.801(5); MSA 17.237(801)(5).

*Div,* 422 Mich 636; 375 NW2d 715 (1985), the Court concluded that §§ 354 and 358, which provided for the coördination of WDCA payments with other employer-funded benefits, applied prospectively to claimants injured after the amendments' effective dates *and* to those receiving benefits after the effective date regardless of their date of injury.[6] However, most recently in *Hurd v Ford Motor Co, supra,* this Court determined that 1980 PA 357, which amended the WDCA's causation standard for mental-disability claims, applied prospectively solely to those injured after the provision took effect.

From our prior decisions, I discern the following pattern: (1) Each amendment contained a specific effective date. (2) In the instances concerning the amount of benefits to which a claimant was entitled (*Selk, Franks*), the Court disregarded the date of injury, finding a date of benefits received or awarded determinative.[7] By contrast, in *Hurd,* the sole decision to address an amendment redefining a standard of benefit eligibility, the Court focused instead upon the date of injury as controlling in our construction of the provision's effective date. In *no* instance has the Court disregarded both the date of injury *and* date of benefits received or awarded in order to impose total retroactivity upon a claimant.[8]

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[6] Section 354 concerned general employee benefits. Section 358 addressed unemployment benefits. In 1985 PA 103, § 354(17), the Legislature overruled the portion of *Franks* applying § 354 to recipients injured prior to its effective date. The Legislature did not act with regard to § 358.

[7] The reference to *Franks* now extends solely to its discussion of 1980 PA 357, § 358.

[8] The absence of a total retrospective application in these decisions is in accord with the well-settled rule that the presence of a specific effective date is indicative of the Legislature's intent to limit the act's retroactivity. See *Selk, supra* at 36 (LEVIN, J., dissenting); 2 Sands, Sutherland Statutory Construction (4th ed), § 41.02, p 342, n 3.

SUBSTANTIVE v PROCEDURAL ASPECTS

Section 373(1) contains procedural elements which arguably favor retroactive application of the instant statute. The procedural nature of a rebuttable presumption is unquestioned. However, upon examination of the standards of disability applicable prior to the passage of § 373(1), I find that the provision has effected key substantive changes under the WDCA:

1. The amendment designates retirees who terminate active employment under early retirement programs similar to defendant's "30 and out" plan, as a class of claimants distinct from others seeking WDCA benefits.
2. Section 373 presumes this class of claimants has not incurred a loss of wage-earning capacity due to a work-related injury. Prior to the amendment's passage, retirees, as any other claimant, bore the burden of proving a loss of wage earning capacity.
3. A retiree-claimant may rebut the presumption *only* by a preponderance of evidence that the retiree is incapable due to a work-related injury of performing work within the retiree's qualifications, training, or experience. Previously, the act focused upon the narrower issue of a claimant's earning capacity within the claimant's *field* of employment.
4. Section 373 explicitly supersedes any standard of disability previously used to determine a claimant's eligibility for benefits under chapters 3 and 4 of the WDCA.

In my examination of the state of the law prior to § 373(1)'s enactment, it is readily apparent that the Legislature has chosen to impose a more stringent standard of disability upon the plaintiff's class of claimants.[9] Although the definition of disability is couched within a procedural context, in

[9] For an excellent discussion of disability under the WDCA prior to the passage of § 373(1), see Comment, *Disability under the Michigan worker's compensation act,* 62 U Det L R 433 (1985).

light of its redefinition of a retiree's disability standard, I conclude that § 373(1)'s substantive elements merit paramount consideration.[10] Thus,

> [i]n accordance with the rule applicable to original acts, it is presumed that provisions added by the amendment affecting substantive rights are intended to operate prospectively. Provisions added by the amendment that affect substantive rights will not be construed to apply to transactions and events completed prior to its enactment unless the legislature has expressed its intent to that effect or such intent is clearly implied by the language of the amendment or by the circumstances surrounding its enactment. [1A Sands, Sutherland Statutory Construction (4th ed), § 22.36, pp 300-301.]

Because § 373(1) defines the substantive rule of disability and is therefore determinative of plaintiff's eligibility, I find that the plaintiff's rights in this instance, as with all others present under the WDCA, accrued at the time of injury and that this factor militates in favor of prospective application.[11]

REMEDIAL COMPONENT OF § 373(1)

However, even in the instance of a purely or predominantly substantive rule, retroactive application may be employed where the provision is further deemed to be remedial in nature:

> An exception to the general rule is recognized

[10] Accord, 2 Sands, Sutherland Statutory Construction (4th ed), § 41.09, p 397.

[11] Cf. *Wright v State Accident Ins Fund*, 43 Or App 279; 602 P2d 1086 (1979), rev'd on other grounds 289 Or 323; 613 P2d 755 (1980), which held an amendment to the presumption of disability applied to fire fighters under the Oregon WDCA applied to those injured *prior* to its effective date because it did not effect a substantive change in the plaintiff's burden of proof.

where a statute is remedial or procedural in nature. . . . *Thus, statutes which operate in furtherance of a remedy or mode of procedure and which neither create new rights nor destroy, enlarge, or diminish existing rights are generally held to operate retrospectively* unless a contrary legislative intention is manifested. [*Franks, supra* at 672. Emphasis added.]

The defendant argues and I agree that the instant provision is "remedial" in that it was designed to counter decades of alleged abuse under the workers' compensation system:

For many years the most hotly discussed topic concerning the Michigan workers' compensation system was the so-called "retiree problem." It was almost unique to this State. Its legal underpinning was the notion developed by the Workers' Compensation Appeal Board, with some support from the judiciary . . ., that a retired worker, even one who had voluntarily retired and gone on a company-funded pension, could still be suffering from a loss of wage earning capacity. If the retiree could demonstrate that he or she had incurred a disability caused by pre-retirement job activity or working environment (a bad back from 30 years on the assembly line or a dust disease from 30 years in a foundry), the retiree was entitled to workers' compensation. It should be emphasized that in many of these cases the disability was undoubtedly genuine, at least in the physical impairment sense, and such an employee would unquestionably be eligible for medical benefits. The fighting issue was whether he was also entitled to recover for wage loss. . . . [F]or a "Big Three" automobile manufacturer (the most common target of this practice), it was plainly provoking, not to mention costly, to see workers take early retirement and walk out of a plant one day and then proceed to file workers' compensation claims the next week. [St. Antoine, Report on *Workers' Compensation in Michigan: Costs, Benefits, and Fairness* (1984), p 60.]

However, in *Franks,* this Court cautioned that this exception is inapplicable where " '[retroactive application would] also significantly and detrimentally affect the substantive right of certain injured employees to *receipt* of workers' compensation benefits.' " *Franks, supra* at 673. (Emphasis added.)

The defendant argues that the instant provision does not impair plaintiff's substantive right to benefits. I disagree. Defendant is correct that a claimant's benefit levels are not vested so as to shield them from review at a future date:

> The right to workmen's compensation disability benefits depends on whether, at a given point in time, the claimant is within the statutory intendment. The scope of that intendment is subject to change. A determination that a claimant is not today entitled to disability benefits does not preclude reexamination of his entitlement should the facts or the law, by legislative amendment or court decision, change tomorrow. Entitlement to continuing disability benefits is an open question. [*Hlady v Wolverine Bolt Co,* 393 Mich 368, 391; 224 NW2d 856 (1975) (LEVIN, J., concurring).]

However, unlike the provisions addressed in *Franks* and *Selk, supra,* § 373(1) embodies the substantive determination whether a retiree is entitled to *any* benefits. Although defendant asserts the provision does not truly concern benefit entitlement, in that it excludes medical benefits, I find the compensation excluded from § 373(1) is secondary to the basic entitlement to compensation benefits which sustain an injured employee's livelihood.

Although defendant argues that § 373(1) should be applied only to benefits received after its effective date, I conclude that defendant's construction would subject plaintiff to a substantive rule of law

not in existence at the time his rights accrued under the WDCA. This Court should be reticent to impose a stricter standard of review which could conceivably eliminate a claimant's entitlement to compensation benefits where they were injured prior to January 1, 1982.[12]

## CONCLUSION

Section 373(1) cannot be divorced from the WDCA overall policy to balance economic fairness to employers against the protection of injured workers. Thus, in light of our prior decisions, the absence of clear legislative intent, and the statute's predominant substantive effect upon a claimant's entitlement to benefits, I would hold that § 373(1) is applicable solely to employees injured after its effective date. I would affirm the May 2, 1986, decision of the Workers' Compensation Appeal Board and vacate the peremptory reversal of the Court of Appeals.

GRIFFIN, J. (*dissenting*). This appeal focuses upon § 373,[1] an amendment of the Workers' Disability Compensation Act,[2] which created a rebuttable presumption that employees who retire, receive a nondisability pension or social security benefits, and then apply for workers' compensation are not disabled within the meaning of a standard set forth in the amendment. The issue to be decided is whether the presumption applies in this case which was pending at the time of enactment and

[12] The fact that this individual claimant may be able to rebut the § 373(1) presumption (see *ante,* p 401 for the hearing referee's findings), is not dispositive. Our construction must be premised upon the provision's effect at large and in light of the other factors examined in this opinion.

[1] MCL 418.373; MSA 17.237(373).

[2] MCL 418.101 *et seq.;* MSA 17.237(101) *et seq.*

where the plaintiff-retiree claims to have suffered a work-related injury prior to the amendment's effective date. Since § 373 contains no exception from coverage for retirees claiming injury before its effective date, and in view of its remedial purpose directed at a perceived abuse of the workers' compensation system, I would hold that it is applicable in this case with respect to workers' compensation benefits payable after January 1, 1982, when the amendment became effective.

I

As a general rule, "statutes are presumed to operate prospectively unless the contrary intent is clearly manifested." *Selk v Detroit Plastic Products,* 419 Mich 1, 9; 345 NW2d 184 (1984). An exception to the general rule is recognized where a statute is remedial or procedural in nature. *Franks v White Pine Copper Div,* 422 Mich 636, 672; 375 NW2d 715 (1985); *Selk, supra* at 10; *Hansen-Snyder Co v General Motors Corp,* 371 Mich 480, 485; 124 NW2d 286 (1963). Moreover, "a statute is not regarded as operating retrospectively merely because it relates to an antecedent event . . . ." *Franks, supra* at 671; *Selk, supra* at 9.

A

In the case at bar, plaintiff argues that § 373(1) is substantive, rather than procedural. He maintains that § 373(1) establishes a new, more stringent standard of disability for those receiving nondisability pension or social security benefits. Plaintiff contends that prior to enactment of § 373 a retiree-claimant could satisfy the disability requirement then in effect by demonstrating impair-

ment of wage-earning capacity within his particular field of employment. *Kaarto v Calumet & Hecla, Inc,* 367 Mich 128; 116 NW2d 225 (1962). He points out that the standard embodied in § 373(1) requires a showing of inability "to perform work suitable to the employee's qualifications, including training or experience." Plaintiff argues that this "new standard" affects the substantive rights of retiree-claimants and therefore should be applied prospectively.

Plaintiff relies on *Hurd v Ford Motor Co,* 423 Mich 531, 534; 377 NW2d 300 (1985). In that case, the Court examined § 301(2),[3] another provision of the same public act, 1980 PA 357, and found that it "was enacted to invalidate this Court's decision in *Deziel v Difco Laboratories, Inc (After Remand),* 403 Mich 1; 268 NW2d 1 (1978), thus effecting a substantive change in the law and that the provisions of this amendment have prospective application."

Prior to enactment of § 301(2), at issue in *Hurd,* the eligibility of an employee with a mental disorder for workers' compensation was determined by the "honest perception" standard set forth in *Deziel, supra.* In *Hurd,* however, we concluded that by enacting § 301(2), as part of 1980 PA 357, the Legislature changed the standard of mental disability and that such a change was substantive in nature.

Justice MOODY was quite right when he wrote:

> Whether a ruling is procedural or substantive is sometimes difficult to decide; a legal rule may have both procedural and substantive aspects that are difficult to separate. [Moody, *Retroactive appli-*

[3] MCL 418.301(2); MSA 17.237(301)(2).

*cation of law-changing decisions in Michigan,* 28 Wayne L R 439, 449, n 44 (1982).][4]

I believe that a careful reading of § 373(1) reveals that it is both procedural and substantive in its wording and effect. The provision might be regarded as purely procedural if it contained only the following:

> (1) An employee who terminates active employment and is receiving nondisability pension or retirement benefits under either a private or governmental pension or retirement program, including old-age benefits under the social security act, 42 USC 301 to 1397f, that was paid by or on behalf of an employer from whom weekly benefits under this act are sought shall be *presumed* not to have a loss of earnings or earning capacity as the result of a compensable injury or disease under either this chapter or chapter 4.

However, the provision also includes these words:

> This presumption may be rebutted only by a preponderance of the evidence that the employee is unable, because of a work related disability, to perform work suitable to the employee's qualifications, including training or experience. *This standard of disability supersedes other applicable standards used to determine disability under either this chapter or chapter 4.* [Emphasis supplied.]

Obviously, § 373(1) refers both to a "presumption" and to a "standard of disability." The language of § 373 itself makes clear that the standard set forth is different than that which would other-

[4] Justice MOODY's commentary focused upon judicial changes in the law; however, I believe his statement is equally applicable to statutory changes.

wise apply. Such an interpretation is indicated by the addition of § 373(2) which mandates that eligibility for medical benefits shall not be barred by the new standard. Furthermore, the Legislature's intent to establish a new and different disability standard is emphasized by the inclusion of this language:

> *This standard* of disability *supersedes* other applicable standards used to determine disability under either this chapter or chapter 4. [Emphasis supplied.]

While recognizing its procedural characteristics, I believe that § 373, when viewed as a whole, reflects a purpose on the part of the Legislature to change the disability standard applicable to an "employee who terminates active employment and is receiving . . . benefits under either a private or governmental pension or retirement program . . . ." Furthermore, I agree with the plaintiff that the standard set forth in § 373(1) is more stringent than the one which otherwise would have obtained. See *Kaarto, supra; Adair v Metropolitan Building Co,* 38 Mich App 393; 196 NW2d 335 (1972).[5] Consistent with the holding in *Hurd, supra,* I conclude that § 373 is substantive as well as procedural in nature.

B

Defendant argues that even if § 373 is substantive, it should be applied retrospectively because it

[5] See, generally, St. Antoine, *Workers' Compensation in Michigan: Costs, Benefits, and Fairness* (1984); 2 Larson, Workmen's Compensation Law, § 57.22; Welch, Worker's Compensation in Michigan: Law & Practice, § 8.01 *et seq.;* Leslie, *The tortured course of the definition of disability in Michigan workers' compensation law, past, present and future,* 5 Cooley L R 65 (1988).

is a remedial statute, citing *Rookledge v Garwood,* 340 Mich 444, 453; 65 NW2d 785 (1954).

In *Rookledge* this Court held:

> It is generally understood that if a statute or amendment is "designed to correct an existing law, redress an existing grievance, or introduce regulations conducive to the public good," it will be regarded as remedial in nature. *In re School District No 6, Paris and Wyoming Townships, Kent County,* 284 Mich 132, 144 [278 NW 792 (1938)]. The same connotation is given to those statutes or amendments which apply to procedural matters rather than to substantive rights. The definitive rule in this respect, found in 50 Am Jur, pp 33, 34, Statutes, § 15, is:
>
> "Legislation which has been regarded as remedial in its nature includes statutes which abridge superfluities of former laws, remedying defects therein, or mischiefs thereof implying an intention to reform or extend existing rights, and having for their purpose the promotion of justice and the advancement of public welfare and of important and beneficial public objects, such as the protection of the health, morals, and safety of society, or of the public generally."

There can be no question but that § 373 was enacted by the Legislature for the purpose of remedying a perceived abuse of the workers' compensation system. Professor Theodore St. Antoine, who served two governors as an adviser on workers' compensation reform, described the problem in a report to Governor Blanchard in these terms:

> For many years the most hotly discussed topic concerning the Michigan workers' compensation system was the so-called "retiree problem." It was almost unique to this State. Its legal underpinning was the notion developed by the Workers' Compensation Appeal Board, with some support from the

judiciary, . . . that a retired worker, even one who had voluntarily retired and gone on a company-funded pension, could still be suffering from a loss of wage earning capacity. If the retiree could demonstrate that he or she had incurred a disability caused by pre-retirement job activity or working environment (a bad back from 30 years on the assembly line or a dust disease from 30 years in a foundry), the retiree was entitled to workers' compensation. It should be emphasized that in many of these cases the disability was undoubtedly genuine, at least in the physical impairment sense, and such an employee would unquestionably be eligible for medical benefits. The fighting issue was whether he was also entitled to recover for wage loss. . . . [F]or a "Big Three" automobile manufacturer (the most common target of this practice), it was plainly provoking, not to mention costly, to see workers take early retirement and walk out of a plant one day and then proceed to file their workers' compensation claims the next week. [St. Antoine, Report on *Workers' Compensation in Michigan: Costs, Benefits, and Fairness* (1984), p 60.]

As early as 1975, Professor St. Antoine, as chairman of the Governor's Workmen's Compensation Advisory Commission, had delivered a report to Governor Milliken which stated in part:

The question of the retirees is one of the most important, and perhaps the single most intractable, of all the issues currently arising under the Michigan workmen's compensation system. In 1973, the "Big Three," General Motors, Ford, and Chrysler paid out over 24 million dollars to retirees. With the additional costs of administering these claims and, where necessary or appropriate, retaining counsel, the total costs to the companies exceeded $30 million. According to the Michigan Department of Commerce Data Base, other self-

insurers and the insurance carriers paid almost as much, over 20 million dollars. Hence the total cost of claims by retirees exceeded 60 million dollars in 1973, the most recent year for which reasonably firm statistics are available. With increased benefit levels since 1973 and an increased volume of claims, reasonable estimates for the total retiree cost in Michigan for 1975 range from 80 to 90 million dollars. [*Report of Governor's Workmen's Compensation Advisory Commission* (1975), p 17.]

Although the 1975 advisory commission was unable to reach agreement upon recommendations for improvement of the system in Michigan, the report further stated:

> As a solution, some employer spokesmen offer a two-step approach. Any worker who retired because of old age or under a pension plan would be rebuttably presumed to have removed himself from the labor market and therefore not capable of suffering a loss of earning capacity. The presumption could be overcome by evidence showing that the worker had been unable to obtain substantial employment because of a disability rather than because of age or economic conditions. Then, after rebutting the presumption, any retiree-claimant who was also eligible for pension benefits would have his workmen's compensation reduced to the extent of his employer funded pension benefits.
>
> This solution addresses what many employers consider to be the central problem: Is the retiree prevented from working by a disability which occurred in and arose out of the course of employment or has the retiree withdrawn from the labor market and is merely seeking a little something extra? [*Id.*, p 21.]

In 1977 an attempt to enact legislation dealing

with the "retiree problem" fell short.[6] One commentator, in summarizing this effort, stated:

> Some of the notorious abuses of workers' compensation in Michigan were also attacked by S. 1285 . . . . More importantly for curbing the "retiree problem," S. 1285 would have created a rebuttable presumption that retirees have not suffered a loss of earnings or earning capacity as a result of a compensable injury or disease. [Hunt, *Workers' Compensation in Michigan: Problems and Prospects* (Kalamazoo: W. E. Upjohn Institute for Employment Research, 1979), pp 22-23.]

On April 11, 1979, Governor Milliken delivered a special message to the Legislature on workers' compensation which further underscored the remedial nature of the legislation embodied in § 373. He said:

> A frequent criticism is that Michigan, almost alone among the states, pays a large portion of its workers' compensation benefits to persons who have left the labor market for reasons other than disability.

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[6] See 1977 Journal of the Senate 2350-2351, and proposed SB 1285, § 371(1) which would have provided:

> An employee who retires or who otherwise terminates active employment and is eligible for or receiving pension or retirement benefits under a private or governmental program or is eligible for or receiving social security retirement benefits, shall be presumed not to have a loss of earnings or earning capacity as the result of a compensable injury or disease. This presumption may be rebutted only by proof by the employee by a preponderance of the evidence that the employee is unable, solely because of disability as defined in this act, to perform substantial work suitable to the employee's qualifications, training, or experience and not merely disabled from earning full wages at the work in which the employee was last subject to the conditions resulting in disability. This subsection shall not be construed as a bar to receiving medical benefits payable under section 315.

> I recommend that we eliminate or minimize compensation payments to those persons no longer in the labor market.
>
> Previous reform negotiations have produced general agreement that a presumption should be established that recipients of pensions and social security retirement benefits have not suffered a loss of earning capacity, unless rebutted by a preponderance of evidence. This presumption should be established in the statute. [1979 Journal of the Senate 608.]

Finally, on December 30, 1980, while this case was pending before the hearing referee, § 373 was enacted by the Michigan Legislature as part of 1980 PA 357,[7] the first step in a series of reforms of the Michigan workers' compensation system. In light of the legislative history and other circumstances surrounding its enactment, I would conclude that § 373 is remedial[8] within the meaning of the rule laid down in *Rookledge, supra.* See also *Lahti v Fosterling,* 357 Mich 578; 99 NW2d 490 (1959); *Karl v Bryant Air Conditioning Co,* 416 Mich 558; 331 NW2d 456 (1982).

C

As this Court said in *Karl, supra* at 575, a remedial statute may operate retrospectively if it does not "take away vested rights." See also *Ballog v Knight Newspapers, Inc,* 381 Mich 527; 164 NW2d 19 (1969); *Hansen-Snyder, supra.*

In assessing whether a "vested" right would be taken away, it is important to have in mind that

[7] For additional information on the legislative history of 1980 PA 357, see VanderLaan & Studley, *Workers' compensation reform: A case study of the legislative process in Michigan,* 14 U Mich J L Ref 451 (1981).

[8] In *Hurd, supra,* the Court did not find that the statute there involved was remedial in the sense of *Rookledge.*

the nature of the right to workers' compensation is quite different from the right to recover damages in tort or other civil actions. As the Court said in *Franks, supra* at 654:

> Workers' compensation benefits are social-welfare income-maintenance benefits. Workers' compensation is the first or progenitor safety net providing a means of income maintenance for persons who have met misfortune or whose regular income source has been cut off. All the social welfare programs—workers' compensation, unemployment compensation, social security old age, disability, and survivors benefits, no-fault automobile benefits, aid to families with dependent children, and general assistance—are directed to the same objective, income maintenance. All these programs are funded by impositions on employers and others of mandatory payments (to the government, insurers or, in the case of the self-insured, to the beneficiary), with statutorily prescribed benefits. *In providing for such benefits, the Legislature did not covenant not to amend the legislation.* [Emphasis supplied.]

In a concurring opinion, Justice LEVIN in *Franks, supra* at 683, wrote:

> Workers' compensation benefits are payable weekly, and are geared to weekly wage loss. The nature of workers' compensation is that events after an award of benefits may change the extent of an entitlement to benefits. A disabled worker may cease to be disabled or obtain gainful employment. The number of the worker's dependents may change. The right to receive workers' compensation benefits thus generally depends on one's status, week by week, and is subject to change during any week.
>
> A workers' compensation award, thus, differs from a judgment in a tort action where, when the plaintiff prevails, a lump-sum award is fixed and

payable without regard to whether predictions concerning the severity or longevity of the claimed damages are borne out by subsequent experience.

Taking into consideration the nature of the right to workers' compensation, I conclude that § 373 does not abolish or take away vested rights. See also *Rookledge, supra; Harsha v Detroit,* 261 Mich 586; 246 NW 849 (1933); *Bejger v Zawadzki,* 252 Mich 14; 232 NW 746 (1930).

D

Even though a statute is remedial and does not abolish or take away vested rights, it will not be applied retrospectively if a contrary legislative intent has been manifested. *Karl, supra* at 571; *Selk, supra* at 10, citing *Rookledge, supra.*

In other words, the question whether a statute is to apply prospectively or retrospectively is always governed, in the final analysis, by legislative intent if it can be determined. As the Court has said, "the *Rookledge* principle is also simply one of statutory construction." *Selk, supra* at 10.

As the Court of Appeals said in *Wojciechowski v General Motors Corp,* 151 Mich App 399, 408-409; 390 NW2d 727 (1986), the Legislature did not indicate "its retrospective or prospective intention [with respect to § 373] in clear and express language." Furthermore, a careful examination of the statute and the circumstances surrounding its enactment reveal no manifest intent that its provisions should not apply to one whose injury preceded the effective date. On the contrary, legislative history subsequent to its enactment tends to confirm an intent that § 373 should apply to all "employee[s] who terminate active employment and [are] receiving nondisability pension or retire-

ment benefits" regardless of when they were injured.

Notice should be taken of the fact that on May 14, 1987, the Legislature enacted and gave immediate effect to 1987 PA 28, which amended various provisions of the Workers' Disability Compensation Act. Included was an amendment of § 354(17) (providing for coördination of social security and certain employer-financed benefits). The amendment provides:

> The decision of the Michigan Supreme Court in *Franks v White Pine Copper Division,* 422 Mich 636 (1985) is declared to have been erroneously rendered insofar as it interprets this section [§ 354], it having been and being the legislative intention not to coördinate payments under this section resulting from liability pursuant to section 351, 361, or 835 for personal injuries occurring before March 31, 1982. It is the purpose of this amendatory act to so affirm. This remedial and curative amendment shall be liberally construed to effectuate this purpose.

Without venturing comment concerning the constitutionality of such a pronouncement, an issue not before us, I believe the amendment sheds some light on the intent of the Legislature, at least as of May 14, 1987.

It is significant that the Legislature, through its limited and carefully worded amendment, sought to "overrule" only that part of our decision in *Franks* which interpreted § 354. Of course, in *Franks* we also considered whether § 358 (providing for the offset of unemployment compensation benefits) should apply to a workers' compensation claimant whose injury preceded the provision's effective date. We held that "the setoff provision of § 358 may be applied to reduce workers' compensa-

tion liability to workers injured prior to its effective date." *Franks, supra* at 668-669.

It is also noteworthy that on May 14, 1987, when the Legislature enacted 1987 PA 28, which amended § 354 and several other sections of the act, it chose not to amend § 373, despite the fact that more than a year earlier, on May 5, 1986, the Court of Appeals in *Wojciechowski, supra* at 408, had ruled that § 373 "which creates a presumption of no loss of wage earning . . . should be retroactively applied" in a case where the injury occurred prior to the provision's effective date.

Of course, courts should not read too much into silence on the part of the Legislature. On one occasion Justice VOELKER caustically questioned that members of the Legislature are "clamoring and elbowing each other in their zeal to get at the pearls of wisdom embalmed in the latest decisions and advance sheets . . . ." *Van Dorpel v Haven-Busch Co,* 350 Mich 135, 146; 85 NW2d 97 (1957).[9]

However, where, as in the case of workers' compensation reform legislation, the final product of intense bargaining represents a compromise to accommodate strong, divergent interests, it would be unrealistic to believe that the contending forces in and beyond the Legislature were not fully aware of what was left out of the package, as well as what was included. Particularly in such situations, silence and inaction on the part of the Legislature, can be very meaningful.[10]

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[9] Criticizing courts which rely too heavily on legislative silence, Justice VOELKER referred to the practice as the "Rip-Van-Winkle doctrine of judicial stagnation and inertia," *Van Dorpel, supra* at 148.

[10] As a part of 1982 PA 32, approved with immediate effect on March 10, 1982, the Legislature repealed the enacting clause of 1980 PA 357, and simultaneously reenacted § 373 along with certain other provisions, providing again that § 373 "shall take effect January 1, 1982." As we noted in *Franks, supra* at 668, that action taken subsequent to January 1, 1982, had the effect at the time of directing retrospective operation of § 373.

Guidance may also be drawn from the fact that, while it enacted 1980 PA 357 on December 30, 1980, the Legislature specifically directed that § 373 should not take effect until a year later, on January 1, 1982. Comments made by Justice LEVIN in *Franks,* although related to other provisions of the 1980 and 1981 reform acts, are equally applicable to § 373:

> The legislative purpose in providing a specific future effective date was to indicate when the provisions of the amendatory acts . . . would take effect.
>
> * * *
>
> [T]here is no basis in the language of the . . . reform legislation or in its history that would justify the conclusion that the Legislature, which expressly stated that these amendments were all to become effective on January 1, 1982, did not intend that they would be effective as to all weekly payments of workers' compensation becoming due on or after that effective date even though the worker was injured before that date. [*Id.* at 681, 683-684 (LEVIN, J., concurring).]

Moreover, when the effectiveness of a statute has been postponed to a specific future date (for one year in the case of § 373) it seems reasonable to believe, in the absence of some contrary indication, that a purpose of the Legislature was to provide advance notice to those who would be affected by its provisions. Obviously, if, as plaintiff contends, the Legislature had intended that § 373 should apply only to those who would be injured in work-related accidents occurring after the effective date, the purpose of notice could not be served.

In the absence of contrary intent expressed by the Legislature (e.g., such as that provided with respect to § 354), I believe a reasonable construc-

tion requires that a statute which contains a specific future effective date should be applied from and after that date to all who are expressly covered by its terms. The Legislature has often demonstrated that when it wishes to "grandfather" or except from coverage a particular group, it can find the language to do so.

Accordingly, I would hold that the provisions of § 373 of 1980 PA 357 are applicable with respect to workers' compensation benefits payable after January 1, 1982, in determining the amount, if any, of weekly benefits due and payable to any employee described in § 373(1) without regard to when the employee may have been injured or disabled.

LEVIN, J., concurred with GRIFFIN, J.

KINCAID v DETROIT MUTUAL INSURANCE COMPANY

Docket No. 81128. Argued April 5, 1988 (Calendar No. 5). Decided October 3, 1988.

Dennis Kincaid was awarded workers' compensation benefits, payable as the obligation of his employer, the Detroit Mutual Insurance Company, as a result of total and disabling injuries sustained in the course of his employment. It was additionally determined that he was entitled to differential benefits payable by the Second Injury Fund. The Workers' Compensation Appeal Board affirmed. Thereafter, 1980 PA 357, § 352(1), established a new entitlement to supplemental benefits intended as a cost-of-living adjustment of an eligible employee's basic compensation rate. Detroit Mutual determined that Kincaid was not entitled to the supplement. 1982 PA 32, amended § 352(1) to provide that the supplement be computed as a percentage of an employee's weekly compensation rate and amended § 352(5) to provide that the supplement be reduced by the amount of differential benefits being received by the employee. Detroit Mutual again determined that Kincaid was not entitled to the supplement. Kincaid contested the interpretation, and a hearing referee awarded supplemental benefits. The Workers' Compensation Appeal Board reversed, finding that the calculation of supplemental benefits was intended to be based exclusively upon the weekly compensation rate paid by the employer and not the sum total of the weekly compensation rate plus the differential benefits paid by the Second Injury Fund. The Court of Appeals, MICHAEL J. KELLY, P.J., and SULLIVAN and P. R. JOSLYN, JJ., reversed (Docket No. 89177). The defendant appeals, limited to the issue how the phrase "weekly compensation rate" of § 352(1) should be interpreted.

In an opinion by Justice GRIFFIN, joined by Chief Justice RILEY and Justices LEVIN and BRICKLEY, the Supreme Court *held:*

The phrase "weekly compensation rate" as used in § 352(1) of the Workers' Disability Compensation Act, which provides cost-

REFERENCES

Am Jur 2d, Workmen's Compensation §§ 385 *et seq.*

See the Index to Annotations under Workers' Compensation.

of-living supplemental benefits, refers only to the amount of weekly compensation payable as the obligation of the employer; the words do not refer to or include the amount of differential benefits payable under § 521(2) as the obligation of the Second Injury Fund.

1. The enactment of § 352(1) of the workers' compensation act by 1980 PA 357, which established the supplement to weekly compensation, was intended to be an integral part of a comprehensive effort to reform the workers' compensation system in Michigan. Prior to its enactment, legislative concern for the effects of inflation principally focused upon the plight of the long-term disabled recipient who received no inflation adjustments, rather than upon the totally and permanently disabled recipient who received a differential benefit. 1980 PA 357, § 352(1) created for the first time a workers' compensation benefit wholly funded through taxes paid by the public at large to be administered by a state agency, the Compensation Supplement Fund. By contrast, differential benefits paid by the Second Injury Fund are funded through assessments against self-insured employers and workers' compensation insurance carriers.

2. The modification of the phrase "basic compensation rate" of § 352(1) by 1982 PA 32 to read "weekly compensation rate" was not made for the purpose of changing or broadening its meaning. The relationship of the phrase as modified with the other words in § 352(1) and language in other provisions of the act points to the conclusion that the modification was intended to clarify, rather than expand, the meaning, to refer to compensation which is the obligation of the employer. The change from "basic compensation" in 1980 PA 357 to "weekly compensation" in 1982 PA 32 was made merely for the purpose of conforming and making more consistent the wording within § 352(1) and in its relation to other sections of the act. It was employed as a shorthand abbreviation of the employer's obligation to pay disability as spelled out in detail in § 351.

Reversed.

Justice ARCHER, joined by Justice CAVANAGH, dissenting, stated that the phrase "weekly compensation rate" as used in § 352(1) of the workers' compensation act which provides cost-of-living supplemental benefits refers to the actual rate of compensation received by an employee rather than only that portion of the amount of weekly compensation payable as the obligation of the employer. When the statute is viewed as a whole, it is apparent that a broader meaning was intended by the substitution of "weekly" for "basic." Such a construction ensures that an injured worker will receive adequate benefits,

meaningfully supplemented to compensate for inflation and its effect on purchasing power.

Justice BOYLE concurred only in the result suggested by Justice ARCHER.

160 Mich App 580; 408 NW2d 820 (1987) reversed.

WORKERS' COMPENSATION — SUPPLEMENTAL BENEFITS — DIFFERENTIAL BENEFITS — WEEKLY COMPENSATION RATE — WORDS AND PHRASES.

The phrase "weekly compensation rate" as used in § 352(1) of the Workers' Disability Compensation Act, which provides cost-of-living supplemental benefits, refers only to the amount of weekly compensation payable as the obligation of the employer; the words do not refer to or include the amount of differential benefits payable under § 521(2) as the obligation of the Second Injury Fund (MCL 418.352[1], 418.521[2]; MSA 17.237[352][1], 17.237[521][2]).

*Kelman, Loria, Downing, Schneider & Simpson* (by *Barbara F. Grossman* and *George L. Downing*) for the plaintiff.

*John P. Baril* for defendants Detroit Mutual Insurance Company and Liberty Mutual Insurance Company.

*Frank J. Kelley,* Attorney General, *Louis J. Caruso,* Solicitor General, and *Ray W. Cardew, Jr.,* Assistant Attorney General, for defendant Compensation Supplement Fund.

GRIFFIN, J. In this case we are asked to determine whether the phrase "weekly compensation rate" in § 352(1)[1] of the Workers' Disability Compensation Act,[2] as amended, refers (1) to the amount of weekly compensation payable as the obligation of the employer under § 351(1) to a disabled employee, or (2) to the total of such weekly compensation payable by the employer

[1] MCL 418.352(1); MSA 17.237(352)(1).

[2] MCL 418.101 *et seq.;* MSA 17.237(101) *et seq.*

*plus* the amount of "differential" benefits payable weekly by the Second Injury Fund under § 521(2),[3] where an employee is totally and permanently disabled. We hold that the phrase refers only to the amount of the employer's obligation, and thus we reverse the decision of the Court of Appeals.

I

Dennis Kincaid was injured on January 12, 1970, in the course of his employment with the Detroit Mutual Insurance Company. On December 31, 1975, a hearing referee found Kincaid to be totally and permanently disabled. In addition to compensation payable weekly as the obligation of his employer pursuant to § 351(1), it was determined that Kincaid was entitled to "differential" benefits payable weekly as the obligation of the Second Injury Fund pursuant to § 521(2). Both awards were affirmed by the Workers' Compensation Appeal Board, and no appeal was taken.

As of January 1, 1982, Kincaid was receiving compensation from his employer in the amount of $80 a week, and a "differential" benefit from the Second Injury Fund in the amount of $86.67 a week. That was the effective date of § 352(1) which, as part of 1980 PA 357, established a new entitlement to "supplemental" benefits, intended as a cost-of-living adjustment for eligible employees with injury dates between September 1, 1965, and December 31, 1979.

In accordance with an interpretation of § 352(1) issued through the Compensation Supplement Fund (CSF) by the Director of the Bureau of Workers' Disability Compensation, Kincaid's employer determined that Kincaid was not entitled to a

[3] MCL 418.521(2); MSA 17.237(521)(2).

supplement. Section 352(1),[4] as amended by 1982 PA 32, provides that "[t]he supplement shall be computed as a percentage of the *weekly compensation rate"* which the employee is receiving on January 1, 1982. Furthermore, § 352(5) provides that "the supplement [shall be] reduced by the amount of the differential payments" which the employee is receiving.

The parties agree that in calculating the amount of an employee's "supplemental" benefit, the inflation factor to be applied under the statute in the case of this employee injured in the year 1970 is seventy-one percent (0.71). However, there is disagreement as to how the calculation should be made.

In accordance with the CSF's interpretation, the employer calculated Kincaid's supplement by multiplying the amount of his weekly compensation payable by the employer ($80) by the inflation factor (0.71), which produced a preliminary supplement of $57 per week. However, when Kincaid's weekly differential benefit of ($86.67) was then subtracted from $57, as required by § 352(5), the negative result indicated that Kincaid was not entitled to a supplement.

Kincaid filed a petition, contesting the interpretation. He argued that the inflation factor (0.71) should be applied to $166.67, the total of the weekly amount paid by his employer ($80) plus the differential benefit paid by the Second Injury Fund ($86.67). From that product, $118, he would then deduct $86.67, his differential benefit, resulting in a supplemental benefit of $31.33 per week. On the basis of Kincaid's interpretation of the phrase "weekly compensation rate," he would be entitled

[4] 1982 PA 32 amended the phrase "basic compensation rate" in the third sentence of § 352(1) to read "weekly compensation rate." MCL 418.352(1); MSA 17.237(352)(1).

to receive $80 from his employer, $86.67 from the Second Injury Fund, and $31.33 from the CSF, or a total of $198 per week.[5]

In a decision mailed July 12, 1983, a hearing referee agreed with the plaintiff's interpretation. However, upon appeal, the WCAB reversed, stating:

> [W]e . . . find it was the intent of the Legislature in enacting Section 352(1) that the calculation of supplemental benefits should be based *exclusively* upon the *weekly compensation rate* paid by the employer, in this case, *and not* the sum total of the weekly compensation rate *plus* the differential benefits paid by the Second Injury Fund. [Emphasis in original.]

Thereafter, the Court of Appeals reversed the decision of the WCAB. 160 Mich App 580; 408 NW2d 820 (1987). We granted leave to appeal limited to the issue how the phrase "weekly compensation rate" in § 352(1) should be interpreted.

II

The dispute in this appeal centers on the question: What was the purpose and intent of the Legislature when, by adopting 1982 PA 32, it modified the phrase, "basic compensation rate" as it had appeared in § 352(1) of 1980 PA 357, to read "weekly compensation rate"?

Plaintiff concedes that the phrase, "basic compensation rate," in the earlier version had referred only to that compensation which is the obligation of the employer. However, he argues that by amending the phrase, the Legislature manifested

[5] Kincaid died on February 8, 1983, and his widow, Violet Kincaid, was substituted as plaintiff. Accordingly, insofar as the plaintiff in this case is concerned, our decision will determine the extent of Kincaid's entitlement to supplemental benefits between January 1, 1982, and February 8, 1983.

an intent to broaden its meaning so as to include the differential benefits he also received from the SIF.

On the other hand, the CSF contends that several amendments of § 352(1) made by 1982 PA 32, including the modification of "basic compensation rate" to "weekly compensation rate" were adopted for clarification purposes only, and that there was no intent on the part of the Legislature to change the meaning of § 352(1) in any respect. The CSF asserts that in the context of § 352(1) and the workers' compensation act as a whole the phrase "weekly compensation rate" is restrictive rather than expansive.

Agreeing with the position of the plaintiff, the Court of Appeals held:

> We hold that the differential benefits are not to be excluded from the *calculation* of the supplement, but are to be subtracted from the supplement *after* it has been calculated and before it is paid. We rely heavily on the amending language of § 352 which excluded the more narrow term "basic compensation" in favor of the broader term "weekly compensation." We find that the statute evidences an intent to include differential benefits within the meaning of weekly compensation. [160 Mich App 586-587. Emphasis in original.]

As we said in *In re Petition of State Hwy Comm*, 383 Mich 709, 714-715; 178 NW2d 923 (1970):

> The fundamental rule of construction of statutes is to ascertain and give effect to the intention of the Legislature; courts are bound, whenever possible, so to construe statutes as to give them validity and a reasonable construction; seeming inconsistencies in the various provisions of a statue should be reconciled, if possible, so as to arrive at a meaning which gives effect to all parts of the

statute; a construction leading to an absurd consequence should be avoided.

Since we find the phrase "weekly compensation rate" on its face to be ambiguous, it is appropriate that we look beyond the statute to its history and the circumstances surrounding its enactment. *Lakehead Pipe Line Co, Inc v Dehn,* 340 Mich 25; 64 NW2d 903 (1954).

III

Enactment of § 352(1) which established the "supplement" to weekly compensation was not an isolated occurrence. Rather, it was an integral part of a comprehensive effort to "reform" the workers' compensation system in Michigan. In a report delivered in 1975 to Governor Milliken, a Governor's Workmen's Compensation Advisory Commission, chaired by Professor Theodore St. Antoine, reviewed a number of problems and abuses relating to the system. The report included the following:

> Finally, there is the question of inflation. The continued erosion of the purchasing power of fixed benefits has made a mockery of prior efforts to maintain the dignity of the disabled worker. Even though fault need not be attributed to any part of the compensation system, the system has, nonetheless, failed to fulfill its promise to workers whose disabilities have continued from years ago to the present. So too, unless basic changes are enacted or unless inflation is miraculously halted, the system will fail to fulfill its promise to workers disabled today whose disabilities continue forward.
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> * * *
>
> The magnitude of inflation in the future cannot be accurately forecast, but it is possible to identify potential sources of the additional funds to main-

> tain the purchasing power of benefits. The three most likely sources are the *general fund, each particular carrier,* or *carriers in general.* [Emphasis supplied.]

A study by Dr. H. Allan Hunt, referred to by the WCAB in its opinion, included this historical perspective:

> During inflationary times like the present, the passage of just a few years with double-digit inflation can have a devastating impact on the standard of living of a disabled worker. This concern is reflected in the following statement by William Marshall, President of the Michigan AFL-CIO, concerning the Michigan workers' compensation system:
>
> "Perhaps the most inequitable part of our present law insofar as benefits is [sic] concerned, is the lack of a cost-of-living provision for injured workers. In this age where inflation is a fact of life, our current law fixes benefits as of the date of injury and condemns the disabled to an erosion of their purchasing power and in the final result to welfare."

Hunt, *Inflation Protection for Workers' Compensation Claimants in Michigan* (Kalamazoo: W. E. Upjohn Institute for Employment Research 1981), p 1.

However, as the WCAB opinion makes clear, the concern prior to 1980 PA 357 about the effects of inflation focused principally upon the plight of the long-term totally disabled who received no inflation adjustments, rather than the totally and permanently disabled who, since 1969, had been receiving a "differential" benefit as an inflation offset. As Dr. Hunt pointed out, by providing "differential" benefits to the totally and permanently disabled, Michigan was one of a few states then

providing any inflation relief to workers' compensation recipients. However, Dr. Hunt concluded that this was not enough since "[t]he result is that a total of less than 1,500 of the roughly 25,000 cases in active payment status were receiving such inflation adjustment payments as of late 1979." *Hunt, supra,* p 4.

On December 30, 1980, a breakthrough in the reform effort occurred when the Legislature passed, and the Governor signed 1980 PA 357, the first in a series of public acts which have revised the Workers' Disability Compensation Act. The 1980 reform act addressed a number of problems and concerns; however, one of the most significant provisions was § 352(1) providing for the "supplemental" benefit.

The legislation also created the Compensation Supplement Fund, an agency of the State of Michigan funded by legislative appropriations,[6] which bears the ultimate obligation for payment of the "supplemental" benefit. As the CSF points out, this step represented a sharp change in public policy because prior thereto, from the inception of the system, the burden of financing workers' compensation benefits had been placed by the Legislature

[6] MCL 418.391; MSA 17.237(391) provides in part:

> (1) The compensation supplement fund is created as a separate fund in the state treasury. The fund shall be administered by the state treasurer pursuant to this section. The legislature shall appropriate to the compensation supplement fund from the general fund the amounts necessary to meet the obligations of the compensation supplement fund under section 352, and the administrative costs incurred by the bureau under this section.
>
> (2) The director shall promulgate rules pursuant to Act No. 306 of the Public Acts of 1969, as amended, being sections 24.201 to 24.315 of the Michigan Compiled Laws, that prescribe the conditions under which the money in the compensation supplement fund shall be expended pursuant to section 352 and this section.

upon the employer or the industry which occasioned the employee's injury. See *Andrejwski v Wolverine Coal Co,* 182 Mich 298; 148 NW 684 (1914). Accordingly, enactment of § 352(1) created for the first time a workers' compensation benefit that is wholly funded through taxes paid by the public at large.

By contrast, it may be noted that while the Second Injury Fund is also a state agency, its obligation to pay "differential" benefits to totally and permanently disabled employees[7] is funded through assessments against self-insured employers and workers' compensation insurance carriers.[8]

In the light of that background, we now examine more closely the Legislature's use of the words, "weekly compensation rate," in the context of § 352(1) and in the workers' compensation act as a whole.

IV

As amended by 1982 PA 32, § 352(1) provides:

> Beginning January 1, 1982, an employee receiving or entitled to receive benefits equal to the maximum payable to that employee under *section 351* or the dependent of a deceased employee receiving or entitled to receive benefits under *section 321* whose benefits are based on a date of personal injury between September 1, 1965, and December 31, 1979, shall be entitled to a *supplement to weekly compensation.* The supplement shall be computed using the total annual percentage change in the state average weekly wage, rounded to the nearest 1/10 of 1%, as determined

[7] MCL 418.521(2); MSA 17.237(521)(2).

[8] MCL 418.551; MSA 17.237(551).

under section 355.[9] The supplement shall be computed as a percentage of the *weekly compensation rate* which the employee or the dependent of a deceased employee is receiving or is entitled to receive on January 1, 1982 had the employee been receiving benefits at that time, rounded to the nearest dollar. The supplement shall not exceed 5% compounded for each calendar year in the adjustment period. The percentage change for purposes of the adjustment shall be computed from the base year through December 31, 1981. A supplement shall not be paid retroactively for any period of disability before January 1, 1982. [Emphasis added.]

As the text makes clear, § 352(1) limits its application to those employees who receive benefits pursuant to §§ 321 and 351.

Section 321[10] provides benefits for the depen-

[9] MCL 418.355; MSA 17.237(355) provides:

(1) The maximum weekly rate shall be adjusted once each year in accordance with the increase or decrease in the average weekly wage in covered employment, as determined by the Michigan employment security commission.

(2) Effective January 1, 1982, and each January 1 thereafter, the maximum weekly rate of compensation for injuries occurring within that year shall be established as 90% of the state average weekly wage as of the prior June 30, adjusted to the next higher multiple of $1.00.

(3) For the purpose of computing the supplemental benefit under section 352, the state average weekly wage for any injury year shall be the average weekly wage in covered employment determined by the Michigan employment security commission for the 12 months ending June 30 of the preceding year.

[10] MCL 418.321; MSA 17.237(321) provides:

If death results from the personal injury of an employee, the *employer* shall pay, or cause to be paid, subject to section 375, in 1 of the methods provided in this section, to the dependents of the employee who were wholly dependent upon the employee's earnings for support at the time of the injury, a *weekly payment* equal to 80% of the employee's after-tax average weekly wage, subject to the maximum and minimum rates of

dents of a deceased employee. While the instant case does not relate to such benefits, a review of § 321 is nevertheless useful. It demonstrates on its face that the use in § 321 of the term "weekly compensation," as well as "weekly payments," refers solely to compensation for which the employer is obligated. Accordingly, the wording and obvious meaning of § 321 provide no support for plaintiff's argument that "weekly compensation rate" includes differential benefits, an obligation of the SIF.

We turn now to § 351(1) which provides:

> While the incapacity for work resulting from a personal injury is total, the *employer* shall pay, or cause to be paid as provided in this section, to the injured employee, *a weekly compensation* of 80% of the employee's after-tax average weekly wage, but not more than the maximum weekly rate of compensation, as determined under section 355. Compensation shall be paid for the duration of the disability. The conclusive presumption of total and permanent disability shall not extend beyond 800 weeks from the date of injury and thereafter the question of permanent and total disability shall be determined in accordance with the fact, as the fact may be at that time. [MCL 418.351(1); MSA 17.237(351)(1). Emphasis supplied.]

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compensation under this act, for a period of 500 weeks from the date of death. If at the expiration of the 500-week period any such wholly or partially dependent person is less than 21 years of age, a hearing referee or worker's compensation magistrate, as applicable, may order the *employer* to continue to pay the *weekly compensation* or some portion thereof until such wholly or partially dependent person reaches the age of 21. If the employee leaves dependents only partially dependent upon his or her earnings for support at the time of injury, the *weekly compensation* to be paid shall be equal to the same proportion of the *weekly payments* for the benefit of persons wholly dependent as 80% of the amount contributed by the employee to such partial dependents bears to the annual earnings of the deceased at the time of injury. [Emphasis added.]

While § 351(1) applies to all eligible employees whose incapacity for work is total, it should be kept in mind that some are totally incapacitated for a period of time, while others are totally and *permanently* disabled. It is clear that the "weekly compensation" referred to in § 351(1) is the basic or general compensation that is the obligation of the employer and which is received by all eligible employees who are totally incapacitated. As already indicated, a totally and permanently disabled employee, such as the plaintiff, may also receive "differential" benefits. However, his entitlement to "differential" benefits is not based on § 351; rather, it is based on § 521, to which no reference is made in § 351.

Although the words "*basic* compensation rate," in § 352(1), as it originally appeared in 1980 PA 357, were later modified by 1982 PA 32 to read "*weekly* compensation rate," we do not find, as plaintiff contends, that the modification was made for the purpose of changing or broadening the meaning of the term. Furthermore, plaintiff has been able to point to no legislative history which would support such an interpretation.

On the other hand, we believe the relationship of those words to other words within § 352(1), as well as to language used in other provisions of the act, points to the conclusion that the Legislature intended to clarify, rather than to expand, the meaning of the words.

As the CSF has pointed out, the term, "*basic* compensation," in the 1980 version of § 352(1), was a new term without definition which appeared nowhere else in the act. If the term had not been modified, there would have been a question whether "basic compensation" in the third sentence of § 352(1) referred to "weekly compensa-

tion" as used in the first sentence of the same section.

Furthermore, a review of the act reveals that the term "weekly compensation" and slight variations thereof are used in various sections throughout the act to refer to that compensation which is the obligation of the employer.[11] It is our conclusion that the words "basic compensation" were changed to "weekly compensation" merely for the purpose of conforming and making more consistent the wording within § 352(1) and in its relation to other sections of the act.[12]

After a careful examination of § 352(1) as well as §§ 321 and 351, we conclude that the WCAB was correct when it said:

> The Legislature's use [in § 352(1)] of the term "weekly compensation rate" was employed as a shorthand abbreviation of the *employer's* obligation as spelled out in detail in Section 351 to pay disability and that if it had intended to include *differential benefits* it had the opportunity to use a much broader term when writing the statute. [Emphasis in original.]

We also take note of the fact that 1982 PA 32 made several other changes in § 352(1) which were clarifying in nature. For example, by inserting the words "equal to the maximum payable to that employee" in the first sentence, it appears that the Legislature sought to reinforce its intent that the new "supplemental" benefit would be paid only to employees receiving benefits under §§ 321 and 351. Furthermore, the penultimate sentence of § 352(1)

[11] For example, see §§ 301(5)(b); 301(10); 321; 335; 351(1); 361(1); 371(1), (2); 372(1)(a), (b).

[12] See *Maglothin v Tryco Steel Corp*, 137 Mich App 640; 357 NW2d 914 (1984), wherein the amount of the supplemental benefit available under § 352(1) was determined by the parties on the basis of the amount of compensation payable by the employer.

was changed to delete "to 1982" and insert "through December 31, 1981." While the director might have administered the provision in the same way without such an amendment, it served to provide clarification.

Plaintiff cites *Van Dorpel v Haven-Busch Co,* 350 Mich 135; 85 NW2d 97 (1957), for the proposition that doubt as to the construction of a provision in the workers' compensation act should be resolved in favor of the worker. However, that proposition is counterbalanced in this case by the maxim that statutes granting the power to expend public funds are to be narrowly construed. 3 Sands, Sutherland Statutory Construction (4th ed), § 65.02, p 222. Furthermore, such doubt as may have existed is resolved upon a close examination of the context in which the phrase "weekly compensation rate" is used.

In the light of those considerations as well as the legislative history, we conclude that when it enacted § 352(1), the Legislature's principal purpose was to provide the supplemental benefit as inflation relief for the long-term totally disabled who previously had received no inflation adjustments. However, the Legislature also provided that those totally and permanently disabled who previously had been receiving inflation adjustments in the form of differential benefits would receive the supplement if, and only to the extent that, it exceeded the differential benefit in a particular case.

V

Accordingly, we hold that the words, "weekly compensation rate" in the third sentence of § 352(1), MCL 418.352(1); MSA 17.237(352)(1), refer only to the amount of weekly compensation pay-

able as the obligation of the employer, and the words do not refer to or include the amount of differential benefits payable pursuant to § 521, MCL 418.521; MSA 17.237(521), as the obligation of the Second Injury Fund.

We reverse the decision of the Court of Appeals and reinstate the order of the Workers' Compensation Appeal Board.

RILEY, C.J., and LEVIN and BRICKLEY, JJ., concurred with GRIFFIN, J.

ARCHER, J. (*dissenting*). The majority holds that the phrase "weekly compensation rate" in § 352(1)[1] of the Workers' Disability Compensation Act, refers only to that portion of the amount of weekly compensation payable as the obligation of the employer under § 351(1).[2] I dissent from this holding and would affirm the decision of the Court of Appeals, which held that the phrase "weekly compensation rate" refers to the actual rate of compensation received by an employee.[3]

I

Pursuant to § 352 of the Workers' Disability Compensation Act, an employee who is totally disabled or who is permanently and totally disabled is entitled to a supplement to his weekly compensation if the disabling injury occurred between September 1, 1965, and December 31, 1979. The relevant language of § 352 provides:

> The supplement shall be computed as a percentage of the *weekly compensation rate* which the

[1] MCL 418.352(1); MSA 17.237(352)(1).

[2] MCL 418.351(1); MSA 17.237(351)(1).

[3] *Kincaid v Detroit Mutual Ins Co*, 160 Mich App 580; 408 NW2d 820 (1987).

> employee or the dependent of a deceased employee is receiving or is entitled to receive on January 1, 1982 had the employee been receiving benefits at that time, rounded to the nearest dollar. [MCL 418.352(1); MSA 17.237(352)(1).]

The phrase "weekly compensation rate" appears in § 352(1) as enacted by 1982 PA 32, 1982 PA 282, and 1984 PA 46. As originally enacted by 1980 PA 357, § 352(1) contained the phrase "basic compensation rate." The Court of Appeals relied heavily on this change of phraseology in holding that the Legislature intended to expand the scope of benefits to be included in computation of the supplement.[4] Although the majority acknowledges that the Legislature effected this change in the statute, it states:

> [W]e do not find, as plaintiff contends, that the modification was made for the purpose of changing or broadening the meaning of the term. [*Ante,* p 439.]

This finding by the majority directly contravenes an elementary principle of statutory construction. The pertinent rule has been stated as follows:

> The courts have declared that the mere fact that the legislature enacts an amendment indicates that it thereby intended to change the original act by creating a new right or withdrawing an existing one. Therefore, any material change in the language of the original act is presumed to indicate a change in legal rights. [1A Sands, Sutherland Statutory Construction (4th ed), § 22.30, p 265.]

Accord *Sam v Balardo,* 411 Mich 405; 308 NW2d

[4] *Id.* at 587.

142 (1981); *Detroit Edison Co v Janosz,* 350 Mich 606, 613; 87 NW2d 126 (1957).

In *Lawrence Baking Co v Unemployment Compensation Comm,* 308 Mich 198, 205; 13 NW2d 260 (1944), the Court stated:

> "It will be presumed that the legislature, in adopting the amendment, intended to make some change in the existing law, and therefore the courts will endeavor to give some effect to the amendment. So a change of phraseology from that of the original act will raise the presumption that a change of meaning was also intended."

The majority fails to acknowledge this rule and cites insufficient evidence to rebut the presumption that the Legislature intended to make a substantive change when it amended the statute.

The majority attempts to justify its nullification of clear legislative intent by stating:

> [W]e believe the relationship of those words to other words within § 352(1), as well as to language used in other provisions of the act, points to the conclusion that the Legislature intended to clarify, rather than to expand, the meaning of the words.
>
> As the CSF has pointed out, the term, "*basic compensation,*" in the 1980 version of § 352(1), was a new term without definition which appeared nowhere else in the act. If the term had not been modified, there would have been a question whether "basic compensation" in the third sentence of § 352(1) referred to "weekly compensation" as used in the first sentence of the same section. [*Ante,* pp 439-440.]

This argument assumes that the term "weekly compensation" in the first sentence of § 352(1) refers only to that portion of the employee's

weekly benefits payable as the obligation of the employer. I disagree with this premise. There is nothing in § 352(1) that requires such a restrictive construction of the phrase "weekly compensation." A more reasonable construction is that the Legislature intended to change the more restrictive phrase "basic compensation," which would refer only to general disability benefits, to the broader term "weekly compensation rate" in order to ensure that the employee would receive a meaningful supplement to his prior total weekly benefits.

When the statute as a whole is reviewed, there are several instances where the phrases "weekly compensation," "weekly compensation rate," "weekly payments," and "weekly benefits" are used interchangeably to refer either to the obligation of the employer or to the total package of benefits to be received by an injured worker in a given week.[5] It follows that the Legislature intended to use the *broader* meaning of the term when it substituted the word "weekly" for the word "basic" in legislation designed to provide a supplement to the inflation-ravaged benefits relied upon by permanently and totally disabled workers.

A second elementary principle of statutory construction absent from the majority's analysis is the oft-stated maxim: *Expressio unius est exclusio alterius.* If the Legislature had intended to restrict the operation of § 352(1) to general disability benefits, it would have expressly said so. In drafting § 352, the Legislature expressly excluded recipients of certain types of benefits from eligibility for the supplement. For example, § 352(9) provides:

> This section does not apply to an employee

[5] See §§ 301(5)(b), 301(10), 321, 335, 351(1), (2), and (3), 353(2), 354(1), 357(1) and (2), 358, 360(1), 361(1), 371(2), 372(1)(a) and (b), 375(1), 801(2) and (5).

receiving benefits under § 361(1).[6] [MCL 418.352(9); MSA 17.237(352)(9).]

In contrast, the Legislature omitted differential benefits payable pursuant to § 521(2)[7] from the enumerated exceptions to application of the compensation supplement. Accordingly, the stated maxim applies, thereby precluding an inference of legislative intent to prohibit addition of differential benefits prior to application of the appropriate multiplier.

II

The majority indicates that it is attempting to give effect to legislative purpose in light of economic considerations as well as "legislative history." *Ante,* p 441. In making this attempt, the majority gives short shrift to the rule that ambiguities in the statute are to be resolved in favor of an injured worker. This fundamental tenet of statutory construction becomes even more crucial in the analysis of legislative provisions for permanently and totally disabled workers. In *King v Second Injury Fund,* 382 Mich 480, 490; 170 NW2d 1 (1969), the Court adopted this eloquent statement of the public policy of Michigan in granting relief to the plaintiff:

> "The Michigan legislature fully intended that the very few people who meet the restrictive definitions of 'total and permanent disability' needed to be placed in a very special class and provided with special attention. It is recognized that these people will be disabled for the remainder of their

[6] MCL 418.361(1); MSA 17.237(361)(1). This section provides a weekly benefit to partially disabled workers to partially compensate for the difference between an injured employee's earnings before and after the injury.

[7] MCL 418.521(2); MSA 17.237(521)(2).

> lives and that the wage structure and cost of living, with the years passing, is rising. It is recognized that these people will need special attention because they cannot earn a living and must hire others to perform household tasks such as cutting their grass, shoveling their snow, and other tasks which a person not so seriously crippled would be able to perform without hired help. To limit such a person to two-thirds of his wage for the rest of his life would mean that he would be getting an extremely small and inadequate amount when, 20 years later, the wage structure and cost of living has risen to an alarming degree and the purchasing power of the dollar has dropped by over one half."

In answer to these considerations advanced by the plaintiff, today's majority argues that "[this] proposition is counterbalanced in this case by the maxim that statutes granting the power to expend public funds are to be narrowly construed." *Ante,* p 441.

This argument fails to consider that injured workers who lose purchasing power due to inflation will often seek some other form of public assistance. One commentator effectively observed:

> [Society] can put [the injured worker] on county relief, or some other form of direct handout. This . . . is a poor solution in at least two ways: It stigmatizes the man as a pauper, and it places the cost on the political or geographical subdivision where he happens to have his residence, although that subdivision had no connection with the injury. [1 Larson, Workmen's Compensation Law, § 2.20, p 6.]

Although the compensation supplement fund is derived from public funds, it is expressly intended by the Legislature to compensate injured workers. Other types of public assistance are not so desig-

nated and consequently bear the stigma that society often places on those receiving general assistance.

III

For these reasons, I dissent from the majority holding. I would affirm the decision of the Court of Appeals, which upheld the right of injured workers to receive adequate workers' disability compensation benefits that are meaningfully supplemented to compensate for inflation and its concomitant devastating effect on purchasing power.

CAVANAGH, J., concurred with ARCHER, J.

BOYLE, J., concurred only in the result suggested by ARCHER, J.

AUTO CLUB INSURANCE ASSOCIATION v HILL

Docket No. 80966. Argued March 9, 1988 (Calendar No. 7). Decided October 7, 1988.

Gregory J. Hill was denied a claim by his insurer, Auto Club Insurance Association, for damages for noneconomic loss resulting from an automobile accident with an uninsured motorist. An arbitration panel awarded him money damages, including damages for noneconomic loss, finding that the threshold requirements for noneconomic loss under the no-fault act did not apply where an accident involved an uninsured motorist. The Auto Club brought an action in the Bay Circuit Court, seeking to vacate the award. The court, Eugene C. Penzien, J., affirmed the award. The Court of Appeals, BRONSON and GILLESPIE, JJ. (DANHOF, C.J., concurring), affirmed in an unpublished opinion per curiam (Docket No. 85828). The plaintiff appeals.

In an opinion by Justice ARCHER, joined by Chief Justice RILEY and Justices BRICKLEY, BOYLE, and GRIFFIN, the Supreme Court *held:*

Under the no-fault act, uninsured motorists are subject to tort liability for noneconomic loss only if the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement. In this case, on the basis of the terms of the policy, the defendant is not entitled to compensation for noneconomic loss unless the loss meets the threshold requirements.

1. The no-fault act unambiguously provides that a person is subject to tort liability for noneconomic loss caused by the ownership, maintenance, or use of a motor vehicle, without regard to whether the person is insured, only where the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement. Immunity for noneconomic loss below this threshold is not qualified by the possession of no-fault insurance. Recovery of noneconomic damages is not provided under the basic no-fault system for allocating the cost

REFERENCES

Am Jur 2d, Automobile Insurance §§ 293 *et seq.*, 340 *et seq.*

Rights and liabilities under "uninsured motorists" coverage. 79 ALR2d 1252.

of accidents, and, thus, there is no logical basis for imposing greater liability for noneconomic damages because of an uninsured motorist's failure to fund the basic no-fault system.

2. In this case, the agreement provided that in the event of a collision with an uninsured motorist the defendant would be entitled to damages for bodily injury which an insured person is legally entitled to recover from the owner or operator of an uninsured motor vehicle. Because an uninsured motorist is not liable for noneconomic loss unless the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement, the defendant is entitled to damages for noneconomic loss only if the injuries meet the threshold requirements. Thus, reversal of the judgment of the Court of Appeals and remand to the trial court for further proceedings is required.

Reversed and remanded.

Justice CAVANAGH, joined by Justice LEVIN, dissenting, stated that tort liability for noneconomic loss less than the statutory threshold caused by the negligent use of an uninsured vehicle was not abolished. The provision of the no-fault act abolishing tort liability except for noneconomic loss greater than the statutory threshold does not apply to the owner of an uninsured motor vehicle involved in an accident. The no-fault act provides for abolition of tort liability only with respect to owners of insured vehicles; the exception continuing liability for noneconomic loss that exceeds the statutory threshold did not relieve an uninsured motorist of tort liability for noneconomic loss above or below the threshold.

INSURANCE — NO-FAULT — UNINSURED MOTORISTS — NONECONOMIC LOSS.

Uninsured motorists are subject to tort liability for noneconomic loss only if the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement (MCL 500.3135[1]; MSA 24.13135[1]).

*Zimostrad & Zimostrad, P.C.* (by *Stanley Zimostrad*), and *MacArthur, Cheatham, Acker & Smith, P.C.* (by *James G. Gross* and *Dwight R. Robinson*, of counsel), for the plaintiff.

*John C. Leaming* and *van Benschoten, Hurlburt & Tsiros, P.C.* (by *Harvey E. van Benschoten* and *Mandel I. Allweil*), for the defendant.

ARCHER, J. We granted leave to appeal to decide whether the threshold requirements of MCL 500.3135(1); MSA 24.13135(1)[1] apply when a motorist seeks benefits for noneconomic loss under the uninsured motorist provision of his no-fault policy. As a preliminary issue, we must determine the scope of tort liability of any uninsured motorist for noneconomic damages arising from an automobile collision.

We hold that uninsured motorists are subject to tort liability for noneconomic loss only if the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement. MCL 500.3135; MSA 24.13135. On the basis of the insurance agreement between the parties at bar, we hold that the insured party is not entitled to damages for noneconomic loss unless his injuries meet the threshold set forth in § 3135. Therefore, we reverse the judgment of the Court of Appeals and remand this case to the trial court for further proceedings not inconsistent with this opinion.

I

On April 9, 1981, the vehicle of defendant-appellee Gregory J. Hill was struck from the rear by an uninsured motorist. Mr. Hill filed a claim with his automobile insurance provider, plaintiff-appellant Auto Club Insurance Association (ACIA), for damages for noneconomic loss suffered as a result of the collision. This claim was pursuant to the fol-

[1] A person remains subject to tort liability for noneconomic loss caused by his or her ownership, maintenance, or use of a motor vehicle only if the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement.

lowing provision of his no-fault insurance contract with ACIA:

> Uninsured Motorists Coverage.
> We will pay damages for bodily injury which an insured person is legally entitled to recover from the owner or operator of an uninsured motor vehicle. Bodily injury must be caused by accident and arise out of the ownership, operation, maintenance or use of the uninsured motor vehicle.

Mr. Hill's claim was denied. Pursuant to a clause in the insurance policy, the dispute was submitted for arbitration. The arbitration panel awarded defendant $11,000, inclusive of damages for noneconomic loss.

The ACIA petitioned the Circuit Court of the Eighteenth Judicial Circuit to vacate the award of the arbitration panel. The petition asserted that the defendant had not alleged that he sustained injuries that met the threshold requirements as set forth in § 3135 for receipt of damages for noneconomic loss.[2] Defendant Hill responded with

[2] In *DiFranco v Pickard,* 427 Mich 32; 398 NW2d 896 (1986), this Court established a standard for determining whether a particular injury constitutes a serious impairment of bodily function sufficient to qualify for damages for noneconomic loss. A serious impairment of body function under the no-fault act need not be an impairment of the entire body function or of an important body function. The threshold requires inquiry into what body function, if any, was impaired because of injuries sustained in a motor vehicle accident, and whether the impairment was serious. The focus of the inquiry is not on the injuries, but on how the injuries affected a particular body function. The Court stated:

> In determining whether the impairment was serious, several factors should be considered: the extent of the impairment, the particular body function impaired, the length of time the impairment lasted, the treatment required to correct the impairment, and any other relevant factors. An impairment need not be permanent to be serious. [*Id.* at 39-40.]

a petition to affirm the award. The latter petition was granted.

Plaintiff sought relief in the Court of Appeals. The Court of Appeals affirmed the finding of the circuit court.[3] Plaintiff-appellant's subsequent motion for rehearing was denied.

The ACIA now seeks relief in this Court. We granted leave to appeal limited to the issue whether the threshold requirements of MCL 500.3135(1); MSA 24.13135(1) apply when an insured motorist seeks benefits for noneconomic loss under the uninsured motorist provision of a no-fault policy.[4]

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[3] *Auto Club Ins Ass'n v Hill,* unpublished opinion per curiam of the Court of Appeals, decided February 23, 1987 (Docket No. 85828). The issues considered by the Court of Appeals were essentially two-fold: (1) whether an uninsured motorist who does not contribute to the no-fault reparation system is entitled to the same tort immunity for below threshold injuries as a motorist who contributes to the no-fault reparation system, and (2) whether an arbitration decision may be vacated where a split of authority exists, precluding any substantial error of law apparent on the face of the award and where the result is legally sound.

There were two separate rationales. The per curiam opinion held that the limitations on liability contained in the no-fault act "are available only to those who have obtained the required no-fault insurance or other security." *Id.* at slip op, p 4. The Court reasoned that the insurer had stepped into the shoes of the uninsured motorist, thereby losing the protections of the act's limitations of liability. In a separate opinion, Judge DANHOF concurred in the judgment on the basis of the absence of clear error in the arbitration panel's decision. Judge DANHOF stated:

> [B]ecause there is a split of authority in our Court, I cannot say that the arbitrator made an error of law in following *Jones v DAIIE,* 124 Mich App 363; 335 NW2d 39 (1983), lv den 418 Mich 878 (1983) [holding that the threshold does not apply to uninsured motorists]. [*Id.* at slip op, p 5.]

In an apparent reconciliation of the two rationales for upholding the judgment of the court below, the per curiam opinion stated:

> Further, in so holding, we cannot find that the arbitrators made an error of law in following *Jones.* [*Id.* at slip op, p 4.]

[4] 429 Mich 858 (1987).

II

In order to give proper effect to § 3135,[5] this Court must enforce the clear and unambiguous language of the statute as drafted by the Legislature. In *Browder v Int'l Fidelity Ins Co,* 413 Mich 603, 611; 321 NW2d 668 (1982), this Court stated:

> A basic rule of statutory construction is that where the Legislature uses certain and unambiguous language, the plain meaning of the statute must be followed. [Citations omitted.]

This Court may not impose its view of the best

[5] The relevant portions of the no-fault act are as follows:

(1) *A person remains subject to tort liability for noneconomic loss caused by his or her ownership, maintenance, or use of a motor vehicle only if the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement.*

(2) *Notwithstanding any other provision of law, tort liability arising from the ownership, maintenance, or use within this state of a motor vehicle with respect to which the security required by section 3101(3) and (4) was in effect is abolished except as to:*

(a) Intentionally caused harm to persons or property. Even though a person knows that harm to persons or property is substantially certain to be caused by his or her act or omission, the person does not cause or suffer such harm intentionally if he or she acts or refrains from acting for the purpose of averting injury to any person, including himself or herself, or for the purpose of averting damage to tangible property.

(b) *Damages for noneconomic loss as provided and limited in subsection (1).*

(c) Damages for allowable expenses, work loss, and survivor's loss as defined in sections 3107 to 3110 in excess of the daily, monthly, and 3-year limitations contained in those sections. The party liable for damages is entitled to an exemption reducing his or her liability by the amount of taxes that would have been payable on account of income the injured person would have received if he or she had not been injured.

(d) Damages up to $400.00 to motor vehicles, to the extent that the damages are not covered by insurance. An action for damages pursuant to this subdivision shall be conducted in compliance with subsection (3). [MCL 500.3135; MSA 24.13135. Emphasis added.]

means to achieve a legislative purpose. In construing a statute, this Court must discern the intent of the Legislature in enacting the relevant provision. In doing so, we must first look to the language of the statute itself. *Thornton v Allstate Ins Co,* 425 Mich 643; 391 NW2d 320 (1986). After considering the language and general scope of the act, we may determine legislative intent in light of the purpose it seeks to accomplish or the evil it seeks to remedy. *Longstreth v Gensel,* 423 Mich 675; 377 NW2d 804 (1985).

A

Section 3135(1) of the no-fault act provides:

> A person remains subject to tort liability for noneconomic loss . . . only if the injured person has suffered . . . serious impairment of body function . . . . [MCL 500.3135(1); MSA 24.13135(1).]

This section unambiguously governs liability for noneconomic loss, as distinguished from damages for economic loss which the no-fault insurer is liable to pay under §§ 3107 to 3110 of the act.[6] *Bradley v Mid-Century Ins Co,* 409 Mich 1, 62; 294 NW2d 141 (1980). The section also clearly specifies to whom its terms apply. The Legislature did not qualify the term "person" with any distinction

[6] The dissent cites the Uniform Motor Vehicle Accident Reparations Act as the model for the Michigan no-fault act. It is true that a different result than that reached today would be required pursuant to the provisions of the uniform act. It is also true that in drafting the Michigan no-fault act, our Legislature adopted the uniform act almost word for word. However, in a major departure, the Legislature added § 3135(1), which has no counterpart in the uniform act. In crafting this totally new provision to govern liability for noneconomic loss, the Legislature made clear its intention to create a threshold so that persons sustaining minor injuries would be compensated only for economic loss.

between persons insured and those who are uninsured.[7]

In contrast, § 3135(2) governs general tort liability. It applies only where the required no-fault coverage is in effect: "[T]ort liability arising from the ownership, maintenance or use [of a properly insured vehicle][8] is abolished" except under certain specific enumerated circumstances, including damages for noneconomic loss "as provided and limited in subsection (1)." MCL 500.3135(2)(b); MSA 24.13135(2)(b).

Defendant-appellee Hill contends that the exception to the abolition of tort liability in § 3135(2)(b) circumscribes the scope of tort immunity granted in § 3135(1). He argues that the reference to

[7] In dissent, Justice CAVANAGH argues that use of the word "remains" in § 3135(1) indicates that § 3135(2) excludes uninsured motorists from the benefit of the tort immunity granted in § 3135(1). He states:

> Only those—insureds—whose tort liability has been abolished under subsection (2) could have liability for noneconomic loss that "remains" under subsection (1). Persons whose tort liability has not been abolished—uninsureds—could not have liability that "remains." [*Post,* p 468.]

We disagree for several reasons. First, as stated in the text, the Legislature did not qualify its use of the term "person" when it designated those who would receive the benefit of the tort immunity granted in subsection (1). Second, the Legislature clearly stated that such a "'person' remains subject to tort liability for noneconomic loss . . . *only if* the injured person [meets the threshold]." Third, Justice CAVANAGH adopts an overly restrictive meaning of the term "remains." It is doubtful that the Legislature would use such a circuitous means of distinguishing between insured and uninsured motorists in subsection (1) when it could have easily and more clearly made this distinction by using a term or phrase other than "person," which is the broadest legal term of art possible for reference to those legal entities subject to damage suits for noneconomic loss caused by ownership, maintenance, or use of a motor vehicle. Fourth, subsection (1) precedes subsection (2) and is separate from the enumerated exceptions to the abolition of tort liability found in the latter provision. This indicates that subsection (1) is independent of subsection (2).

[8] As required by MCL 500.3101(3), (4); MSA 24.13101(3), (4).

§ 3135(1) in § 3135(2)(b) imposes a requirement of no-fault insurance for immunity from tort liability for below threshold noneconomic loss. We find no basis for adopting such a strained construction of the tort immunity granted in § 3135(1).

B

There is no qualification in the language of § 3135(1) referring to § 3135(2). Although the same general subject, i.e., tort liability, is treated in both subsections, they apply to two distinct types of liability. Subsection (1) governs immunity from tort liability for noneconomic loss. Subsection (2) abolishes general tort liability with several enumerated exceptions.

The reference in § 3135(2)(b) to § 3135(1) does not change the meaning of § 3135(1) itself. That reference limits the subsection 2(b) exception from the abolition of tort liability for noneconomic loss to above-the-threshold noneconomic loss. Thus, the reference to § 3135(1) merely obviates the need to enumerate the circumstances under which tort liability for noneconomic loss is excepted from the general abolition of tort liability contained in § 3135(2). In other words, if not for the reference to § 3135(1) in § 3135(2)(b), the latter subsection would read: "damages for noneconomic loss, if the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement."

If the Legislature had intended to qualify the tort immunity granted in § 3135(1) by requiring proper no-fault insurance,[9] it could have expressly done so as it did with respect to the tort immunity granted in § 3135(2).

[9] See n 8.

C

Our construction of § 3135 is consistent with the policies and legislative purpose underpinning its promulgation.

The basic goal of the personal injury provisions of the no-fault insurance act is to provide individuals injured in motor vehicle accidents assured, adequate and prompt reparation for certain economic losses. *Babbitt v Employers Ins of Wausau,* 136 Mich App 198; 355 NW2d 635 (1984). This Court has held, however, that the Legislature's purpose in establishing the alternative criteria of death, permanent serious disfigurement or serious impairment of body function as prerequisites for collection of noneconomic damages, "was simply to weed out from the tort system claims for injuries less severe than the criteria." *Byer v Smith,* 419 Mich 541, 546; 357 NW2d 644 (1984). The Legislature intended to bar "any recovery whatsoever for noneconomic loss unless the injury is serious and [to relieve] the courts of the burden of litigation where the injury is not serious." *Id.* at 545.

III

In addition to its consistency with this Court's interpretation of legislative policy, we find direct support in case law for our construction of § 3135.

In *Bradley v Mid-Century Ins Co, supra,* the Court resolved a series of companion cases involving certain contractual limitations in uninsured motorist endorsements of automobile insurance policies. In parts II and III of the *Bradley* opinion, the Court discussed the relationship between uninsured motorist coverage and first-party benefits under the no-fault act.

A

In part II of *Bradley,* the Court discussed and decided whether uninsured motorist coverage under more than one policy could be stacked to provide recovery for damages sustained in an accident which occurred after the enactment of the no-fault act and the simultaneous repeal of the uninsured motorist amendment of the Insurance Code, MCL 500.3010; MSA 24.13010. *Bradley, supra* at 46-60. The plaintiff in part II, Gary Davidson, argued that "antistacking provisions" contained in his automobile insurance policy were violative of public policy. The Court held that the clauses at issue were enforceable. *Id.* at 54.

In discussing the purposes and policy involved in promulgation by the Legislature of the no-fault insurance act, the Court made several observations relevant to resolution of the issue at bar. The Court analyzed the purpose of uninsured motorist coverage before and after the passage of the no-fault act. Prior to promulgation of the act, uninsured motorist coverage was designed to protect the integrity of the Motor Vehicle Accident Claims Fund. *Id.* at 52. Under the no-fault system, however, uninsured motorist coverage is a substitute for residual liability insurance. The Court stated:

> [U]ninsured motorist coverage . . . provides some compensation in cases where the victim has suffered severe (above-the-threshold) injuries and there is no residual liability coverage to provide compensation for pain and suffering and excess economic loss.
>
> * * *
>
> We are persuaded that the Legislature repealed the uninsured motorist amendment not because it assumed there would be no uninsured motorists, but because after the passage of no-fault a person

injured by an uninsured motorist had a source of recovery for all damages except pain and suffering and excess economic loss.

* * *

True, no-fault benefits may be insufficient to fully compensate one injured by a negligent uninsured motorist. But no accident victim is permitted, under the no-fault act, to recover for below threshold pain and suffering . . . . [*Id.* at 52-54.]

Thus, in part II of *Bradley,* this Court distinguished between loss compensable by the basic no-fault benefits, i.e., economic loss, and damages for pain and suffering and excess economic loss, compensable in cases of "severe (above-the-threshold) injuries."

B

In part III of its opinion, the *Bradley* Court addressed the question whether an insurer could offset first-party benefits paid under the no-fault act from the policy limits of uninsured motorist protection without regard to the total damages that would be payable by the uninsured motorist or the nature of those damages, i.e., economic or noneconomic. This Court reiterated its view that uninsured motorist coverage under the no-fault act is a substitute for residual liability insurance:

Under the no-fault motor vehicle liability act an insured may collect from his insurer for work loss and medical expenses without regard to fault. He may sue the negligent tortfeasor for excess economic loss and, if the threshold of injury is met, for noneconomic loss. The statute requires that motorists carry residual liability insurance in addition to no-fault insurance to provide a source of recovery to persons severely injured as a result of driver negligence. *If a motorist is uninsured he*

*may be sued for all economic loss as well as above-threshold non-economic loss.*

A purpose of the no-fault act is to provide a contractual right of action against one's own insurer for wage loss and medical expenses arising from a motor vehicle accident. *A tort action for non-economic and excess economic loss was preserved in cases of severe loss.* The Legislature has thus divided an injured person's loss into two categories—loss for which the no-fault insurer is liable and loss for which the tortfeasor is liable. No-fault insurance provides security for the first type; uninsured motorist coverage, which presupposes that the insured is entitled to recovery under the tort system, provides security for the second type—it is offered to protect against being left with a worthless claim against an uninsured motorist. [*Id.* at 61-62. Emphasis added.]

Because of this distinction between economic losses compensable under basic no-fault coverage and those losses compensable pursuant to an uninsured motorist endorsement, the Court held that the set-off clause could not be enforced in the manner that the insurer sought:

In providing insurance against the uninsured motorist, the insurer promises the insured that his right of action for *greater than threshold* injuries will not be worthless if the tortfeasor turns out to be uninsured.

If the tortfeasor is insured or otherwise collectible, the insurer paying no-fault benefits has a statutory right to reimbursement for benefits theretofore paid by it only out of a recovery for those economic losses. So, too, if the insurer contracts to make good for an uninsured motorist—*coverage complementary and supplementary to the basic no-fault policy and standing in the place of third-party residual liability insurance*—the insurer and the insured should have corresponding rights relative to amounts recoverable under an

uninsured motorist endorsement; the insurer should be permitted a set-off only to the extent a recovery duplicates benefits it has already paid.

*The insured is entitled to payment under the "all sums recoverable" language of the uninsured motorist endorsement for all economic and above the threshold non-economic loss for which an uninsured motorist would be liable.* [*Id.* at 63-64. Emphasis added.]

Because the set-off clause failed to note the distinction between types of damages, the Court found the clause to be either defectively ambiguous or inconsistent with the reasonable expectations of the insured. *Id.* at 60-61.

Defendant-appellee argues that the *Bradley* Court's description of the nature and scope of uninsured motorist coverage is mere dicta. We disagree. This Court's conclusion that the set-off clause was unenforceable was squarely on the basis of the differences between first-party no-fault benefits and compensation for noneconomic losses pursuant to uninsured motorist coverage. We found that the insurer's interpretation of the policy would nullify the effect of uninsured motorist coverage in precisely those situations in which it was intended to apply:

Unless voluntarily purchased uninsured motorist coverage provides meaningful protection for severe, above-threshold, injuries without regard to what the insurer is required to pay under the mandatory no-fault coverage, it serves no apparent purpose in the context of a no-fault statute mandating the payment of benefits. If the set-off were enforced in the manner the insurers seek, no-fault benefits paid would reduce uninsured motorist coverage dollar for dollar. As soon as the insurer has paid out $20,000 in no-fault benefits, there would be no recovery whatsoever under the uninsured motorist endorsement. [*Id.* at 64.]

We find this Court's interpretation of the nature and scope of uninsured motorist coverage in *Bradley* to be consistent with our interpretation of the extent of immunity from tort liability granted in § 3135(1) of the no-fault act.

C

Defendant-appellee asserts that in *Citizens Ins Co v Tuttle,* 411 Mich 536; 309 NW2d 174 (1981), the Court defined the scope of tort liability for noneconomic damages to include compensation for below-threshold injuries. In that case, Mr. Tuttle's cow, which was running loose on the highway, was involved in a collision with a tractor and trailer. Citizens Insurance Company brought an action in tort against Donald Tuttle to recover the cost of repairs paid to its insured for damages resulting from the collision. This Court was faced with the question whether tort liability arising out of conduct other than the ownership, maintenance or use of a motor vehicle was abolished by the no-fault act. We held that the tort liability abolished by the no-fault act is only such liability as arises out of the tortfeasor's ownership, maintenance or use of a motor vehicle. This does not include tort liability which arises out of other conduct, such as the negligent keeping of cattle. *Id.* at 546-547.

Defendant-appellee supports his argument on the basis of the following language in *Tuttle:*

> Moreover, subsection (2) abolishes tort liability arising from the ownership, maintenance or use *only of vehicles for which the required no-fault insurance or other security has been obtained.* The policy apparently expressed in so conditioning the abolition of tort liability upon the obtaining of no-fault coverage is that *a person is to be relieved of tort liability only upon participating, through the*

> *payment of premiums, in a system for spreading the costs of compensating vehicular injuries without regard to fault.* To extend the abolition of tort liability to non-motorist tortfeasors would be to incorporate into the no-fault system the costs of providing personal protection insurance benefits to motorists, passengers and pedestrians injured by non-motorist tortfeasors without incorporating offsetting premiums from non-motorist tortfeasors, since non-motorist tortfeasors are not required to purchase no-fault insurance with respect to their conduct as non-motorists.
>
> . . . The non-motorist tortfeasor is the equivalent of the uninsured motorist and should be treated similarly. *Both are outside the basic no-fault system of allocating the costs of accidents and both remain subject to tort liability.* [*Id.* at 546-547. Emphasis added.]

Defendant-appellee asserts that the uninsured motorist in this case has paid no premium and has not supported the underlying no-fault act. He argues that the ACIA, standing in the shoes of the uninsured motorist, is therefore outside the basic no-fault system and should remain subject to liability for damages without regard to the threshold requirements of § 3135.

We find this argument to be unpersuasive. The question before the Court in *Tuttle* involved the liability of a nonmotorist tortfeasor. The Court analogized the nonmotorist tortfeasor to an uninsured motorist who enjoys no tort immunity for economic damages because he has not contributed to the insurance premium pool which funds first-party economic benefits. *Id.* at 546-547. We find this rationale to be limited to liability for economic damages.

The analogy in *Tuttle* was on the basis that "[b]oth [the nonmotorist tortfeasor and the unin-

sured motorist] are outside the basic no-fault system of allocating the cost of accidents and both remain subject to tort liability." *Id.* This basis for withholding tort immunity for economic damages does not apply to noneconomic damages because recoveries for noneconomic damages are not provided by the basic no-fault system for allocating the cost of accidents. There is no logical basis for imposing greater liability for noneconomic damages upon a person because of his failure to fund the basic no-fault system, which pays for only economic damages.[10]

Indeed, in § 3102 of the act, the Legislature has provided penalties for those who own or operate motor vehicles without the required security. MCL 500.3102; MSA 24.13102. Also, the owner or registrant of an uninsured motor vehicle cannot collect first-party benefits if that motor vehicle is involved in an accident. MCL 500.3113(b); MSA 24.13113(b). This express provision of penalties for violation of the terms of the no-fault act indicates that the Legislature has expressed the extent to which it will punish violators. Without an express authorization for penalties in addition to those found in §§ 3102 and 3113 of the act, we decline to construe the statute in a manner that would further penalize uninsured motorist tortfeasors.

IV

The insurance agreement between the parties at bar provided that in the event of a collision with an uninsured motorist the defendant would be entitled to "damages for bodily injury which an insured person is legally entitled to recover from

[10] The dissent also cites *Citizens Ins Co v Tuttle,* albeit without explanation. *Post,* p 470. No attempt is made in the dissent to respond to the distinctions we find between this case and the circumstances in *Tuttle.*

the owner or operator of an uninsured motor vehicle." An uninsured motorist is not liable for noneconomic loss unless the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement. Accordingly, we hold that the defendant in this case is not entitled to damages for noneconomic loss unless his injuries meet the threshold requirement.[11]

## CONCLUSION

We hold that, pursuant to MCL 500.3135(1); MSA 24.13135(1), uninsured motorists are subject to tort liability for noneconomic loss only if the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement. Our review of the terms of the insurance agreement upon which the defendant's claim was based compels us to hold that he is not entitled to compensation for his noneconomic loss unless his loss meets the threshold requirement. We reverse the judgment of the Court of Appeals and remand this case to the trial court for further proceedings not inconsistent with this opinion.

RILEY, C.J., and BRICKLEY, BOYLE, and GRIFFIN, JJ., concurred with ARCHER, J.

CAVANAGH, J. (*dissenting*). The no-fault automobile liability act abolishes tort liability respecting an insured vehicle except for noneconomic loss greater than the statutory threshold: death, serious impairment of body function, or permanent serious disfigurement.[1]

[11] Mr. Hill did not argue, in this Court or in the courts below, that his insurance agreement with the ACIA was defectively ambiguous for failing to explicitly exclude liability for damages for noneconomic loss unless the injury sustained were above the threshold requirements of § 3135.

[1] (1) A person remains subject to tort liability for noneconomic

The question presented is whether a person who suffers noneconomic loss less than the statutory threshold caused by the negligent use of an uninsured vehicle may recover under the uninsured motorist coverage of an automobile insurance policy.

The majority holds that the act abolishes tort liability for noneconomic loss below the statutory threshold without regard to whether the vehicle is insured. We would hold that tort liability is not abolished as to an uninsured vehicle and that the defendant may recover from his insurer under the uninsured motorist coverage.

Subsection (2) of § 3135 of the act, stating that tort liability is abolished as to an insured vehicle, and subsection (1), stating that an owner remains subject to tort liability for noneconomic loss "only" if a loss greater than the threshold has occurred,[2] should be read together and harmonized. Subsection (2) speaks specifically to the question whether an owner of an uninsured vehicle is relieved of tort liability, and states that he is not. That specific provision should and can be given effect by regarding the language of subsection (1) (providing that a person remains subject to tort liability for noneconomic loss only if a greater than threshold

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loss caused by his or her ownership, maintenance, or use of a motor vehicle only if the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement.

(2) Notwithstanding any other provision of law, tort liability arising from the ownership, maintenance, or use within this state of a motor vehicle with respect to which the security required by section 3101(3) and (4) was in effect is abolished except as to:

* * *

(b) Damages for noneconomic loss as provided and limited in subsection (1). [MCL 500.3135(1), (2)(b); MSA 24.13135(1), (2)(b).]

[2] See n 5 of the majority opinion for the complete text.

injury has occurred) as applicable only where tort liability has been abolished as provided in subsection (2).

Only those—insureds—whose tort liability has been abolished under subsection (2) could have liability for noneconomic loss that "remains" under subsection (1). Persons whose tort liability has not been abolished—uninsureds—could not have liability that "remains." A person not within the intendment or scope of subsection (2) (abolishing tort liability) is not within the intendment or scope of subsection (1) (liability for noneconomic loss that remains); an uninsured is not within the intendment or scope of subsection (2) and hence is not within the intendment or scope of subsection (1).

The no-fault act, as this Court has observed,[3] is modeled on the Uniform Motor Vehicle Accident Reparations Act which expressly,[4] and on examination of the commentary[5] clearly, provides—more

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[3] See *Citizens Ins Co v Tuttle*, 411 Mich 536, 546; 309 NW2d 174 (1981).

[4] (a) Tort liability with respect to accidents occurring in this State and arising from the ownership, maintenance, or use of a motor vehicle is abolished except as to:

(1) liability of the owner of a motor vehicle involved in an accident if security covering the vehicle was not provided at the time of the accident;

* * *

(7) damages for noneconomic detriment in excess of [$5,000], but only if the accident causes death, significant permanent injury, serious permanent disfigurement, or more than 6 months of complete inability of the injured person to work in an occupation. "Complete inability of an injured person to work in an occupation" means inability to perform, even on a part-time basis, even some of the duties required by his occupation or, if unemployed at the time of injury, by any occupation for which the injured person was qualified. [Uniform Motor Vehicle Accident Reparations Act, 14 ULA 63, § 5.]

[5] The rationale for denying the tort exemption to persons

clearly we agree than the Michigan act—that the provision of the act abolishing tort liability does not apply to the owner of an uninsured motor vehicle involved in an accident.

It may seem incongruous that an injured person who has uninsured motorist coverage may recover for below the threshold noneconomic loss when the driver of the other vehicle was at fault and the vehicle was uninsured, while no recovery below the threshold may be obtained if the other vehicle was insured. Such incongruity is the result of the language of the uninsured motorist rider to the injured person's automobile insurance and does not justify the majority's construction of the no-fault act to correct this possible incongruity in the underwriting of uninsured motorist coverage.[6]

failing to comply with the requirement of providing security (Section 7) is that such persons have not contributed to the payment of basic reparation benefits which are intended to replace much of existing tort liability. For example, the State is not empowered to require that the United States government post security for the payment of basic reparation benefits. The United States' obligation to pay the victims of accidents involving government motor vehicles is limited to paying "tort claims, in the same manner, and to the same extent as a private individual under like circumstances" (28 USC 2674). Under the provisions on security covering the vehicles (Section 7), the United States government may elect to provide security for its vehicles. If the United States provides security, it would be exempt from tort liability. But, under this paragraph, if it elected not to do so, it would continue to be liable in tort "to the same extent as a private individual" who had not complied with the security requirement. This paragraph retains tort liability only for the owner of the unsecured vehicle, since, under the provisions on security covering the vehicle, only the owner is required to furnish such security. The driver of an unsecured vehicle who is not the owner is not liable in tort under the tort action retained by this paragraph. The owner's vicarious liability under owner-consent statutes or principles of the law of agency is retained, however, as if the driver's tort liability had been retained as well. [Commissioners' Comment, 14 ULA 65-66, § 5(a)(1).]

[6] The Kentucky Court of Appeals has held that the § 5(a)(1) thresh-

Our attention has been directed by the parties to statements in *Bradley v Mid-Century Ins,* 409 Mich 1, 62; 294 NW2d 141 (1980), and *Citizens Ins Co v Tuttle,* 411 Mich 536, 546-547; 309 NW2d 174 (1981). Neither the statement in *Bradley* (tending to support the insurer) nor those in *Citizens* (tending to support the insured) were necessary to decision in those cases,[7] and did not decide the issue in the instant case, an issue of sufficient difficulty to have justified plenary consideration in the instant case by this Court.

We would affirm the decision of the Court of Appeals.

LEVIN, J., concurred with CAVANAGH, J.

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old of the UMVARA does not bar an insured's action to recover under the uninsured motorist provision of an automobile policy for pain and suffering resulting from injuries sustained in a collision with an automobile negligently driven by an uninsured motorist. *Hanover Ins Co v Blincoe,* 573 SW2d 930 (Ky App, 1978).

The Supreme Court of North Dakota faced the same issue in *Steenson v General Casualty Co,* 397 NW2d 461, 462 (ND, 1986). The statute provided:

> *Secured person exemption.—*
>
> 1. In any action against a secured person to recover damages because of accidental bodily injury arising out of the ownership or operation of a secured motor vehicle in this state, the secured person shall be exempt from liability to pay damages for:
>
> a. Noneconomic loss unless the injury is a serious injury.

The court concluded:

> There is nothing expressed in these statutes to suggest that recovery on the uninsured motorist coverage is limited by the threshold requirements of the separate no-fault statute. [*Id.,* p 463.]

7 Wisdom too often never comes, and so one ought not to reject it merely because it comes late. [*Henslee v Union Planters Nat'l Bank,* 335 US 595, 600; 69 S Ct 290; 93 L Ed 259 (1949) (dissent of Frankfurter, J.).]

## DOW CHEMICAL COMPANY v CURTIS

Docket No. 80516. Argued December 9, 1987 (Calendar No. 8). Decided October 17, 1988.

Irwin Curtis and 485 other employees of the Dow Chemical Company, while on strike against Dow in 1974 and without resigning their employment, obtained short-term interim employment with other employers which lasted on average less than two days. The strikers then filed claims for unemployment compensation, contending that the interim employment terminated the labor dispute disqualification provision of the Employment Security Act. While the strike was still in progress and the claims were pending before the Employment Security Commission, the labor dispute disqualification provision was amended by 1974 PA 104, making clear that claimants similarly situated were ineligible for benefits. The commission, after the effective date of the amendment, granted benefits, finding that the interim employment terminated the labor dispute disqualification in each case, and that corresponding charges should be placed against Dow's rating account. The Board of Review affirmed. The Midland Circuit Court, Paul J. Clulo, J., affirmed. The Court of Appeals, HOOD, P.J., and BEASLEY and J. E. TOWNSEND, JJ., affirmed, finding that only a clear statement of legislative intent should justify retroactive application of the amended labor dispute disqualification provision (Docket No. 86463). The plaintiff appeals.

In an opinion by Justice GRIFFIN, joined by Chief Justice RILEY and Justices LEVIN and BRICKLEY, the Supreme Court *held:*

1974 PA 104 governs benefit eligibility for benefit weeks following June 9, 1974, its effective date. Claims made for benefit weeks after the effective date of the amendment are controlled by the new criteria set forth in the amendment. In

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REFERENCES

Am Jur 2d, Labor and Labor Relations §§ 2000 *et seq.*

Am Jur 2d, Unemployment Compensation §§ 32 *et seq.*, 67.

General principles pertaining to statutory disqualification for unemployment compensation benefits because of strike or labor dispute. 63 ALR3d 88.

the absence of any clear indication by the Legislature that retrospective application was intended, the MESC properly charged Dow's rating account for benefits paid prior to the effective date of the amendment. The amendment also precludes any charge against Dow's rating account for benefits paid with respect to benefit weeks after its effective date, in light of the fact that none of the claimants met the new criteria for terminating the labor dispute disqualification.

1. Section 29(8) of the Employment Security Act was amended by 1974 PA 104 to restore its viability in the wake of the decision in *Great Lakes Steel Corp v Employment Security Comm,* 381 Mich 249 (1968), that interim employment of a few hours or days of work with other employers accepted by strikers was sufficient to terminate the disqualification. The act, as amended, supplies objective criteria for evaluating the substantiality of interim employment. In the absence of any clear indication by the Legislature that retrospective application was intended, the MESC in this case properly charged Dow's rating account for benefits paid to the employees with respect to benefit weeks prior to the effective date of the amendment. The amendment also precludes any charge against Dow's rating account for benefits paid with respect to benefit weeks after its effective date in light of the fact that none of the claimants met the new criteria for terminating the labor dispute disqualification.

2. Unemployment benefits are a matter of statutory grace. Under the act, an employer may request a redetermination of eligibility or qualification for benefits. The act is structured so that if the law changes, or if facts change, an interested party has the right to demand that both eligibility and qualification be determined anew. In this case, Dow made a timely protest of the eligibility and qualification of each claimant for each week of the strike. Initial determinations of claims for benefits on the basis of interim employment prior to the effective date of the amendment did not constitute final adjudications. Claims for benefit weeks after the effective date of the amendment are controlled by the new criteria.

Justice ARCHER, concurring, stated that on the basis of statutory and case law existing prior to the effective date of 1974 PA 104, the striking employees had properly terminated their disqualification by obtaining interim employment. Accordingly, the Michigan Employment Security Commission is entitled to charge Dow Chemical Company's MESC rating account for charges corresponding to benefits paid to striking workers prior to the effective date of the amendment. However, 1974 PA 104 is correctly applied to preclude charges to Dow's rating account

for benefits paid after the effective date of the amendment. The result is mandated by the unique statutory scheme embodied in the MESA.

Reversed and remanded.

Justice CAVANAGH, joined by Justice BOYLE, dissenting, stated that an employee's right to unemployment compensation accrues on the date of unemployment. When determining a claimant's eligibility for benefits, the applicable law is the law in effect on the date of unemployment, not the law in effect on the dates that benefits become due and payable. Because 1974 PA 104 specifically does not provide for prospective or retrospective application, it must be applied prospectively. The act should not be applied to allow redetermination of a claimant's initial eligibility for benefits for benefit weeks commencing on or after the effective date of the amendment, however. A claimant's unemployment gives rise to the right to receive unemployment benefits. An amendatory act entitled to prospective application in an unemployment compensation case should be applied to claims on the basis of unemployment dates occurring on or after the effective date chosen by the Legislature. In this case, because the striking workers successfully terminated their disqualification for unemployment benefits by performing interim employment, their right to the benefits accrued prior to the effective date of 1974 PA 104, and their initial eligibility for benefits may not be redetermined.

Justice BOYLE, dissenting, stated that, consistent with the legislative assumptions at the time of enactment and prior case law, the applicable law for determining eligibility for unemployment compensation under the Employment Security Act is presumed to be the law in effect on the date of unemployment.

Unemployment compensation essentially is an insurance scheme: the systematic accumulation of funds, on the basis of actuarial studies, during periods of employment provides benefits during periods of unemployment. The history of the Employment Security Act indicates a consistent assumption on the part of the Legislature that the applicable law is the law in effect on the date of unemployment, i.e., the date of accrual, not the date of each payment. Consistent with the insurance nature of the unemployment compensation scheme and the Supreme Court's prior decisions, the Legislature presumes that substantive rights under the act accrue as of the date of unemployment. Because the amendment of § 29(8) affected substantive rights, the amendment should be applied only prospectively.

158 Mich App 347; 404 NW2d 737 (1987) reversed.

UNEMPLOYMENT COMPENSATION — EMPLOYMENT SECURITY ACT — LABOR DISPUTE DISQUALIFICATION — RATING ACCOUNT CHARGES.

The amendment of the labor dispute disqualification provision of the Employment Security Act, 1974 PA 104, which provides new objective criteria for evaluating the substantiality of interim employment of striking workers, governs benefit eligibility for benefit weeks following June 9, 1974, its effective date, permitting the Employment Security Commission to properly charge an employer's rating account for benefits paid prior to the effective date and precluding charges against the account for benefits paid with respect to benefit weeks after the effective date (MCL 421.29[8]; MSA 17.531[8]).

*Levin, Levin, Garvett & Dill* (by *Erwin B. Ellmann* and *Eli Grier*) for Dow Chemical Company.

*Kim Arthur Siegfried* for Irvin Curtis, et al.

*Frank J. Kelley,* Attorney General, *Louis J. Caruso,* Solicitor General, and *David A. Voges,* Assistant Attorney General, for Michigan Employment Security Commission.

Amicus Curiae:

*Jordan Rossen,* General Counsel, and *Richard W. McHugh,* Associate General Counsel, for International Union, UAW.

GRIFFIN, J. In 1974, while on strike against the Dow Chemical Company, 486 of Dow's employees arranged with other employers to perform interim jobs which lasted, on the average, less than two days, for the purpose of qualifying for unemployment compensation. While the strike was still in progress and claims by the 486 employees for unemployment benefits were pending before the Michigan Employment Security Commission, the

Legislature amended[1] § 29(8), the labor dispute disqualification provision of the Michigan Employment Security Act,[2] and made clear that similarly situated claimants are ineligible. In this appeal, we are required to decide whether the statutory change is applicable to the 486 claims at issue in this case. Although reclamation of unemployment benefits awarded by the commission and already paid to these employees is now barred by limitations imposed by statute,[3] we hold that 1974 PA 104 operates to preclude any charge against Dow's rating account[4] for benefits paid with respect to benefit weeks after the effective date of the amendment, June 9, 1974.

I

The facts are not in dispute. In accordance with the call of their union, United Steel Workers of America, AFL-CIO-CLC, approximately 5,000 hourly workers struck Dow on March 18, 1974, in a dispute over wages and working conditions. During the strike period, which continued until September 9, 1974, none of the employees involved in this appeal resigned from their employment with Dow. Each claimant's regular work with Dow remained available to him throughout the strike, and each striker retained certain pension rights and seniority status with Dow.

Many of the striking employees, including the 486 involved in this appeal, filed claims for unemployment compensation. Initially, the MESC issued determinations disqualifying all claimants from

[1] 1974 PA 104.

[2] MCL 421.1 *et seq.*; MSA 17.501 *et seq.*

[3] MCL 421.62(a); MSA 17.566(a) precludes recovery of improperly paid benefits from an individual more than three years after the date of receipt, except under circumstances that are not applicable.

[4] MCL 421.20(a); MSA 17.521(a).

benefits by reason of § 29(8) of the act, which at that time (March, 1974) provided:

> An individual shall be disqualified for benefits for any week with respect to which his total or partial unemployment is due to a labor dispute in active progress, or to shutdown or start-up operations caused by such labor dispute, in the establishment in which he is or was last employed, or to a labor dispute (other than a lockout) in active progress, or to shutdown or start-up operations caused by such labor dispute, in any other establishment within the United States which is functionally integrated with such establishment and is operated by the same employing unit. No individual shall be disqualified under this subsection 29(8) if he is not involved in such dispute.

Thereafter, upon the advice of their union, the 486 claimants involved in this appeal obtained short-term employment from other employers, and then filed again for unemployment benefits, contending that their brief interim employment had the effect of terminating the § 29(8) labor dispute disqualification.

It is undisputed that the nature and duration of the interim work performed by each of the claimants are accurately described in a summary of cases attached to Dow's brief on appeal. The summary indicates that the average time worked by the claimants prior to June 9, 1974, the effective date of the amendment of § 29(8), was less than two days; in many instances, claimants worked for only a few hours.[5] Although all of the claimants

[5] For example, one employee worked at a concrete business owned by his sister for eight hours at $3.10 per hour, hanging a door; another employee was hired by his brother-in-law to work as a gas station attendant for less than two days at $2.00 per hour; yet another striker accepted five hours of work fixing a fence for his brother-in-law at his restaurant. Other "interim employment" by the

received remuneration for work performed, virtually none earned an amount equivalent to their unemployment compensation rate for the week.

As indicated above, while the Dow strike was in progress, the Legislature amended § 29(8) of the MESA[6] and thereby added certain criteria to be applied in determining whether subsequent employment operates to terminate the labor dispute disqualification:

> An individual's disqualification imposed or imposable under this subsection shall be terminated by his performing services in employment with an employer in at least 2 consecutive weeks falling wholly within the period of his total or partial unemployment due to the labor dispute, and in addition by earning wages in each of those weeks in an amount equal to or in excess of his actual or potential weekly benefit rate with respect to those weeks based on his employment with the employer involved in the labor dispute.

Accordingly, under the amendment the labor dispute disqualification could be avoided only by working for another employer for at least two consecutive weeks and for wages for each such week equal to or in excess of the actual or potential weekly benefit rate provided by the MESA. Not a single one of the 486 claimants in the instant case fulfilled the requirements of the 1974 amendment either before or after June 9, 1974.

Nevertheless, the MESC determined that the interim employment of the 486 claimants operated to terminate the labor dispute disqualification in each case, that each of the 486 claimants was

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claimants included unloading a box car for a few hours for a total wage of $23.50, stacking carpet for one day, unloading paneling for a total earning of $16.50, and working for $2.00 per hour for one day at a club at which the claimant was a member.

[6] 1974 PA 104.

entitled to unemployment benefits, and that corresponding charges should be placed against Dow's rating account. Dow unsuccessfully challenged each claim by appealing to the MESC Board of Review. The 486 cases were then consolidated in an appeal by Dow in the Midland Circuit Court, which affirmed the board's decision, and its decision was thereafter affirmed by the Court of Appeals sub nom *Dow Chemical Co v Curtis,* 158 Mich App 347; 404 NW2d 737 (1987).

The MESC and the courts below refused to apply the 1974 amendment retrospectively. The Court of Appeals stated:

> The June 9, 1974, amendment to the statute added a higher standard that a claimant must satisfy in order to terminate the labor dispute disqualification. . . . Applying 1974 PA 104 retroactively to claimants who undertook interim employment prior to June 9, 1974, and who could have shown a termination of the labor dispute disqualification under then-existing 1974 PA 11, would have the effect of diminishing their rights to unemployment benefits. Consequently, the general rule in favor of giving retroactive application to remedial statutes is not applicable. Only a clear statement of legislative intent should justify giving retroactive application to this statute. [*Id.,* pp 357-358.]

Refusing also to apply the amendment to determine benefit eligibility for the weeks after June 9, 1974, the Court of Appeals stated:

> Finally, Dow contends that, since eligibility must be determined weekly, MESC erred as a matter of law in failing to redetermine each claimant's eligibility for the weeks commencing June 9, 1974, the effective date of the statutory amendment. Again, we disagree. [*Id.,* p 359.]

On appeal in this Court, Dow again argues that the amendment should be applied to the 486 claims, and that the MESC and the courts below erred as a matter of law in holding to the contrary. Dow maintains that because none of the 486 claimants met the criteria set forth in the 1974 amendment, they were ineligible for any unemployment benefits. In the alternative, Dow argues that the 1974 amendment should determine benefit eligibility for the weeks following its effective date, June 9, 1974.

Unemployment benefits already paid to these claimants cannot now be reclaimed because of a statutory bar. MCL 421.62(a); MSA 17.566(a). However, our decision will determine whether, and to what extent, Dow's rating account should be charged, pursuant to § 20(a) of the MESA,[7] with approximately $1,500,000 paid out for the 486 claims, a charge that imposes a continuing burden on Dow's account.

For reasons set forth below, we conclude that 1974 PA 104 governs eligibility with respect to benefit weeks after June 9, 1974, its effective date.[8]

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[7] MCL 421.20(a); MSA 17.521(a).

[8] The effective date of the amendment is explained in another portion of the act:

> (1) If this 1974 amendatory act is given immediate effect, the effective date of this amendatory act shall be the first day of the calendar week containing the thirtieth day after it is approved by the governor or becomes law without his approval.
>
> (2) An individual who has a current and unexhausted benefit year on the effective date as provided in subsection (1) shall have his weekly benefit rate and the maximum amount of benefits recomputed in accordance with this amendatory act with respect to any week of unemployment beginning on or after that date on that portion of his benefit rights not exhausted prior to that date but his weekly benefit rate and maximum amount of benefits established and not exhausted prior to the aforementioned effective date shall not be subject to reduction or elimination by the recomputation. [MCL 421.66; MSA 17.569(16).]

II

1974 PA 104 was enacted to restore the viability of the § 29(8) labor dispute disqualification in the wake of this Court's interpretation of that section in the context of a 1959 strike. In *Great Lakes Steel Corp v Employment Security Comm,* 381 Mich 249; 161 NW2d 14 (1968), employees of Great Lakes Steel were involved in a lengthy strike. Some of the employees obtained interim employment during the strike with other employers, from which they were laid off after having worked only "a few days to several weeks." *Id.,* p 251.

The *Great Lakes* Court interpreted then § 29 to mean that interim employment of even a very short duration was sufficient to terminate the labor dispute disqualification. The Court held that the only standard to be applied with regard to such interim employment was that the claimants be "employees" of "interim employing units." *Great Lakes, supra,* p 254. As indicated by the collection of cases annotated in 61 ALR3d 766,[9] the majority of jurisdictions, even in the absence of statutory criteria, have insisted that a labor dispute disqualification is not terminated unless the new employment is undertaken in good faith and the former employment is severed. See, e.g., *Mark Hopkins, Inc v California Employment Comm,* 24 Cal 2d 744, 748-749; 151 P2d 229 (1944). The rationale for imposition of such standards is obvious:

To do otherwise would open the door to unlim-

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The MESC determined the effective date of 1974 PA 104 to be June 9, 1974.

[9] See anno: *Unemployment compensation: Labor dispute disqualification as applicable to striking employee who is laid off subsequent employment during strike period,* 61 ALR3d 766.

ited abuse. It would permit a striker to obtain any sort of temporary work and when it was terminated to apply for benefits for the loss of the temporary job even though the work stoppage [against the struck employer] still continued. [*Alin v Alaska Employment Security Comm,* 17 Alas 607, 615 (1958).]

As the instant case well demonstrates, failure by the *Great Lakes* Court to interpret § 29 so as to require "bona fide" employment opened the door to artful dodging of the labor dispute disqualification. The MESC itself recognized this deficiency and urged adoption of criteria to measure the nature and extent of services required to terminate the labor dispute disqualification.[10] Thereafter, the Legislature enacted 1974 PA 104 which amended

[10] Commentary submitted by the MESC to the Legislature in connection with SB 741, 1974 PA 104, dated March 15, 1974, included the following:

"In *Great Lakes Steel Corporation v Michigan Employment Security Commission* (1968), 381 Mich 249, the Supreme Court of Michigan held that a claimant shall be deemed to have terminated a labor dispute disqualification imposed under Section 29(8) by performing services subsequent to the beginning of the labor dispute in employment for remuneration with an employer.

"The Court however made no finding as to what amount of remuneration must be received by the claimant in order to terminate the labor dispute disqualification. However, it appears that in the *Great Lakes Steel* case that all of the individuals worked with the interim employees [sic] from several days to several weeks and that the amount of remuneration that the individuals received was at least equal to the amount that would have been the individual's benefit rate in such week of interim employment if he had been eligible and qualified in all respects.

"It is therefore recommended that Section 29(8) be amended to provide that a labor dispute disqualification be terminated if an individual performs services in employment with an employer in at least two consecutive weeks falling wholly within the period of his total or partial unemployment due to the labor dispute and if in addition he earns wages in each of such weeks in an amount equal to or in excess of his actual or potential weekly benefit rate with respect to such weeks based on [sic] his employment with the employer involved in the labor dispute."

§ 29(8) to supply objective criteria for evaluating the substantiality of "interim employment."

In the absence of any clear indication from the Legislature that retrospective operation was intended, and for reasons set forth below, we conclude that the MESC properly charged Dow's rating account for benefits paid to these employees with respect to benefit weeks prior to the effective date of the amendment. We also hold that 1974 PA 104 precludes any charge against Dow's rating account for benefits paid to these employees with respect to benefit weeks after the effective date of the amendment.

MCL 421.32(d); MSA 17.534(d), provides:

> The issuance of each benefit check shall be considered a determination by the commission that the claimant receiving the checking [sic] was covered during the compensable period, and *eligible and qualified* for benefits. [Emphasis supplied.]

Section 32(d) authorizes employers to request "a redetermination as to the eligibility or qualification as to that period and a determination as to later weeks and benefits still unpaid as are affected by the protest." Upon receipt of the challenge to benefits, the MESC

> shall investigate and redetermine whether the claimant is eligible and qualified as to that period. If, upon the redetermination, the claimant is found ineligible or not qualified, the commission shall investigate and determine whether the claimant obtained benefits, for 1 or more preceding weeks within the series of consecutive weeks which includes the week covered by the redetermination, improperly as the result of administrative error . . . .

Under § 32a(2), MCL 421.32a(2); MSA 17.534(1)(2), redetermination is authorized for any "good cause" shown. The MESC is required to review a timely protested "determination" and issue a "redetermination." MCL 421.32a(1); MSA 17.534(1)(1).

Unemployment benefits are a matter of statutory grace. MCL 421.57; MSA 17.561. The MESA is so structured that if the law changes or if facts change an interested party has the right to demand that eligibility or qualification, or both, be determined anew. See §§ 28, 29 and 32 of MESA; *Roman Cleanser Co v Murphy,* 386 Mich 698, 705; 194 NW2d 704 (1972); *Talley v Unemployment Compensation Div of Industrial Accident Bd,* 63 Idaho 644; 124 P2d 784 (1942). In the instant case, Dow, pursuant to § 32(d), timely protested the eligibility and qualification of each employee-claimant for each week of the strike. Although some filed claims for benefits on the basis of interim employment prior to June 9, 1974, and checks were issued prior to that date, the initial determinations did not constitute final adjudications of the rights to unemployment benefits. Claims made for benefit weeks after June 9, 1974, were controlled by the new criteria set forth in the amendment.

We conclude that 1974 PA 104 governs benefit eligibility for the benefit weeks following its effective date, and charges to Dow's rating account for benefits paid with respect to benefit weeks after June 9, 1974, are precluded in light of the fact that none of the employee-claimants met the new criteria for terminating the labor dispute disqualification.

Accordingly, we reverse the judgment of the Court of Appeals and remand this case to the MESC for entry of an order consistent with this opinion.

RILEY, C.J., and LEVIN and BRICKLEY, JJ., concurred with GRIFFIN, J.

ARCHER, J. (*concurring*). The plaintiff-appellant Dow Chemical Company seeks to eliminate charges to its MESC rating account for unemployment benefits paid to striking union workers during the course of a 1974 strike. These benefits were paid to claimants-appellees pursuant to a loophole[1] that existed in the labor dispute disqualification provision of the Michigan Employment Security Act, MCL 421.29(8); MSA 17.531(8), prior to its amendment by 1974 PA 104.[2]

I agree with the majority's conclusion that 1974 PA 104 operates prospectively and that it governs eligibility for the benefit weeks following its effective date despite claimants' termination of their

[1] At the time of the strike, § 29(8) provided as follows:

> An individual shall be disqualified for benefits for any week with respect to which his total or partial unemployment is due to a labor dispute in active progress, or to shutdown or start-up operations caused by such labor dispute, in the establishment in which he is or was last employed, or to a labor dispute (other than a lockout) in active progress, or to shutdown or start-up operations caused by such labor dispute, in any other establishment within the United States which is functionally integrated with such establishment and is operated by the same employing unit. No individual shall be disqualified under this subsection 29(8) if he is not directly involved in such dispute.

[2] The amendment of § 29(8) added more stringent requirements for an employee to terminate a disqualification. The additional language reads as follows:

> An individual's disqualification imposed or imposable under this subsection shall be terminated by his performing services in employment with an employer in at least 2 consecutive weeks falling wholly within the period of his total or partial unemployment due to the labor dispute, and in addition by earning wages in each of those weeks in an amount equal to or in excess of his actual or potential weekly benefit rate with respect to those weeks based on his employment with the employer involved in the labor dispute.

labor dispute disqualification for prior weeks on the basis of the statute as it existed before amendment. I write separately to emphasize that this result is mandated by the unique statutory scheme embodied in the MESA.

I

The relevant language of the MESA states that an employee is "disqualified [when he is on strike due to a labor dispute] in the establishment in which he is or was *last* employed . . . ." It is undisputed that the claimants had interim employment other than their employment with Dow. Therefore, these employees were not disqualified under the pre-amendment statute because they were not within the unambiguous statutory language disqualifying only those unemployed due to a labor dispute at their *last* place of employment. *Great Lakes Steel Corp v Employment Security Comm,* 381 Mich 249; 161 NW2d 14 (1968).

In *Great Lakes Steel,* this Court held that a disqualification under § 29(8) of the MESA could be terminated by interim employment of short duration. In the instant case, the courts below uniformly held that the *Great Lakes Steel* interpretation of § 29(8) was the controlling interpretation of the statute prior to its amendment by 1974 PA 104.[3] In addition, each of the courts below has held that the statute should be applied as it existed before the amendment because the 486 claimants filed prior to the effective date of the amendment. The judgment of this Court differs from that reached in the Court of Appeals only with respect to charges to the employer's rating account for

[3] In dicta, the majority criticizes the analysis and result in *Great Lakes Steel. Ante,* pp 480-482. In fact, the *Great Lakes Steel* Court reached the correct result on the basis of the statute as it existed prior to amendment by 1974 PA 104.

weeks following the effective date of the amendment.

II

The provision governing the effective date of 1974 PA 104 provides:

> (1) If this 1974 amendatory act is given immediate effect, the effective date of this amendatory act shall be the first day of the calendar week containing the thirtieth day after it is approved by the governor or becomes law without his approval.
>
> * * *
>
> This act is ordered to take immediate effect.
> Approved May 16, 1974. [1974 PA 104, MCL 421.66; MSA 17.569(16).][4]

There is no indication in this provision that the amendment is to be given retroactive effect. This Court has stated:

> The pertinent rule of statutory construction used to determine the effect an amendatory act has on transactions and events completed prior to its enactment is set forth in 1A Sands, Sutherland Statutory Construction (4th ed), § 22.36, pp 300-301:
>
> "In accordance with the rule applicable to original acts, it is presumed that provisions added by the amendment affecting substantive rights are intended to operate prospectively. *Provisions added by the amendment that affect substantive rights will not be construed to apply to transactions and events completed prior to its enactment unless the legislature has expressed its intent to that effect or such intent is clearly implied by the language of the amendment or by the circumstances surrounding its enactment.*" [Emphasis

[4] The amendment took effect June 9, 1974.

added. *Hurd v Ford Motor Co,* 423 Mich 531, 535; 377 NW2d 300 (1985).]

Also, in *Franks v White Pine Copper Div,* 422 Mich 636; 375 NW2d 715 (1985), the Court addressed the question of retrospective application of statutory revisions, distinguishing between provisions affecting substantive rights, and those that are merely procedural or remedial in nature.

The Court stated:

> "As a matter of statutory construction, statutes are presumed to operate prospectively unless the contrary intent is clearly manifested." [*Selk v Detroit Plastic Products,* 419 Mich 1, 9; 345 NW2d 184 (1984).] "A retrospective law is one which takes away or impairs vested rights acquired under existing laws, or creates a new obligation and imposes a new duty, or attaches a disability with respect to transactions or considerations already past." [*Hughes v Judges' Retirement Bd,* 407 Mich 75, 85; 282 NW2d 160 (1979)].
>
> "Although a statute is not regarded as operating retrospectively merely because it relates to an antecedent event, . . . application of the provisions of § 358 to impose a disability, in the form of a setoff, upon the amount of workers' compensation time periods prior to the effective date of the legislation in question, is purely retroactive. . . .
>
> * * *
>
> An exception to the general rule is recognized where a statute is remedial or procedural in nature. *Hansen-Snyder Co v General Motors Corp,* 371 Mich 480; 124 NW2d 286 (1963). Thus, statutes which operate in furtherance of a remedy or mode of procedure and which neither create new rights nor destroy, enlarge, or diminish existing rights are generally held to operate retrospectively unless a contrary legislative intention is manifested. . . .
>
> . . . [T]he statute here in question may not be

regarded as wholly procedural in character. *Its effect, if applied, would result in taking from the plaintiff the substantive right to receipt of compensation payments which existed prior to enactment of § 358. Consequently, only a clear statement of legislative intent could justify retroactive application.*

Nor are we persuaded that § 358 should be applied retroactively because it can be characterized as "remedial." This Court has been reluctant to apply this exception without extensive exploration of legislative intent. . . . *We agree with the Court of Appeals that "[w]hile § 358 is 'remedial' in the sense that it was adopted to effect a reform which, in the eyes of many, will correct certain injustice in the system, [retroactive application would] also significantly and detrimentally affect the substantive right of certain injured employees to receipt of workers' compensation benefits."* [422 Mich 671-673, quoting *Franks v White Pine Copper Div,* 122 Mich App 177, 186; 332 NW2d 447 (1982). Emphasis added.]

The Court held that under the provisions of § 358 of 1980 PA 357, unemployment compensation benefits paid for weekly periods before the effective date of the statutory amendment were not deductible from workers' compensation benefits payable for the identical weekly periods. Only those benefits payable *after* the effective date of the statute were to be reduced by unemployment compensation paid or payable for the same periods.

In the instant case, we are faced with considerations similar to those addressed by the Court in *Franks v White Pine Copper Div.* The statute in this case cannot easily be characterized as a purely remedial statute. The substantive rights of workers to receive unemployment benefits following requalification are affected by the statutory amendment. Therefore, according to the rationale

in *Franks v White Pine Copper Div, supra,* 1974 PA 104 may operate only prospectively.

III

The Court of Appeals determined that 1974 PA 104 could not be applied to benefits in weeks after the effective date of the amendment because "[t]he events or circumstances which triggered the termination of the claimants' disqualification under § 29(8) were their employment, prior to June 9, 1974, by employers other than the employer involved in the labor dispute."[5] It found the disqualification inquiry distinguishable from the issue of eligibility under § 28(1) of the MESA. The Court reasoned that eligibility is determined on a week-to-week basis, whereas labor dispute disqualification or termination of such disqualification is a one-time event.

I agree with the majority that 1974 PA 104 must be applied to weeks after June 9, 1974. The relevant issue is the timing of the accrual of an employee's right to unemployment benefits for a particular week on the basis of eligibility and qualification. That issue is governed by MESA.

> The issuance of each benefit check shall be considered a determination by the commission that the claimant receiving the checking [sic] was covered during the compensable period, and eligible and qualified for benefits. [MCL 421.32(d); MSA 17.534(d).]

This section also authorizes employers to request a redetermination as to eligibility or qualification.

[5] 158 Mich App 347, 359; 404 NW2d 737 (1987).

Upon receipt of a protest or request, the commission

> shall investigate and redetermine whether the claimant is eligible and qualified as to that period. If, upon the redetermination, the claimant is found ineligible or not qualified, the commission shall investigate and determine whether the claimant obtained benefits, for 1 or more preceding weeks within the series of consecutive weeks which includes the week covered by the redetermination, improperly as the result of administrative error . . . . [*Id.*]

Under MCL 421.32a(1); MSA 17.534(1)(1), the commission is required to review a timely protested "determination" and issue a "redetermination." Thus, the Court of Appeals erred when it held that no prospective redetermination of qualification or disqualification could occur where such qualification or disqualification took place prior to the effective date of the amendment. The quoted provisions clearly indicate that the Legislature intended that claimants be eligible and qualified for benefits in each week for which they received them.

## CONCLUSION

On the basis of statutory and case law existing prior to the effective date of 1974 PA 104, I find that Dow Chemical Company's striking employees had properly terminated their disqualification by obtaining interim employment. Accordingly, the MESC is entitled to charge Dow Chemical Company's rating account for charges corresponding to benefits paid prior to the effective date of the amendment. However, 1974 PA 104 is correctly applied to preclude charges to Dow's MESC rating account for benefits paid to striking workers after the effective date of the amendment.

CAVANAGH, J. (*dissenting*). We are asked to de-

termine the extent to which an amendment of the labor dispute disqualification provision of the Michigan Employment Security Act[1] contained in 1974 PA 104 applies to the 486 claims at issue in this appeal. Implicit in the majority opinion is the conclusion that the amendment is substantive and ought to be applied prospectively. I write separately to express my disagreement with the majority's conclusion that the claimants' eligibility may be redetermined for benefit weeks subsequent to the effective date of the amendment.

I

During a labor dispute with Dow Chemical Company, 486 striking workers performed short-term employment in order to terminate their disqualification for unemployment benefits under the labor dispute disqualification provision of MCL 421.29; MSA 17.531. The claimants then applied for and were awarded unemployment compensation benefits.

Dow appealed these awards to an MESC referee and then to the Employment Security Board of Review but was unsuccessful. Dow then filed a consolidated appeal in Midland Circuit Court, but the orders of the Board of Review were affirmed. The decision was also affirmed by the Court of Appeals. *Dow Chemical Co v Curtis,* 158 Mich App 347; 404 NW2d 737 (1987).

II

The labor dispute disqualification provision of

[1] MCL 421.1 *et seq.;* MSA 17.501 *et seq.*

§ 29(8) in effect at the time the present claimants sought unemployment benefits provided:

> An individual shall be disqualified for benefits for any week with respect to which his total or partial unemployment is due to a labor dispute in active progress, or to shutdown or start-up operations caused by such labor dispute, in the establishment in which he is or was last employed, or to a labor dispute (other than a lockout) in active progress, or to shutdown or start-up operations caused by such labor dispute, in any other establishment within the United States which is functionally integrated with such establishment and is operated by the same employing unit. No individual shall be disqualified under this subsection 29(8) if he is not directly involved in such dispute.

Under the terms of this provision as interpreted by this Court's decision in *Great Lakes Steel Corp v Employment Security Comm,* 381 Mich 249; 161 NW2d 14 (1968), the MESC and the courts below looked to the identity of each claimant's last employing unit to determine whether the unemployment was due to a labor dispute involving the last employer. The *Great Lakes* Court concluded that the labor dispute disqualification is terminated when a striking employee provides services for an interim employer from whom remuneration is received. *Id.,* 254.

The Legislature subsequently amended § 29(8) by 1974 PA 104 which raised the standards under which a striking employee may terminate the labor dispute disqualification. The amended version, which became effective on June 9, 1974, provides:

> An individual's disqualification imposed or imposable under this subsection shall be terminated by his performing services in employment with an employer in at least 2 consecutive weeks falling wholly within the period of his total or partial unemployment due to the labor dispute, and in

addition by earning wages in each of those weeks in an amount equal to or in excess of his actual or potential weekly benefit rate with respect to those weeks based on his employment with the employer involved in the labor dispute.

The majority notes that not a single claimant fulfilled the more stringent requirements of the amended statute either before or after June 9, 1974. It is undisputed, however, that all of the claimants involved in the present case terminated their disqualification prior to June 9, 1974, and became eligible for benefits under the terms of the preamendment version of the statute.

The precise question to be decided is whether an amended statute that affects substantive rights can be applied so as to extinguish a claimant's eligibility for benefits. I disagree with the majority's conclusion that one's initial eligibility for benefits may be redetermined for benefit weeks commencing on or after the effective date of the amendment. This result was not authorized by the Legislature and is not supported by principles of statutory construction or by prior precedent of this Court.

The Court's decision in *Franks v White Pine Copper Div,* 422 Mich 636, 670-672; 375 NW2d 715 (1985), outlines the guiding principles to be used when determining the extent to which a statutory change in the law is to be applied. Statutes are presumed to operate prospectively unless the Legislature has expressly provided for retrospective application. The initial inquiry, then, is whether the Legislature has clearly stated its intention on this question.

I agree with the majority that there is no specific language in 1974 PA 104 indicating that retrospective application was intended. Conse-

quently, although the majority has carefully avoided the use of the word "prospective," the amendment must be applied prospectively.

The majority holds that the amendatory act is not to be applied to benefits paid prior to the amendment's effective date. In this respect, the majority has provided for a prospective application. The majority does not, however, provide for a purely prospective application, since it authorizes the termination of the claimants' rights to benefits, rights which accrued prior to the effective date of the amendment.

The majority has criticized the *Great Lakes* decision and has heralded the Legislature's adoption of 1974 PA 104. A preference for the higher standards adopted by the Legislature is not, however, a substitute for the application of general principles of statutory construction and does not justify a departure from established precedent.

When determining the effect of an amendatory act on transactions completed prior to its enactment, we have previously looked to the rule set forth in 1A Sands, Sutherland Statutory Construction (4th ed), § 22.36, pp 300-301:

> In accordance with the rule applicable to original acts, it is presumed that provisions added by the amendment affecting substantive rights are intended to operate prospectively. Provisions added by the amendment that affect substantive rights will not be construed to apply to transactions and events completed prior to its enactment unless the legislature has expressed its intent to that effect or such intent is clearly implied by the language of the amendment or by the circumstances surrounding its enactment.[2]

[2] See *Hurd v Ford Motor Co,* 423 Mich 531, 535; 377 NW2d 300 (1985); *White v General Motors Corp,* 431 Mich 387; 429 NW2d 576 (1988).

In *Hurd v Ford Motor Co,* 423 Mich 531; 377 NW2d 300 (1985), we determined that an amendment of the Workers' Disability Compensation Act[3] which was enacted by the Legislature to invalidate this Court's decision in *Deziel v Difco Laboratories, Inc (After Remand),* 403 Mich 1; 268 NW2d 1 (1978), effected a substantive change in the law. Because there was no indication of the Legislature's intent, we concluded that the provision was entitled to prospective application. The section was held to apply only to personal injuries occurring on or after the provision's effective date. *Hurd, supra,* 535.

More recently, in *White v General Motors Corp,* 431 Mich 387; 429 NW2d 576 (1988), this Court provided for a prospective application of § 373 of the WDCA[4] which imposed a higher standard of disability for those receiving nondisability pension or retirement benefits. Once again, the higher standard contained in the amendment was applied prospectively to injuries occurring on or after the effective date of the provision.

In the workers' compensation context, then, amendatory acts affecting questions of eligibility have been applied prospectively so as to apply to injury dates occurring on or after the effective date of the provision. *Hurd, White, supra.* Thus, an injured worker's right to benefits accrues on the date of injury, and the law in effect at the time of the work-related injury is controlling. An amendatory act entitled to prospective application in an unemployment compensation case should be applied to claims on the basis of unemployment dates on or after the effective date chosen by the Legislature, since it is the claimants' unemployment that

[3] MCL 418.101 *et seq.;* MSA 17.237(101) *et seq.*

[4] MCL 418.373; MSA 17.237(373) as amended by 1980 PA 357, effective January 1, 1982.

gives rise to their right to receive benefits.[5] In the present case, then, because the striking workers successfully terminated their disqualification for unemployment benefits by performing interim employment, their right to the benefits accrued prior to the effective date of the amendment, and their initial eligibility for benefits may not be redetermined.[6]

The majority suggests that the MESA authorizes a redetermination of the present claimants' eligibility for benefit weeks following the effective date of 1974 PA 104. I disagree. Section 32(d) of the MESA[7] provides in part:

> The issuance of each benefit check shall be considered a determination by the commission that the claimant receiving the checking [sic] was covered during the compensable period, and eligible and qualified for benefits.

This section was explained in *Roman Cleanser*

[5] The Court of Appeals stated in *Jozwik v Employment Security Comm,* 30 Mich App 506, 520; 186 NW2d 755 (1971), that

> "the primary mandatory prerequisite in any instance, the key that unlocks the floodgates, is the existence of a state of unemployment. If no unemployment, then no benefits could arise, in any event, regardless of qualifications or eligibility. Unemployment is the indispensable, essential element or ingredient which brings into being and sets into motion all of the other provisions of the act. The operation of the act is dependent entirely upon the existence of a status of unemployment as it is defined in the act." [Emphasis omitted.]

[6] The *Great Lakes* Court expressly rejected the employer's claim that the striking workers were not "unemployed" as that term is defined in § 48 of the act. The Court explained that the interim employer became the last employing unit under the labor dispute disqualification provision then in effect when the striking worker obtained employment with that employer. The interim employer also became the "employing unit" under § 48, and the claimants became eligible for benefits because of layoffs by their interim employers. 381 Mich 253-255.

[7] MCL 421.32(d); MSA 17.534(d).

*Co v Murphy,* 386 Mich 698, 705; 194 NW2d 704 (1972), in which this Court stated:

> "Under § 32(d), the issuance of each benefit check is a determination entitling the employer to a redetermination of the former employee's current eligibility and qualification. A redetermination may, thus, be obtained at any time upon a claim that there has been a change of facts or of law. But, absent a change of facts or of law, questions already decided may not be reopened unless 'for good cause' the commission 'reconsiders' under § 32a."

Neither the *Roman Cleanser* decision nor § 32(d) of the act compels the conclusion reached by the majority. If the Legislature had expressly provided for a retroactive application of its amendatory act, § 32 would provide the procedure under which an employer could seek a redetermination of the claimants' eligibility. The Legislature chose not to do so in this instance.

The majority of this Court has determined the application of 1974 PA 104 by looking to the extent to which the employer will be burdened by charges against its rating account. The purpose of the MESA, however, is not advanced when the appropriate application of amendatory acts is determined by looking to the financial effects on an employer.[8] Indeed, our function is much more

[8] The Legislature expressly declared the policy of the MESA in MCL 421.2; MSA 17.502, which states:

> The legislature acting in the exercise of the police power of the state declares that the public policy of the state is as follows: Economic insecurity due to unemployment is a serious menace to the health, morals, and welfare of the people of this state. Involuntary unemployment is a subject of general interest and concern which requires action by the legislature to prevent its spread and to lighten its burden which so often falls with crushing force upon the unemployed worker and his

narrow, and, absent some indication of legislative intent, a decision to apply a substantive amendment so as to take away accrued rights would represent an intrusion into the Legislature's authority to determine questions of policy that govern this area of the law.[9]

I find no indication in the statute or in the provision governing its effective date[10] that the

> family, to the detriment of the welfare of the people of this state. Social security requires protection against this hazard of our economic life. Employers should be encouraged to provide stable employment. The systematic accumulation of funds during periods of employment to provide benefits for periods of unemployment by the setting aside of unemployment reserves to be used for the benefit of persons unemployed through no fault of their own, thus maintaining purchasing power and limiting the serious social consequences of relief assistance, is for the public good, and the general welfare of the people of this state.

As we stated in *General Motors Corp v Erves (On Rehearing)*, 399 Mich 241, 251; 249 NW2d 41 (1976), modified 400 Mich 953 (1977), "[t]he costs involved are considered part of the cost of doing business and are reflected primarily in the price of the product to the consumer."

[9] See *Lawrence Baking Co v Unemployment Compensation Comm*, 308 Mich 198, 212; 13 NW2d 260 (1944); *General Motors Corp v Unemployment Compensation Comm*, 321 Mich 724, 728; 34 NW2d 497 (1948).

[10] The effective date of the provision is governed by MCL 421.66; MSA 17.569(16), which provides in part:

> (1) If this 1974 amendatory act is given immediate effect, the effective date of this amendatory act shall be the first day of the calendar week containing the thirtieth day after it is approved by the governor or becomes law without his approval.
>
> (2) An individual who has a current and unexhausted benefit year on the effective date as provided in subsection (1) shall have his weekly benefit rate and the maximum amount of benefits recomputed in accordance with this amendatory act with respect to any week of unemployment beginning on or after that date on that portion of his benefit rights not exhausted prior to that date but his weekly benefit rate and maximum amount of benefits established and not exhausted prior to the aforementioned effective date shall not be subject to reduction or elimination by the recomputation.

The amendment took effect on June 9, 1974.

Legislature intended to require a claimant to terminate the labor dispute disqualification by locating suitable interim employment on more than one occasion. Once a claimant has established his eligibility for benefits under this provision, a subsequent amendatory act determined to be substantive and entitled to prospective application should not be applied so as to require the claimant to terminate his disqualification once again. Thus, the Court of Appeals correctly determined that a claimant who has been determined to be eligible for benefits under § 29(8) remains eligible and qualified for any week in which the claimant

> (1) is registered for work, has continued to report to the unemployment office as prescribed by the commission, and is seeking work, unless this requirement is waived by the commission, (2) makes a claim for benefits, and (3) is able and available to perform suitable full-time work of a character for which he is qualified. [158 Mich App 359.]

III

Consequently, I would hold that, as in workers' compensation cases where an employee's right to benefits accrues on the date of injury, an employee's right to unemployment compensation benefits accrues on the date of unemployment. When determining a claimant's eligibility for benefits, the applicable law is the law in effect on the date of unemployment, not the law in effect on the date each benefit check becomes due and payable. I would affirm the decision of the Court of Appeals upholding the award of benefits by the MESC.

BOYLE, J., concurred with CAVANAGH, J.

BOYLE, J. (*dissenting*). I agree with the observations and conclusions of Justice CAVANAGH. I, too, am concerned with the inconsistencies between this majority and the majorities in *Hurd v Ford Motor Co,* 423 Mich 531; 377 NW2d 300 (1985), and *White v General Motors Corp,* 431 Mich 387; 429 NW2d 576 (1988). Moreover, I believe that the question of the appropriate accrual date in unemployment compensation must be addressed—whether explicitly or inexplicitly—in this case. The very words "retroactive" and "prospective" are inherently relative. It follows that the use of these words has no value in determining the application of a statutory amendment unless a point of reference is designated. The majority's unreflected quotation of § 32 of the act provides no assistance in determining the correct accrual date for the rights of claimants, since it merely allows redeterminations of eligibility and qualification. The question begged by the majority is the following: What law is applicable in the determination or redetermination of eligibility and qualification? I would answer, as has Justice CAVANAGH, that the applicable law is presumed to be the law in effect on the date of unemployment.[1]

I agree with Justice CAVANAGH that the Employment Security Act is analogous in this respect to the law of workers' compensation where the accrual date has long been held to be the date of injury. *Hurd, supra.* See also Welch, Workers' Compensation in Michigan: Law & Practice, §§ 2.01-2.04. I would add that this conclusion flows from the nature of the statute in question. Unem-

[1] This is not to say that the Legislature is without power to enact retrospective amendments, see MCL 421.57; MSA 17.561, but only that the applicable law is presumed to be that in effect at the date of unemployment unless otherwise specified. However, the majority does not suggest that the section of 1974 PA 104 in question is expressly retroactive.

ployment compensation, like workers' compensation, is essentially an insurance scheme. As we are reminded by § 2 of the act, this scheme functions through "[t]he systematic accumulation of funds during periods of employment to provide benefits for periods of unemployment by the setting aside of unemployment reserves to be used for the benefit of persons unemployed . . . ." MCL 421.2; MSA 17.502. Contributions to these accumulated funds are based upon actuarial studies conducted by the commission at the direction of the advisory council. See MCL 421.3a; MSA 17.503(1). If benefit levels ordinarily fluctuate on the basis of changes in the law after the date of unemployment, after the accumulation of funds, this legislation is in peril. No insurance scheme can long survive if the adjustment of claims is based merely upon post hoc notions of sound public policy.

This concept has not eluded the Legislature. The history of the act shows a consistent assumption on the part of the Legislature that the applicable law is presumed to be that in effect on the date of unemployment.

Section 66(1) of 1974 PA 104, MCL 421.66(1); MSA 17.569(16)(1),[2] provides as a general rule that the effective date of the amendment is immediate, or more precisely, the first day of the calendar week containing the thirtieth day after it became law.[3] The effective date is not, of course, the ac-

[2] While only 1974 PA 104, § 66 is used to demonstrate the proper accrual date in this opinion, this legislation is by no means unique. See 1975 PA 110, § 67, MCL 421.67; MSA 17.569(17).

[3] 1974 PA 104, § 66(1) provides:

> If this 1974 amendatory act is given immediate effect, the effective date of this amendatory act shall be the first day of the calendar week containing the thirtieth day after it is approved by the governor or becomes law without his approval.

The act was approved by the Governor on May 16, 1974.

crual date. As was recently explained in *White:*

> "Effective dates are inserted by the Legislature in all kinds of statutes. When it wishes to address the question of retroactivity, the Legislature has specifically done so in addition to providing for an effective date.
>
> "For example, when the Legislature passed the new rule for a claim and delivery action, in 1976 PA 79, it provided in enactment § 2 that '[t]his amendatory act shall apply to all actions pending or commenced on or after the effective date of this act.' Enactment § 3 of the same statute provided: 'This amendatory act shall take effect July 1, 1975.' Because the Legislature in connection with other statutes in enactment sections has specifically addressed retroactivity in addition to providing an effective date, we are unable to agree that the mere insertion of an effective date, standing alone, is dispositive of the prospective/retroactive effect of 1981 PA 194." [*White, supra,* 398-399 (RILEY, C.J.), quoting with approval, *Selk v Detroit Plastic Products,* 419 Mich 1, 35, n 2; 345 NW2d 184 (1984).]

To be more specific, the use of an "effective date" in any legislation merely serves to negate the presumption under Const 1963, art 4, § 27 which would otherwise provide an effective date ninety days after the end of the legislative session. What is of more significance in determining questions of retrospective or prospective application is the use of the phrase "shall apply."

This phrase can also be found in 1974 PA 104, § 66(4):

> Notwithstanding subsection (1), the provisions of sections 17(c)(iii) and 27(j), in effect prior to this amendatory act, *shall apply* until January 1, 1975. [MCL 421.66(4); MSA 17.569(16)(4). Emphasis added.]

By implication, the new act, 1974 PA 104, applies to all claims after that date. Thus, the applicable law for all claims regarding § 17(c)(iii) and 27(j) after January 1, 1975 is 1974 PA 104, *regardless of the accrual date.*

Further exploration of § 66(4) reveals why the Legislature would prefer that these provisions be applied as of January 1, 1975, to ongoing claims or assessments. Section 17(c)(iii) of the prior act, 1971 PA 231, provided that "the solvency account shall be credited . . . with all reimbursements and benefits paid under subsection (c) of Section 11 . . . ." In turn, 1971 PA 231, § 11(c) authorized the commission to enter reciprocity agreements with other states for the exchange of accumulated benefits. Among other changes, 1974 PA 104, § 11(g) allows reciprocity agreements only if the commission finds the agreement to "be fair and reasonable as to all affected interests." In this respect, 1974 PA 104, § 11(g) does not affect substantive rights but does change procedure for distribution of benefits. Since the amendment, in this respect, is procedural and not substantive, it is presumed to apply retroactively. *White, supra,* 397-398. That result might, however, conflict with prior reciprocity agreements entered by the commission. It was therefore necessary for the Legislature to give this provision limited prospective application, and that was accomplished by way of the "shall apply" language of 1974 PA 104, § 66(4). If, on the other hand, the Legislature had preferred an accrual date corresponding with the date of each benefit payment, it would have been unnecessary to make § 17(c)(iii) applicable as of January 1, 1975, since the effective date of § 11(g) was January 1, 1975, under 1974 PA 104, § 66(3).

The Legislature's presumption of an unemployment accrual date is further demonstrated by

examining § 27(j) of the prior act, 1971 PA 231. As I have previously noted, § 27(j) of the prior act also remained applicable until January 1, 1975, under 1974 PA 104, § 66(4). Section 27(j) of the prior act was, however, a *substantive* provision restricting the rights of certain employees of institutions of higher education to benefits between academic years or terms within an academic year. The 1974 amendment extended the restrictions to certain employees of primary and secondary institutions, if notified of the layoff seven days prior to the end of the term. See 1974 PA 104, § 27(i). Since 1974 PA 104 had an effective date of June, 1974, some employees laid off after that date would have been affected by the amendment and, of course, it would have been impossible for employers to comply, in the same cases, with the seven-day notice requirement. It was therefore necessary to phase-in this legislation at the close of the following term, which corresponded with the end of the calendar year, 1974. Again, the applicable law language of 1974 PA 104, § 66(4) was used to override the presumption of prospective application based upon the date of the unemployment. If, as the majority assumes, the accrual date of substantive rights under the act is the date of each payment, it would have been unnecessary to extend the applicability of 1971 PA 231, § 27(j), since the new provisions of the 1974 amendment, 1974 PA 104, § 27(i), are expressly made effective January 1, 1975, in 1974 PA 104, § 66(3).[4]

This examination of 1974 PA 104, § 66 demonstrates two important matters of legislative intent. First, consistent with the insurance nature of the

[4] The majority's treatment of 1974 PA 104, § 66(4) renders the entire paragraph nugatory, contrary to the general rule of statutory interpretation. *State Bar of Michigan v Galloway*, 422 Mich 188, 196; 369 NW2d 839 (1985).

scheme, ordinary rules of statutory interpretation and this Court's own prior decisions, the Legislature presumes that substantive rights under the act accrue as of the date of unemployment, while procedural provisions are fully retroactive. Second, and most germane to this litigation, the Legislature chose to expressly override these presumptions as to §§ 17(c)(iii) and 27(j). Both common sense and the doctrine of *expressio unius est exclusio alterius, Stowers* v *Wolodzko,* 386 Mich 119, 133; 191 NW2d 355 (1971),[5] thus indicate that the Legislature chose not to override these presumptions as to § 29(8) of the same amendment. Therefore, in accordance with our prior decisions in *White, Hurd,* and *Selk, supra,* the substantive amendment of § 29(8) should be given only prospective application based upon an accrual date corresponding with the date of unemployment for these employees.

I respectfully dissent.

[5] See also 2A Sands, Sutherland Statutory Construction, § 47.23, p 194.

PEOPLE v FINLEY

Docket No. 81221. Argued May 4, 1988 (Calendar No. 10). Decided October 17, 1988. Rehearing denied *post,* 1211.

Robert L. Finley was convicted by a jury in the Wayne Circuit Court, Thomas J. Foley, J., of four counts of first-degree criminal sexual conduct and of armed robbery. The Court of Appeals, DANHOF, C.J., and CYNAR and J. M. BATZER, JJ., although agreeing with the defendant that the trial court incorrectly weighed the factor of similarity in admitting a prior burglary conviction, affirmed, and, adopting the rule of *Luce v United States,* 469 US 38 (1984), requiring a defendant to testify at trial in order to preserve the issue of improper impeachment by prior convictions, held that because the defendant did not testify the issue was not preserved for review (Docket No. 85133). The defendant appeals.

In opinions by Chief Justice RILEY, joined by Justices BOYLE and GRIFFIN, and by Justice BRICKLEY, the Supreme Court *held:*

An accused must testify at trial in order to preserve for review the issue of improper impeachment by prior convictions.

And in opinions by Justice BRICKLEY, Justice CAVANAGH, and Justice LEVIN, joined by Justice ARCHER, the Supreme Court further *held:*

The rule is to apply only prospectively, beginning November 1, 1988.

Chief Justice RILEY, joined by Justices BOYLE and GRIFFIN, would hold that an accused must testify at trial in order to preserve for review the issue of improper impeachment by prior convictions.

1. Under FRE 609(a), where the probative value of evidence of a prior conviction offered to impeach a defendant outweighs its prejudicial effect, a trial court must admit the evidence. Under the rule of *Luce,* a defendant must testify at trial in order to preserve for review the issue of improper impeachment by prior convictions. *Luce* provides a mechanism for meaningful appellate review of an impeachment decision by requiring a fully developed factual record upon which to examine the trial court's decision, and, if determined to be erroneous, to decide whether the error was harmless.

2. In Michigan, whether evidence of a prior conviction is

admitted depends on the category of the crime: evidence of convictions of crimes inherently probative of truth or veracity is automatically admitted; evidence of those not inherently probative of truth or veracity is automatically excluded; and evidence of those involving a theft component is admitted or excluded at the trial court's discretion on the basis of whether the probative value of admission would outweigh the prejudicial effect on the defendant—similar to the analysis required in federal court. Part of the trial court's decision whether to admit requires a determination of the importance of the defendant's testimony to the decisional process, largely unknowable unless the defendant testifies. There remains the same necessity of an adequate record to provide meaningful appellate review. Although the rule of *Luce* is binding on the federal courts, there is no requirement that it be applied in Michigan. However, because the need and rationale for the *Luce* rule in federal courts are equally applicable in Michigan courts, it follows that a Michigan defendant must testify in order to preserve for review the issue of improper impeachment by prior conviction.

3. Three factors are to be considered in determining whether a judicially created rule of law is to be applied retroactively: the purpose of the new rule, the general reliance on the old rule, and the effect of the new rule on the administration of justice. Where a defendant has done everything under an old rule to preserve an issue, the reliance outweighs other factors favoring retroactive application. However, in this case, the defendant did not do all that was required to preserve the issue. He did not testify, nor did he express an intention to testify or outline the nature of his proposed testimony, thus waiving review of the issue. It cannot be argued that the defendant was relying on prior law in preserving the issue, and thus retroactive application of *Luce* will not result in undue harshness.

4. The *Luce* rule will apply in any case tried on or after November 1, 1988. In cases then pending on appeal in which the defendant testified at trial or expressed an intention to testify if his prior record was excluded and stated the nature of his testimony, review of the impeachment issue is preserved.

Affirmed.

Justice BRICKLEY, concurring in part and dissenting in part, agreed that an accused must testify at trial in order to preserve for review the issue of improper impeachment by prior convictions, but would apply the rule only prospectively, beginning November 1, 1988. In this case, prior law, which required that

to preserve the issue for appeal a defendant had to object to introduction of evidence of prior convictions or move for its exclusion, should be applied. Because the defendant did object to such admission, the case should be remanded to the Court of Appeals for a determination whether the admission was erroneous.

Justice CAVANAGH, concurring in part and dissenting in part, stated that while the defendant's conviction should be affirmed, a defendant need not testify at trial to preserve a claim of improper impeachment by a prior conviction for review under MRE 609. The rule of *Luce v United States,* 469 US 38 (1984), requiring such testimony, has no appeal in fairness, logic, or consistency with this Court's prior decisions.

Implicit in the Fifth Amendment guarantee that no person shall be compelled in any criminal case to be a witness against himself is the guarantee that no penalty, sanction, or disadvantage to the defendant shall flow from a decision not to testify at trial. A defendant must pay no court-imposed price for the exercise of the constitutional privilege not to testify. Under *Luce,* a defendant who elects not to testify at trial is denied the right on appeal to raise what may be a substantial issue. If a court can know the precise nature of a defendant's testimony only by hearing a defendant's actual trial testimony, then motions in limine would have no meaning. Contrary to the implications of *Luce,* such motions and offers of proof are an efficient means of avoiding trial delays regarding the admissibility of potentially inflammatory evidence, and litigants are encouraged to use them because the motions allow the trial judge time to decide the issue without interrupting trial. Where a reviewing court finds that a defendant was improperly threatened with impeachment by prior convictions following a timely but unsuccessful motion in limine, the court normally should assume that the defendant's decision not to testify was out of fear of the impeachment.

In this case, the defendant's prior burglary conviction was probative of his credibility and to that extent was properly admitted.

Justice LEVIN, joined by Justice ARCHER, stated that while a defendant, consistent with the Fifth Amendment privilege against self-incrimination, properly may be required to testify in order to preserve for review the issue of improper impeachment by prior conviction, the defendant should be permitted to preserve the issue for review by testifying either in the presence or outside the presence of the jury. Permitting a defendant, who will not testify in the presence of the jury absent a

revision of the trial court's initial ruling regarding use of a prior conviction or a change in the prosecutor's position, to preserve for appeal a challenge to the correctness of the court's ruling by testifying outside the presence of the jury, would work just as well as or better than requiring testimony only in the presence of the jury in aiding both the trial court and the appellate courts in weighing any prejudicial effect against the probative value of allowing admission of a past conviction record. The determination of the harmlessness of an error more readily would be made on appeal where the defendant testifies on a separate record. The appellate court would have no need to consider the effect of an erroneous admission of a prior conviction record and could confine its inquiry simply to whether the defendant's testimony might have created a reasonable doubt.

161 Mich App 1; 410 NW2d 282 (1987) affirmed.

*Frank J. Kelley,* Attorney General, *Louis J. Caruso,* Solicitor General, *John D. O'Hair,* Prosecuting Attorney, *Timothy A. Baughman,* Chief, Criminal Division, Research, Training and Appeals, and *Jeffrey Caminsky,* Assistant Prosecuting Attorney, for the people.

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

RILEY, C.J. The issues in this case are whether we should require a defendant to testify at trial to preserve for review the issue of improper impeachment by prior convictions, and, if so, whether such a requirement should have prospective application only.

We find that the rationale underlying the above rule is sound, and hold that today's decision will apply in any case tried after the release date of this opinion. We further hold that, in cases now pending on appeal, review of the impeachment issue is preserved: 1) if the defendant had in fact testified at trial, or 2) if the defendant had expressed his intention to testify in the event his

prior record was excluded and had stated the nature of his expected testimony. In the instant case, defendant did not testify, nor did he express his intention to testify or outline the nature of his proposed testimony. Thus, defendant has waived review of the issue.

FACTS AND PROCEEDINGS

Defendant was convicted by a jury in Wayne Circuit Court of four counts of first-degree criminal sexual conduct, MCL 750.520b(1); MSA 28.788(2)(1), and of armed robbery, MCL 750.529; MSA 28.797. The judge sentenced defendant to five concurrent prison terms of forty to sixty years.

The victim testified that on October 16, 1984, at approximately 6:15 P.M., she was at a car wash vacuuming the floorboard of her automobile. Two assailants grabbed the back of her hair, pulled her from the automobile, and held a knife to her throat. The victim later identified her assailants as defendant, Robert Finley, and Thomas Vaughn. The men forced the victim into her car and proceeded to drive to several locations, alternately subjecting the victim to repeated acts of oral, anal, and vaginal intercourse. During the course of these events, defendant and Vaughn took approximately seventeen dollars from the victim to pay for gasoline, as well as several articles of jewelry.

Defendant and Vaughn eventually abandoned the victim on the side of an expressway and drove off in her car. The victim flagged down a passing motorist who took her to a nearby police station.

Defendant was arrested after the victim identified him from photographs. The victim also identified Vaughn, who faced charges as a codefendant but died before trial commenced.

On the first day of trial, defendant made a

motion in limine to prevent the prosecution from using his prior felony conviction to impeach him if he testified. Approximately four years before trial, defendant had been convicted in Kentucky of burglary. Defendant did not express his intention to testify if his felony conviction was excluded. Nor did defendant inform the court of the expected nature of his testimony.

The trial court denied defendant's motion, apparently finding that the similarity of the prior burglary conviction to the armed robbery charge militated in favor of admission rather than exclusion. Defendant did not testify at trial.

On appeal, defendant argued that the trial court incorrectly weighed the similarity factor as favoring admission. See *People v Baldwin,* 405 Mich 550; 275 NW2d 253 (1979) (holding that similarity weighs against admissibility). The Court of Appeals agreed with defendant but declined to reverse his conviction. *People v Finley,* 161 Mich App 1; 410 NW2d 282 (1987).

Instead, the Court adopted the rule of *Luce v United States,* 469 US 38; 105 S Ct 460; 83 L Ed 2d 443 (1984), which requires that in order to preserve the issue of improper impeachment by prior convictions, a defendant must testify at trial. In this case, since defendant did not testify, the Court held that the issue was not preserved for review.

We granted leave to appeal on defendant's application, limited to the issues whether this Court should adopt the *Luce* requirement, and, if so, whether that requirement should have prospective application only. 429 Mich 894 (1988).

## I

## ANALYSIS

Under the Federal Rules of Evidence, the use of prior convictions to impeach a defendant's testi-

mony is governed by FRE 609(a).[1] In most cases, the judge will be required to balance the probative value of admitting the prior conviction with the prejudicial effect to the defendant. Where the probative value outweighs the prejudicial effect, the judge must admit the prior conviction.

The purpose of the *Luce* rule is to provide a mechanism for meaningful appellate review of the impeachment decision. In fact, the straightforward logic of *Luce* not grasped by either dissent is that as to evidentiary rulings, error does not occur until error occurs; that is, until the evidence is admitted. Obviously, in other contexts, if an offer of proof is made and the court erroneously permits the introduction of hearsay, character evidence, similar acts, or the myriad of evidence objectionable under the MRE, there is no error requiring reversal unless the evidence actually is introduced. Unless the defendant actually testifies, a number of questions remain open to speculation:

> Any possible harm flowing from a district court's in limine ruling permitting impeachment by a prior conviction is wholly speculative. The ruling is subject to change when the case unfolds, particularly if the actual testimony differs from what was contained in the defendant's proffer. Indeed even if nothing unexpected happens at trial, the district judge is free, in the exercise of sound

[1] FRE 609(a) provides:

> (a) General Rule. For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment.

> judicial discretion, to alter a previous in limine ruling. On a record such as here, it would be a matter of conjecture whether the District Court would have allowed the Government to attack petitioner's credibility at trial by means of the prior conviction. [*Luce, supra* at 41-42.]

The *Luce* Court also noted that the prosecutor may not have attempted to impeach the defendant with the prior conviction. Where the case against the defendant is strong, or other avenues of impeachment are available, it is possible that the defendant's prior record would not have been used. *Luce, supra* at 42.

In addition, a defendant's decision not to testify generally is based on many factors, no one of which is determinative. A reviewing court cannot assume that the defendant decided not to testify out of fear of impeachment by a prior conviction. *Id.* The Court rejected the suggestion that a defendant may state an intention to testify if the court grants the motion in limine because such a commitment is difficult to enforce. *Id.*

In the event that the trial judge incorrectly allows impeachment by prior conviction, the *Luce* rule enhances review of the harmless error issue:

> Were in limine rulings under Rule 609(a) reviewable on appeal, almost any error would result in the windfall of automatic reversal; the appellate court could not logically term "harmless" an error that presumptively kept the defendant from testifying. Requiring that a defendant testify in order to preserve Rule 609(a) claims will enable the reviewing court to determine the impact any erroneous impeachment may have had in light of the record as a whole; it will also tend to discourage making such motions solely to "plant" reversible error in the event of conviction. [*Luce, supra* at 42.]

A ruling in limine on impeachment by prior convictions does not present constitutional implications. *Id.* at 43. As such, while *Luce* is binding on the federal courts, we are not required to apply its holding in Michigan courts. See *People v Turner,* 390 Mich 7, 19; 210 NW2d 336 (1973). However, as noted in *People v Allen,* 429 Mich 558, 636, 637; 420 NW2d 499 (1988) (RILEY, C.J., dissenting), an overwhelming majority of states deciding the issue have adopted the *Luce* rule.[2]

At the time of trial, the Michigan rule was similar to the federal rule.[3] However, very recently, this Court substantially revised MRE 609.[4]

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[2] See the cases cited in *Allen, supra* at 637, n 14. See also *People v Whitehead,* 116 Ill 2d 425; 508 NE2d 687 (1987); *Reed v Commonwealth,* 366 SE2d 274 (Va App, 1988); but see *State v Whitehead,* 104 NJ 353; 517 A2d 373 (1986) (reversing one of the cases cited in *Allen, supra* at 637, n 14).

[3] At the time of trial in this case, MRE 609 provided in pertinent part:

> General rule. For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if
>
> (1) the crime was punishable by death or imprisonment in excess of one year under the law under which he was convicted, or the crime involved theft, dishonesty or false statement, regardless of the punishment, and
>
> (2) the court determines that the probative value of admitting this evidence on the issue of credibility outweighs its prejudicial effect and articulates on the record the factors considered in making the determination.

[4] The relevant sections of MRE 609 now provide:

> (a) General rule. For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall not be admitted unless the evidence has been elicited from the witness or established by public record during cross-examination, and
>
> (1) the crime contained an element of dishonesty or false statement, or
>
> (2) the crime contained an element of theft, and
>
> (A) the crime was punishable by imprisonment in excess of

In *Allen,* a majority of this Court created a new framework with which to analyze the issue of impeachment by prior conviction. The Court established three categories of prior convictions: those inherently probative of truth or veracity are automatically admitted; those not inherently probative of truth or veracity are automatically excluded; and those involving a theft component are to be admitted or excluded at the trial judge's discretion.

The *Allen* Court also clarified the balancing factors to be considered where the prior conviction involved a theft component. The judge must determine whether the probative value of admitting the prior conviction would outweigh the prejudicial effect to defendant. In determining the probative value of the conviction, the judge must objectively consider only the vintage of the prior conviction and its indicia of veracity. *Allen, supra* at 606. The prejudicial effect must be determined by considering only the "similarity [of the prior conviction] to the charged offense and the importance of the defendant's testimony to the decisional process . . . ."[5] *Id.*

one year or death under the law under which the witness was convicted, and

(B) the court determines that the evidence has significant probative value on the issue of credibility and, if the witness is the defendant in a criminal trial, the court further determines that the probative value of the evidence outweighs its prejudicial effect.

(b) Determining probative value and prejudicial effect. For purposes of the probative value determination required by subrule (a)(2)(B), the court shall consider only the age of the conviction and the degree to which a conviction of the crime is indicative of veracity. If a determination of prejudicial effect is required, the court shall consider only the conviction's similarity to the charged offense and the possible effects on the decisional process if admitting the evidence causes the defendant to elect not to testify. The court must articulate, on the record, the analysis of each factor. [429 Mich cv-cvi (1988).]

[5] The *Allen* Court held that the "bright line" aspect of its decision

Defendant argues that the rules and practice of impeachment by prior convictions in Michigan are so dissimilar to the procedure in the federal system that the *Luce* rule is unnecessary. This Court's decision in *Allen* results in a more limited degree of discretion in the trial court than under the federal rules. As such, while appeals in the federal system will usually involve an abuse of discretion, under *Allen,* the issue on appeal will usually be whether the judge erroneously determined that a prior conviction fell within one of the "bright line" categories. Defendant's testimony is unnecessary to determine this question on appeal.

Furthermore, defendant argues that federal practice is different than Michigan practice because under the federal rules, the trial judge may defer ruling on the impeachment question until *after* the defendant actually testifies. However, in Michigan, the judge must rule on the impeachment question *before* the defendant testifies. See *People v Lytal,* 415 Mich 603, 609-610; 329 NW2d 738 (1982). Thus, since the judge must decide the question before hearing a defendant's testimony, defendant argues that a primary rationale underlying the *Luce* rule is undermined.

Defendant suggests that in light of these differences, an alternative procedure, such as described in *United States v Cook,* 608 F2d 1175 (CA 9, 1979), cert den 444 US 1034 (1980), would be sufficient in Michigan. In *Cook,* the court adopted a two-part requirement in order to preserve the issue for appeal. The defendant must express an intention to testify if his prior convictions are excluded. Further, the defendant must sufficiently describe the nature of his testimony for the trial

would have only prospective application, taking effect March 1, 1988. *Id.* at 609. The clarified balancing test was to have limited retroactive application. *Id.*

and appellate courts to decide the balancing question. *Id.* at 1186.

We agree with defendant that there are significant differences between practice in Michigan and in the federal courts. However, we disagree that those differences warrant an alternate procedure. The difficulties remedied by the *Luce* rule are, for the most part, equally present under Michigan practice.

The primary purpose of the *Luce* rule is to facilitate appellate review by requiring a fully developed factual record upon which to examine the trial judge's impeachment decision, and, if erroneous, to decide whether that error was harmless. *Luce* was not necessarily intended to benefit the trial judge in reaching the impeachment decision in the first instance. While there may be a peripheral benefit at the trial level as the judge may change the impeachment decision after hearing a defendant's testimony, that benefit is tangential to the fundamental purpose of providing meaningful appellate review. Thus, we reject defendant's argument that the Michigan rule requiring the impeachment question to be decided before the accused takes the stand weakens the *Luce* rationale.

We also reject—for the same reasons as the *Luce* Court—defendant's suggestion that a *Cook* statement of intention to testify and offer of proof provide a sufficient basis for appellate review. Defendant's promise to testify would be unenforceable, *Luce, supra* at 41, and there is no guarantee that defendant's trial testimony will mirror the offer of proof. *Id.* at 41, n 5.

Defendant's argument that judicial discretion has been curtailed by *Allen* carries more weight. We agree that *Allen* reduced the scope of discretion on this issue, but disagree with the implicit

conclusion that *Allen* obviates the need for a *Luce* rule.

Of the three categories of prior convictions, the discretionarily admitted or excluded convictions are analyzed in a similar fashion as in federal court. The judge must weigh the probative value versus the prejudicial effect and admit or exclude the conviction as a matter of discretion. Part of that decision requires the judge to determine the importance of the defendant's testimony to the decisional process, which is largely unknowable unless the defendant testifies. With the defendant's testimony on the record, it will be easier for the appellate court to determine what the effect on the decisional process would have been had the defendant not testified.[6] Thus, since admission of theft convictions is similar to the federal practice, there remains the same necessity of an adequate record to provide meaningful appellate review. Accordingly, the *Luce* requirement is equally necessary.

Defendant argues, however, that review of decisions in which the conviction falls within one of the "bright line" categories does not require a developed factual record. As such, in the event of an incorrect decision, an accused would be severely prejudiced because, in order to appeal, the defendant must testify and face the improper impeachment.

At the outset, it should be noted that a decision regarding the category into which a prior convic-

[6] The defendant is entitled under *Allen* to have the "effect on the decisional process if [he] does not testify" considered as a factor of prejudice in balancing whether or not to admit evidence of his prior convictions. 429 Mich 602. The instant decision will require the defendant to testify in order to obtain review of the impeachment question. The fact that a defendant did in fact testify should not be regarded as nullifying in the "effect on the decisional process" factor.

tion falls is fairly straightforward, with a relatively small grey area of doubt. Therefore, we do not anticipate a large number of incorrect decisions on this question. It would seem that defendant's fears may be somewhat exaggerated.

However, notwithstanding the above, we reject defendant's argument on another basis. It is true that the question whether a conviction falls within a "bright line" category does not require a defendant's testimony in order to be properly reviewed. However, for the most part, the rationales underlying the *Luce* rule are applicable even where the prior conviction falls within one of the "bright line" categories. Any hardship to the defendant arising out of an incorrect decision is purely speculative in the absence of his testimony. As noted by the *Luce* Court, a defendant's decision not to testify is rarely premised solely on whether prior convictions will be used for impeachment. *Luce, supra* at 42. Further, the prosecutor may have decided to use other means to impeach the defendant. *Id.* Finally, without defendant's testimony, a reviewing court is limited in determining the harmless error question.

It should also be noted that the Federal Rules of Evidence, under which *Luce* was decided, contain a "bright line" component similar to one category of the revised Michigan rule. Under FRE 609(a),[7] any conviction, be it felony or misdemeanor, *shall* be admitted if the crime involved dishonesty or false statement. However, despite this "bright line" component of the federal rule, the Supreme Court determined that defendant's testimony is necessary to facilitate review. Further, a number of states with limited judicial discretion on the issue of admission of prior convictions have

[7] See n 1 for text of FRE 609(a).

adopted the *Luce* rule.[8] Accordingly, we disagree with defendant that the "bright line" aspects of the new Michigan rule render the *Luce* rule unnecessary.

Furthermore, despite the suggestions in Justice CAVANAGH's opinion, it cannot be seriously claimed that the Fifth Amendment bars adoption of *Luce*. Whatever one's views of the philosophy of particular justices, in *Luce*, all eight justices agreed that the issue did not involve a Fifth Amendment challenge. The issue presented is what procedural steps are necessary to preserve an issue for appeal, a matter that no more levies a "court-imposed price" for the exercise of a constitutional privilege than procedural rules requiring the timely assertion of other constitutional rights.

Justice LEVIN's approach purports to meet the *Luce* objectives while imposing on the trial court the burden of conducting a minitrial on the evidentiary issue; whether or not the defendant actually intends to take the stand, it is predictable that such a hearing would always take place in order to protect the claim on appeal. Thus, Justice LEVIN's reverse-*Luce* proposal does not meet the Supreme Court's observation in *Luce* that "[b]ecause an accused's decision whether to testify 'seldom turns on the resolution of one factor' (citation omitted), a reviewing court cannot assume that the adverse ruling motivated a defendant's decision not to testify,"[9] nor will it "tend to discourage making such motions solely to 'plant' reversible error in the event of conviction." *Id.* at 42.

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[8] Compare the jurisdictions surveyed in *Allen, supra* at 597-599, ns 19-27, with those cited at 637, n 14 (RILEY, C.J., dissenting) and n 2 of this opinion.

[9] Indeed, data in Kalven & Zeisel, *The American Jury* (Boston: Little, Brown & Co, 1923), establish that nine percent of defendants elect not to testify even though they have no record or their record has been suppressed.

Nor, given the fact that a reverse-*Luce* hearing will predictably be held in every case can it be said that the reverse-*Luce* hearing is more efficient than *Luce.* If the reverse-*Luce* hearing is held and the judge decides to permit impeachment, the process must then be repeated in front of the jury. If, at the reverse-*Luce* hearing, the judge determines that impeachment will not be allowed, the process (save impeachment by convictions) will be repeated. If the reverse-*Luce* hearing is held and the defendant breaches his commitment to testify, the hearing testimony will be repeated for the jury. It is only in the rare situation in which the court, at the reverse-*Luce* hearing, determines that the defendant cannot be impeached and thereafter revises its decision after the defendant has testified in the jury's presence and a mistrial has been declared that a reverse-*Luce* hearing could be said to be more efficient; an efficiency that pales in significance when measured against the virtual certainty of a reverse-*Luce* hearing in every case.

In sum, we are persuaded that the need and rationale for the *Luce* rule are applicable in Michigan. We hold that a defendant must testify in order to preserve for review the issue of improper impeachment by prior convictions.

II

The second issue to be decided is whether to apply today's decision retroactively. The federal courts have split on the question whether to apply *Luce* retroactively. In *United States v Givens,* 767 F2d 574 (CA 9, 1985), the Ninth Circuit held that *Luce* would not be applied retroactively. In determining whether to give retroactive effect to a decision, the federal courts consider: 1) whether the decision establishes a new principle of law, 2)

whether retroactive application will promote or retard the purposes of the rule, and 3) whether applying the new decision will produce substantial inequitable results. *Chevron Oil Co v Huson,* 404 US 97, 106-107; 92 S Ct 349; 30 L Ed 2d 296 (1971). According to the *Givens* court:

> *Luce* establishe[d] a new principle of law which would, if applied retroactively, wreak a substantial inequity by precluding [the defendant] from challenging the admissibility of proof of his prior convictions. Although application of the *Luce* principle to the present case arguably would further the purpose of the rule by providing the trial court with concrete testimony on which to base its ruling . . ., the first and third factors militate so strongly against retroactive application that they outweigh the second factor. [*Givens, supra* at 578.]

The *Givens* Court recognized the inequity of applying *Luce* retroactively in a case where the defendant had relied on the law extant at the time of his trial by expressing his intention to testify if his motion in limine was granted and by stating the nature of his expected testimony. Since the defendant had done everything required at the time of his trial to preserve the issue, the court determined that, as a matter of fairness, *Luce* would not be applied to bar review.[10]

[10] The *Givens* court distinguished *United States v DiMatteo,* 716 F2d 1361 (CA 11, 1983), on this basis, stating that the defendant in *DiMatteo* did not rely on the law in effect at the time of his trial in attempting to preserve the issue for review. *Givens, supra* at 578.

In *DiMatteo,* the court reversed the defendant's conviction on the basis of an erroneous decision regarding the impeachment of one of defendant's witnesses under FRE 608(b). The defendant did not call that witness at trial. The United States Supreme Court vacated the original *DiMatteo* decision and remanded for reconsideration in light of *Luce.*

The *Givens* decision was released on July 29, 1985. It appears that the *Givens* court was unaware that the decision in *DiMatteo (On Remand),* 759 F2d 831 (CA 11, 1985), was released May 6, 1985, in

Conversely, in *United States v Dunbar,* 767 F2d 72 (CA 3, 1985), the Third Circuit determined that *Luce* would be applied retroactively. Applying the *Chevron* factors, the court determined that *Luce* did not establish a new procedure by which to preserve the issue because other circuits had already adopted the requirement at the time of the defendant's trial. *Id.* at 74. See, e.g., *United States v Luce,* 713 F2d 1236 (CA 6, 1983). Thus, the defendant could not be said to have been surprised by the *Luce* decision. The court also determined that the purpose of the *Luce* rule—to reduce speculative appellate review—would be advanced by applying the rule in that case. Finally, the court determined that applying *Luce* retroactively resulted in no hardship to the defendant "since he had the opportunity to testify and could not have been relying on any existing law to the effect that he would be permitted to appeal." *Dunbar, supra* at 75. At trial, the defendant did not testify, nor did he state his intention to testify in the event that he was successful in excluding his prior record.

We discussed the retroactive application of *Luce* in *Allen, supra* at 638:

> This Court has held that three factors must be considered in determining whether a judicially created rule of law should be applied retroactively.
>
> [1] the purpose of the new rule,
>
> [2] the general reliance on the old rule, and
>
> [3] the effect on the administration of justice.
>
> [*People v Nixon,* 421 Mich 79, 85; 364 NW2d 593 (1984).]

---

that the *Givens* court makes no reference to the later *DiMatteo* opinion. *Givens* cites only the original *DiMatteo* decision and remand order from the United States Supreme Court. On remand, the *DiMatteo* court determined that the *Luce* rule applies to review of decisions under FRE 608(b) as well as FRE 609(a).

I believe that the defendants' reliance on the old rule outweighs other considerations favoring retroactive application. The defendants have done everything necessary to preserve the issue under the old rule. Adoption of the *Luce* rule was not even reasonably foreseeable at the time of their trials. Under these circumstances, I believe it would be unduly harsh to apply the *Luce* rule to these defendants. Therefore, I would apply the rule only prospectively, i.e., to trials beginning after this decision is final. [RILEY, C.J., dissenting.]

In this case, defendant did not do all that was required to preserve the issue. Recently, the Court of Appeals expressly held that absent a statement of intention to testify in the event that prior convictions are excluded, and an outline of the nature of the expected testimony, a defendant waives appellate review of the issue. *People v Richard Johnson,* 167 Mich App 637; 423 NW2d 300 (1988). While *Richard Johnson* was decided approximately three years after defendant's trial in this case, the Court relied upon cases which had been decided well before defendant's trial. See *People v Casey,* 120 Mich App 690; 327 NW2d 337 (1982), and *People v Ferrari,* 131 Mich App 621; 345 NW2d 645 (1983). Furthermore, in *People v Jones,* 98 Mich App 421; 296 NW2d 268 (1980), decided approximately five years before defendant's trial, the Court cited the *Cook* procedure with approval. In *People v Thomas Johnson,* 133 Mich App 150; 348 NW2d 716 (1984), the Court declined to review the impeachment issue where the defendant did not outline the nature of his expected testimony. In addition, the *Thomas Johnson* Court cited *Casey, supra,* and *People v Wilson,*

107 Mich App 470; 309 NW2d 584 (1981), which both discussed the *Cook* requirement approvingly.[11]

In *People v Wakeford,* 418 Mich 95; 341 NW2d 68 (1983), this Court, in dicta, noted the *Cook* procedure, and, while declining to require an offer of proof, stated that such a procedure "has much to commend it." *Id.* at 117. In the absence of a proffer from the defendant, the Court declined to speculate on the effect the defendant's decision not to testify had on the decisional process.

Thus, in light of the decisions in the Court of Appeals and this Court, it cannot be argued that defendant was relying on prior law in preserving the issue. This factor distinguishes the instant case from *Allen* in which the defendants had done everything necessary at the time to preserve the issue.[12] Therefore, application of *Luce* retroactively in this case will not result in the undue harshness which would have resulted from retroactive application in *Allen.*

We hold that the *Luce* rule will apply in any case tried after the release date of this opinion. We further hold that, in cases now pending on appeal, review of the impeachment issue is preserved: 1) if the defendant had in fact testified at trial, or 2) if the defendant had expressed his intention to testify in the event his prior record was excluded and had stated the nature of his expected testimony. In the instant case, defendant did not testify, nor did he express his intention to testify or outline the nature of his proposed testi-

[11] Compare the above cases with *People v Frey,* 168 Mich App 310; 424 NW2d 43 (1988), in which the Court declined to apply the *Luce* rule in the absence of a definitive answer from this Court in *Allen, supra.* However, *Frey* does not indicate whether the defendant had followed the *Cook* procedures.

[12] The discussion in *Allen* reveals that defendants Pedrin and Allen proffered to the trial court the expected nature of their testimony. See *Allen, supra* at 646-647 (RILEY, C.J., dissenting). Defendants Gray and Brooks testified at trial. *Id.* at 624-625.

mony. Thus, defendant has waived review of the issue.

CONCLUSION

We find that the rationales underlying the *Luce* rule are equally applicable to Michigan practice, and hold that to preserve the issue of improper impeachment by prior convictions, the accused must testify at trial. The rule adopted today will apply in any case tried after the date of this opinion. Furthermore, in cases now pending on appeal, review of the impeachment issue is preserved: 1) if the defendant had in fact testified at trial, or 2) if the defendant had expressed his intention to testify in the event his prior record was excluded and had stated the nature of his expected testimony. In the instant case, defendant did not testify, nor did he express his intention to testify or outline the nature of his proposed testimony. Thus, defendant has waived review of the issue. We affirm the decision of the the Court of Appeals.

BOYLE and GRIFFIN, JJ., concurred with RILEY, C.J.

BRICKLEY, J. (*concurring in part and dissenting in part*). I concur in the adoption of the rule defined in *Luce v United States,* 469 US 38; 105 S Ct 460; 83 L Ed 2d 443 (1984). I write, however, to express my disagreement with the lead opinion's disposition of the instant case and with certain other elements of that opinion.

The lead opinion states that "[w]e hold that the *Luce* rule will apply in any case tried after the release date of this opinion," and permits review in some cases pending on appeal even where the

defendant did not testify. I therefore conclude that *Luce* is being given purely prospective application, and I concur with that understanding. I would not, however, apply *Luce* from the day the Court's decision is issued, but rather from November 1, 1988, to ensure that attorneys representing criminal defendants will be made aware of this new procedural requirement.

The application of *Luce* being prospective, we must then decide the instant case, and the cases we hold in abeyance for this decision, on the basis of the law as it existed prior to today's decision. The lead opinion fails to state what it believed that law to be, but I think it is fair to say that it suggests that the rules defined in *United States v Cook,* 608 F2d 1175 (CA 9, 1979), had been adopted in Michigan prior to today's decision. I do not agree.

The lead opinion cites our decision in *People v Wakeford,* 418 Mich 95, 117; 341 NW2d 68 (1983), where we stated that the *Cook* procedure "has much to commend it." However, we also stated in *Wakeford* that "we do not today make such a procedure mandatory." *Id.* I do not see how an explicit refusal to adopt a procedural requirement can be read as an adoption of that requirement, however laudatory it may be. This Court has not discussed *Cook* since the *Wakeford* decision, and it cannot fairly be said that by any action of this Court the *Cook* requirements had been adopted as a preservation requirement.

The lead opinion also cites *People v Allen,* 429 Mich 558; 420 NW2d 499 (1988), as an example in which the *Cook* requirements were met. It states that in *Allen* "defendants had done everything necessary at the time to preserve the issue" and in an accompanying footnote states:

> The discussion in *Allen* reveals that defendants Pedrin and Allen proffered to the trial court the expected nature of their testimony. . . . Defendants Gray and Brooks testified at trial.

The lead opinion fails to note that in *Allen* defendant Smith did not testify, and the *Allen* opinion does not indicate that he proffered to the trial court the expected nature of his testimony. Nevertheless, his claim was reviewed. Similarly, although *Allen* makes clear that Pedrin and Allen made proffers, there is nothing in the opinion to suggest that they also "establish[ed] on the record that [they would] in fact take the stand and testify if [the] challenged prior convictions [were] excluded" 608 F2d 1186. Finally, even if all the *Allen* defendants had complied with *Cook,* that could not be seen as an adoption of *Cook* by this Court.

Three Court of Appeals cases are also cited for the principle that *Cook* was the law in Michigan. These cases do in fact stand for the proposition since they held that review would not be provided where *Cook* had not been complied with. However, I do not believe that these isolated cases, one of which was decided after defendant's trial, can be viewed as representing the general body of Michigan law on this question. Numerous MRE 609(a) cases, including many in which defendant failed to testify, have been reviewed without any mention of the *Cook* test. These opinions have noted only that the defendant moved for exclusion of his prior convictions or objected to their admission. See, e.g., *People v Woods,* 416 Mich 581; 331 NW2d 707 (1982); *People v Hughes,* 411 Mich 517; 309 NW2d 525 (1981); *People v Steele,* 115 Mich App 758; 321 NW2d 804 (1982); *People v Kramer,* 108 Mich App 240; 310 NW2d 347 (1981); *People v Gary Johnson,*

105 Mich App 332; 306 NW2d 501 (1981). In addition, there are other cases in which review was denied for failure to preserve the issue, but in those cases the failure to preserve was found in the lack of objection, not in a failure to state an intention to testify or make a proffer of an outline of the testimony. *People v Henry,* 395 Mich 367; 236 NW2d 489 (1975); *People v Moore,* 391 Mich 426; 216 NW2d 770 (1974); *People v Gaines,* 129 Mich App 439; 341 NW2d 519 (1983); *People v Shrader,* 88 Mich App 680; 279 NW2d 47 (1979); *People v Holt,* 54 Mich App 60; 220 NW2d 205 (1974); *People v Averill,* 59 Mich App 507; 229 NW2d 827 (1975); *People v Jones,* 44 Mich App 633; 205 NW2d 611 (1973).

I thus conclude that prior to today's adoption of *Luce,* the rule in Michigan was that in order to preserve for appeal the issue of impeachment by prior conviction, a defendant had to object to its introduction or move for its exclusion. Defendant Finley did object to the admission of this evidence. I therefore would remand this case to the Court of Appeals for review of his claim that MRE 609 was violated. See *People v Allen,* 429 Mich 558; 420 NW2d 499 (1988).

My second disagreement with the lead opinion is with some aspects of its criticism of Justice LEVIN's dissenting opinion. The lead opinion states that

> whether or not the defendant actually intends to take the stand, it is predictable that such a hearing would always take place in order to protect the claim on appeal [*ante,* p 520],

and that

> a reverse-*Luce* hearing will predictably be held in every case. [*Ante,* p 521.]

I believe these statements mischaracterize Justice LEVIN's opinion. His proposal would still require the defendant to commit himself to testify before the jury if the judge ruled in his favor on the admission of a prior conviction, and, if a defendant refused to testify after a ruling in his favor, his proffered testimony would be read to the jury. I believe it is therefore incorrect to suggest that a defendant who does not in fact want to take the stand, but seeks only to create an appellate issue, would avail himself of the procedure suggested in Justice LEVIN's opinion. Once the defendant took the stand in a "reverse-*Luce* hearing," he would have no option but to have the jury hear his testimony and cross-examination. While this procedure may suffer from inherent inefficiencies, having such a hearing occur in every case is not one of them, nor is there any danger that had we adopted this approach that it would have provided a vehicle for defendants to create an "appellate parachute."

My third disagreement with the lead opinion is its inclusion of what I believe is overly broad dictum. The lead opinion states:

> [T]he straightforward logic of *Luce* not grasped by either dissent is that as to evidentiary rulings, error does not occur until error occurs; that is, until the evidence is admitted. Obviously, in other contexts, if an offer of proof is made and the court erroneously permits the introduction of hearsay, character evidence, similar acts, or the myriad of evidence objectionable under the MRE, there is no error requiring reversal unless the evidence actually is introduced. [*Ante,* p 512.]

The lead opinion cites no authority to support this sweeping dictum, the future readings of which

cannot be foreseen. In addition, the notion that reviewable error does not occur until admission of the challenged evidence does not square with actual practice. Interlocutory appeals are regularly taken on evidentiary questions and pretrial rulings are often deemed erroneous in spite of the fact that their effect has not yet been felt at trial. Error can also occur at trial in varying forms, and the Court should not be so quick to define a universal principle, particularly since the specific grounds for the adoption of the *Luce* requirement are so clearly explained by the Chief Justice.

In conclusion, I concur in the adoption of the *Luce* rule, and believe its application should be strictly prospective, beginning November 1, 1988. In my view, therefore, the instant case must be decided under the preservation requirements in force before today's decision. Since defendant objected to the admission of his prior conviction, I would remand this case to the Court of Appeals to determine if the admission of that conviction was erroneous. Lastly, as just described, I do not concur in two particular passages of the lead opinion.

CAVANAGH, J. (*concurring in part and dissenting in part*). I agree with the majority's conclusion that the defendant's conviction should be affirmed. I dissent, however, from the majority's holding that a defendant must testify at trial to preserve for review a claim of improper impeachment with a prior conviction under MRE 609.

### REJECTION OF THE *LUCE* RULE FOR MICHIGAN PRACTICE

Until today, it has been well settled in Michigan that a defendant need not testify to preserve the issue of impeachment by prior conviction for ap-

pellate review under MRE 609.[1] See, e.g., *People v*

[1] Defendant was tried in February and March of 1985. At the time of his trial, MRE 609 provided:

> RULE 609. IMPEACHMENT BY EVIDENCE OF CONVICTION OF CRIME.
>
> (a) General rule. For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if
>
> (1) the crime was punishable by death or imprisonment in excess of one year under the law under which he was convicted, or the crime involved theft, dishonesty or false statement, regardless of the punishment, and
>
> (2) the court determines that the probative value of admitting this evidence on the issue of credibility outweighs its prejudicial effect and articulates on the record the factors considered in making the determination.
>
> (b) Time limit. Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date.
>
> (c) Effect of pardon, annulment, or certificate of rehabilitation. Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime which was punishable by death or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.
>
> (d) Juvenile adjudications. Evidence of juvenile adjudications is generally not admissible under this rule, except in subsequent cases against the same child in the juvenile division of a probate court. The court may, however, in a criminal case or a juvenile proceeding against the child allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission is necessary for a fair determination of the case or proceeding.
>
> (e) Pendency of appeal. The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.

As discussed in the lead opinion, *People v Allen*, 429 Mich 558; 420 NW2d 499 (1988), amended MRE 609 to vest the trial court with discretion solely regarding the admissibility of most theft offenses and to provide bright-line rules for all other prior convictions. The amended rule automatically admits prior convictions containing an

*Allen,* 429 Mich 558, 612; 420 NW2d 499 (1988) (defendants Pedrin, Allen, and Smith); *People v Wakeford,* 418 Mich 95; 341 NW2d 68 (1983); *People v Williams,* 413 Mich 72, 74; 318 NW2d 462 (1982); *People v Baldwin,* 405 Mich 550, 552; 275 NW2d 253 (1979) (defendant Woolfolk).

Now the people ask us to overturn this rule on the basis of *Luce v United States,* 469 US 38, 43; 105 S Ct 460; 83 L Ed 2d 443 (1984), which declared a new rule for the federal courts:

> We hold that to raise and preserve for review the claim of improper impeachment with a prior conviction, a defendant must testify.

With all due respect to the United States Supreme Court, I would reject this rule for Michigan practice.[2] It has no appeal in fairness, logic, or consistency with this Court's prior decisions.

I

Let us start with the language of the Fifth Amendment itself, which states in part:

> No person . . . shall be compelled in any criminal case to be a witness against himself . . . . [US Const, Am V.]

Implicit in this constitutional guarantee is that no

element of dishonesty or false statement and automatically excludes those which do not. The amendment applies in cases tried after March 1, 1988. The lead opinion sets forth the relevant portion of the amended rule in n 4.

[2] Strictly speaking, the expansive ruling in *Luce* was dictum. Since the defendant in *Luce* made no "proffer to the court as to what his testimony would be," 469 US 39, existing federal procedural law would have provided a sufficient basis to refuse to consider the FRE 609 issue. The Court instead reached out to hold that the lack of proffer was irrelevant (footnote 5), and that the defendant's procedural default was his failure to testify at trial.

penalty, no sanction, no disadvantage to the defendant shall flow from his decision not to testify at trial.

*Griffin v California,* 380 US 609; 85 S Ct 1229; 14 L Ed 2d 106 (1965), reh den 381 US 957 (1965), held unconstitutional a statute permitting the prosecution to comment on the failure of the defendant to testify at his criminal trial. *Carter v Kentucky,* 450 US 288; 101 S Ct 1112; 67 L Ed 2d 241 (1981), held that the Fifth Amendment required the court, upon the request of a nontestifying defendant, to instruct the jury not to draw an adverse inference from the failure of the defendant to testify. The central theme of both cases was "that *a defendant must pay no court-imposed price for the exercise of his constitutional privilege not to testify.*" 450 US 301. (Emphasis added.)

Similarly, the Court in *Lefkowitz v Cunningham,* 431 US 801, 805; 97 S Ct 2132; 53 L Ed 2d 1 (1977), observed:

> [O]ur cases have established that a State may not impose substantial penalties because a witness elects to exercise his Fifth Amendment right not to give incriminating testimony against himself.

The *Luce* rule exacts a heavy price from the defendant for electing not to testify at his trial. He is denied the right on appeal to raise what may be a substantial issue. If *Luce* intended to overrule the holdings of *Griffin, Carter, Lefkowitz,* and similar cases, that "a defendant must pay no court-imposed price" for failing to testify, a clearer statement from the Court that it is doing so is warranted. I would hold that the Fifth Amendment and the Michigan Constitution[3] bar us from adopting *Luce.*

[3] See Const 1963, art 1, § 17.

II

Further, *Luce*'s requirement that a defendant testify to preserve the impeachment issue is inconsistent with the spirit, if not the precise holding, of two of the Supreme Court's own decisions. In *Brooks v Tennessee,* 406 US 605; 92 S Ct 1891; 32 L Ed 2d 358 (1972), relying on the Fifth Amendment, the defendant challenged the constitutionality of a Tennessee statute which required a defendant to be his own first witness if he were to take the stand at all. The defendant in that case elected not to testify, yet the Supreme Court was able to reach the constitutional issue. It struck down the Tennessee statute and reversed the defendant's conviction.

In *New Jersey v Portash,* 440 US 450; 99 S Ct 1292; 59 L Ed 2d 501 (1979), the defendant chose not to testify at his criminal trial when the trial judge refused to rule in limine that the prosecution could not use the defendant's grand jury testimony which had been given under a grant of transactional immunity. The Court rejected the state's argument that the issue was not preserved for review because the defendant failed to testify:

> The State contends that the issue presented by Portash is abstract and hypothetical because he did not, in fact, become a witness. Portash could have taken the stand, testified, objected to the prosecution's use of the immunized testimony to impeach him, and appealed any subsequent conviction. Absent that, the State would have us hold that the constitutional question was not and is not presented. This argument must be rejected. First, it is clear that although the trial judge was concerned about making a ruling before specific questions were asked, he did rule on the merits of the constitutional question. [*Id.,* 454.]

The *Luce* Court attempted to distinguish these two cases on the ground that they related to Fifth Amendment challenges to state court rulings that operated to dissuade defendants from testifying, while *Luce* dealt with a federal court's preliminary ruling under FRE 609. 469 US 42-43. The Court did not articulate any reason for distinguishing between constitutional claims and evidentiary claims in requiring a defendant to testify to preserve his right of appellate review for the latter. We see no basis for such distinction. As long as it is clear that the trial judge did "rule on the merits," the ruling should be subject to appellate review the same as any other interlocutory ruling.

The other rationales offered by the *Luce* Court to support its ruling also do not survive close scrutiny.

III

In reaching its decision, the *Luce* Court explained why it believed the defendant's trial testimony was required:

> A reviewing court is handicapped in any effort to rule on subtle evidentiary questions outside a factual context. This is particularly true under [FRE] 609(a)(1), which directs the court to weigh the probative value of a prior conviction against the prejudicial effect to the defendant. To perform this balancing, the court must know the precise nature of the defendant's testimony, which is unknowable when, as here, the defendant does not testify. [469 US 41.]

I would reject this premise. If a court can "know the precise nature of the defendant's testimony" only by hearing a defendant's actual trial testimony, then motions in limine would have no

meaning. Such a preliminary ruling, so *Luce* seems to say, is meaningless because the court is ruling in the dark, and no matter how specific and detailed, an offer of proof will not dispel the darkness. If the *Luce* Court found hearings in limine unhelpful in resolving FRE 609 claims, it should have, to be consistent, accompanied its ruling with a firm directive to trial judges not to rule in limine on this issue, but to reserve such rulings until after the defendant had testified on direct examination.[4]

Contrary to the implications of *Luce,* however, motions in limine and offers of proof are an efficient means of avoiding trial delays regarding the admissibility of potentially inflammatory evidence, and litigants are encouraged to use them.[5] The motions allow the trial judge ample time to decide the issue without interrupting trial. In *United States v Cook,* 608 F2d 1175, 1186 (CA 9, 1979), which involved an impeachment issue parallel to the present case, the court noted:

> Motions in limine have proven their value in litigation. They save jury time, and avoid the waste that sometimes results from haste when side-bar matters have to be urged in the course of

[4] Although it did not say so, surely *Luce* did not require that the court have the cross-examination testimony of the defendant as well as his direct-examination testimony in order to rule.

[5] Even *Luce* seemed to recognize this. In footnote 4 of its opinion, the Court said that rulings in limine had developed in the federal practice pursuant to the inherent authority of the district court to manage the course of trials.

See also *Cook v United States,* 354 F2d 529, 532 (CA 9, 1965), where the court observed:

> Why the government, thinking in good faith the testimony was admissible, chose the dangerous path of referring to it in the opening statement, rather than by the *usual route of an offer of proof outside the jury's presence,* is difficult to understand. [Emphasis added.]

> the trial. To persist in holding that rulings made in advance of trial are unreviewable unnecessarily discourages the use of such motions.

If a judge must await the defendant's trial testimony before making his ruling, inevitably there would be a delay at the conclusion of the defendant's direct examination to consider the issue. It would not be long before some sophisticated jurors would assume that such a delay meant that the defendant had a criminal record. This would be unfair not only to a defendant with a record, but even more so to one without a record whose cross-examination was delayed for other, unrelated reasons.

The *Luce* Court also said that a proffer of testimony would be no substitute for the actual trial testimony of the defendant because it could "for any number of reasons, differ from the proffer."[6] Proffers of evidence or offers of proof under FRE 103 and MRE 103 are well-recognized procedures in both civil and criminal practice, and we have made significant rulings on the basis of them. It may be that an offer of proof will vary significantly from the evidence subsequently introduced at trial, but it is the experience of the profession that this would be the exception rather than the rule. It is telling that *Luce* cites not a single instance where an offer of proof and the subsequent trial evidence in any setting, impeachment or otherwise, varied materially. At best, *Luce* premised a rule for all cases on the exceptional rather than the norm. I would decline to plow under the wheat field to destroy a few weeds.

For at least a hundred years, the federal courts have assumed that offers of proof have been made in good faith. *Scotland Co v Hill,* 112 US 183, 186;

[6] 469 US 41, n 5.

5 S Ct 93; 28 L Ed 692 (1884), held that if a trial court rejects an offer of proof and

> allows a bill of exceptions which shows that the offer was actually made and refused, and there is nothing else in the record to indicate bad faith, an appellate court must assume that the proof could have been made, and govern itself accordingly.

In *United States v Clemente,* 482 F Supp 102 (SD NY, 1979), the defendants moved in United States District Court to suppress evidence obtained by the government through electronic surveillance. The court noted that the scope of permissible surveillance was to be measured in relation to the magnitude of the alleged illegal activity, and found:

> The alleged scope of defendants' activities is truly massive. At this stage in the proceedings, we deal solely with the allegations of the indictment and *the Government's offer of proof* submitted in opposition to defendants' motions to sever. We have and venture no opinion as to the validity of these allegations except to observe that *no basis has been offered to question the good faith of the Government in their* [*sic*] *assertion.* [*Id.,* 107. Emphasis added.]

If we are to reject offers of proof as being unreliable in the area of Rule 609 issues, then why should we not reject them in other areas? If the *Luce* reasoning had been applied in *Clemente,* the government would have been forced to conduct a minitrial before the court could have ruled on the motion for severance. Applying *Luce*'s reasoning generally, the progress of both civil and criminal jury trials would be extensively delayed to consider what presently is more conveniently considered before trial.

Of course, if an offer of proof is made in bad faith, it usually would not be too difficult to detect and deal with appropriately.[7] In a civil case, an offer of proof may be quite complicated, summarizing the testimony of several witnesses and voluminous documents. Even so, the courts are not prevented from detecting offers of proof made in bad faith. See, e.g., *Bonime v Doyle,* 416 F Supp 1372 (SD NY, 1976). The task is easier in criminal cases involving a Rule 609 issue. The offer of proof is factually simple, dealing solely with the testimony of one witness, the defendant on trial.

IV

In further support of its decision, the *Luce* Court noted:

> When the defendant does not testify, the reviewing court also has no way of knowing whether the Government would have sought to impeach with the prior conviction. If, for example, the Government's case is strong, and the defendant is subject to impeachment by other means, a prosecutor might elect not to use an arguably inadmissible prior conviction. [469 US 42.]

This argument is specious. When a prosecutor opposes a motion in limine in this area, we can assume that he does so for a clear purpose, i.e., to use the defendant's prior conviction for the purpose of impeachment. To argue that the government might change its mind is speculative at best. Further, even if it does, the prosecution can easily make a record of this and preclude the defendant from raising the prior conviction issue on appeal

[7] *United States v Oakes,* 565 F2d 170, 171 (CA 1, 1977), suggested without discussion that if an offer of proof turns out to be misleading, the court may change its ruling and admit the impeaching evidence. That issue is not before us now.

by clearly renouncing its intent to use the impeaching evidence at any point before the defendant rests his case.

V

The *Luce* Court also said "a reviewing court cannot assume that the adverse ruling [on a Rule 609 motion in limine] motivated a defendant's decision not to testify." 469 US 42. It seems the Court is saying that, absent some proof from the defendant, made in some way unspecified by the Court, it will assume that the defendant chose not to testify for reasons unrelated to the Rule 609 ruling. On the contrary, I would hold that if a reviewing court finds that a defendant was improperly threatened with impeachment by prior convictions (following a timely but unsuccessful motion in limine raising the Rule 609 issue), the reviewing court should normally assume that the defendant's decision not to testify was out of fear of the impeachment.[8]

This rule is not unduly harsh on the prosecution. First, its application does not mandate automatic reversal.[9] Second, many legal scholars, including some past and present members of this Court, believe that in criminal cases the defendant

[8] In *United States v LeBlanc*, 612 F2d 1012, 1014 (CA 6, 1980), the court suggested that a defendant is required to state that he declined to testify out of fear of impeachment. This requirement really adds nothing to the record. Experienced counsel would always make the claim. Others might overlook the formality and risk the loss of a substantial issue on appeal.

[9] In this respect, I disagree with the *Luce* Court that "the appellate court could not logically term 'harmless' an error that presumptively kept the defendant from testifying." 469 US 42. If, for example, the evidence of guilt is overwhelming and the substance of the defendant's offer of proof is presented to the jury through other witnesses, it may well be that any error in allowing impeachment evidence could be considered harmless. See discussion of *People v Wakeford*, *post*, pp 543-544.

should never be impeached by prior convictions.[10] However, this is not the rule in Michigan. All I would say today is that if the prosecution has a strong case, it has no real need for the impeaching evidence; if it has a weak case, it cannot be said that improper impeaching evidence allowed or threatened to be allowed against the defendant is harmless.

This kind of hard decision making for a prosecutor is not unique to impeaching evidence. For example, 1 ABA Standards for Criminal Justice (2d ed), The Prosecution Function, Commentary on Standard 3-5.6, p 3-83, provides in part:

> A prosecutor should exercise great care in deciding what evidence to use. A strong case should not be jeopardized by introducing evidence that is essentially cumulative but that may bring about a reversal. It is obviously not easy to forgo using reliable and probative evidence when it is at hand, but the prosecutor must do so in many instances. A high level of experienced litigation judgment is often required, and a prosecution office should have its senior litigation lawyers available for consultation on these difficult decisions.

VI

The *Luce* Court also stated:

> Requiring that a defendant testify in order to preserve Rule 609(a) claims . . . will also tend to discourage making such motions solely to "plant" reversible error in the event of conviction. [469 US 42.]

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[10] In *People v Jackson,* 391 Mich 323; 217 NW2d 22 (1974), five members of the Court expressed grave doubts about allowing a testifying defendant to be impeached by prior convictions.

Nearly every rule of exclusion based either on the common law or on Fourth, Fifth, and Sixth Amendment rights can be used to " 'plant' reversible error."[11] We should have no objection to a defense counsel in a criminal case vigorously defending his client with every legitimate weapon available. We encourage and indeed require it with our canons of ethics. The remedy of the Court should not be to diminish the protection afforded by Rule 609, but instead to recognize meritless claims of violation of the rule when they are presented. We did just that in *People v Wakeford, supra.*

In *Wakeford,* we had no difficulty assessing a claim of error under MRE 609, even though the defendant did not testify:

> No alibi defense was ever suggested, either before or after the trial judge's ruling. On appeal, defense counsel suggests that the defendant could have testified that he was not attending school at the time the identifying witness and alleged former classmate testified that they had attended school together. However, in light of the unrebutted evidence introduced by the defendant on that point, . . . as well as the overwhelming evidence of guilt, we agree with the Court of Appeals that the error, if any, was harmless beyond a reasonable doubt. [418 Mich 117-118.]

The failure of the defendant to testify neither precluded us from considering the merit of his claim of error nor from rejecting it as being harm-

[11] If by "planted" error, the Court meant to refer to invited error, such error of itself is seldom if ever grounds for reversal in either civil or criminal litigation. For example, if a defendant makes no motion in limine, but at trial objects to cross-examination about his prior convictions, he could hardly claim that the mere asking of the question was error in those circumstances. His failure to make a motion in limine would have invited whatever error there may have been.

less. See also our review of defendant Smith's claim in *People v Allen, supra,* 612.

For the reasons discussed in §§ I-VI, I would reject the *Luce* rule in Michigan.

However, as a majority of this Court favors adoption of the rule, I concur in the prospective application stated in the concurring opinion of Justice BRICKLEY.

LEVIN, J. The predicate of an assignment of error on the basis of a judge's ruling, adverse to the defendant, allowing the prosecution to introduce into evidence the defendant's prior conviction record to impeach the defendant's credibility is that but for the adverse ruling the defendant would have testified. I therefore agree with the majority that a defendant may, consistent with his Fifth Amendment privilege against self-incrimination, properly be required to testify to preserve the issue for appellate review.

I would, however, permit a defendant to preserve the issue for review by testifying either in the presence or outside the presence of the jury.

A defendant who believes that despite the judge's adverse ruling it is in his interest to provide the jury with his version, will testify and make the best of the judge's ruling permitting reference to his prior conviction record. A defendant who believes that the judge's adverse ruling will "doom his defense"[1] should, however, be able —as heretofore—to rely on the presumption of innocence and refrain from testifying in the presence of the jury and yet appeal from the judge's adverse ruling by providing for appellate review a separate record of his version made outside the presence of the jury.

[1] See McCormick, Evidence (3d ed), § 43, p 99, quoted in part IX.

The need on appellate review for a record of what the defendant would say if he were to testify would be as well served by a record made outside the presence of the jury as by a record made in the presence of the jury. The institutional needs of the justice system identified by the plurality can be fully served without precluding the defendant from appealing a ruling allowing reference to his prior conviction record if he exercises his constitutional right not to testify in the presence of the jury.

I

Permitting the defendant to testify outside the presence of the jury is consistent with the rationales underlying the United States Supreme Court's decision in *Luce v United States,* 469 US 38; 105 S Ct 460; 83 L Ed 2d 443 (1984).[2] There the Court said that without the defendant's testimony the court would be handicapped in weighing the prejudicial effect against the probative value of the prior conviction record, and in determining whether any error in allowing the admission of such evidence was harmless.

Those objectives would be accomplished as well by permitting a defendant to preserve the issue for appeal by testifying outside the presence of the jury as by requiring him to testify in the presence of the jury. Testimony outside the presence of the jury would come no later than when the defendant would last be permitted to exercise his right to testify, i.e., immediately before the defense rests. The setting would be the same: the judge would be

[2] While some states have followed *Luce,* a number have not. See *State v Whitehead,* 104 NJ 353; 517 A2d 373 (1986); *State v McClure,* 298 Or 336; 692 P2d 579 (1984); *State v Ford,* 381 NW2d 30 (Minn App, 1986); *People v Contreras,* 108 AD2d 627; 485 NYS2d 261 (1985); *Commonwealth v Richardson,* 347 Pa Super 564; 500 A2d 1200 (1985).

there, the prosecutor would be there, everyone else who otherwise would be in the courtroom would be there except the jury. The defendant would be subject to cross-examination at the conclusion of his testimony. The prosecution would have the opportunity of rebuttal, also outside the presence of the jury. The appellate court would have fundamentally the same record to review.

II

In *Luce* the Court said that there was "no commitment by the petitioner that he would testify if the motion [to preclude the government from using a prior conviction to impeach him if he testified] were granted, nor did he make a proffer to the court as to what his testimony would be."[3] The *Luce* opinion continued:

> Requiring a defendant to make a proffer of testimony is no answer; his trial testimony could, for any number of reasons, differ from the proffer.[4]

The proposed alternative would not permit the defendant to preserve the issue by a mere proffer of proof and would require the defendant to testify either in the presence or outside the presence of the jury.

III

The Court in *Luce* said that one "cannot assume that the adverse ruling motivated a defendant's decision not to testify" and that a defendant's commitment to testify if his motion is granted "is

[3] *Luce, supra* at 39.

[4] *Id.* at 41, n 5.

virtually risk free because of the difficulty of enforcing it."[5]

Those concerns are readily obviated. We could require a defendant who seeks to testify on a separate record to commit himself to testify in the presence of the jury if the judge, after he hears the defendant's testimony, rules in the defendant's favor on the admission of prior conviction record or if the prosecutor decides not to use "an arguably inadmissible prior conviction."[6] If the defendant were, in violation of such a commitment, to refuse to do so, his testimony and cross-examination outside the presence of the jury could be read to the jury.

If the defendant does testify, and his testimony in the presence of the jury differs from his testimony outside the presence of the jury, he could be impeached by his testimony outside the presence of the jury.

IV

*Luce* does not in terms require that the defendant testify in the presence of the jury. The Court said: "We hold that to raise and preserve for review the claim of improper impeachment with a prior conviction, a defendant *must testify.*"[7] (Emphasis supplied.) To be sure, the Court indicated elsewhere that Luce had failed to "testify at trial."[8] It is unclear whether testimony on a separate record during the trial would satisfy the *Luce* holding—binding on federal but not state courts—that the defendant "must testify."[9]

[5] *Id.* at 42.

[6] See n 7 and accompanying text.

[7] *Luce, supra* at 43.

[8] *Id.* at 39.

[9] Cf. *United States v Griffin,* 818 F2d 97, 105 (CA 1, 1987).

V

A trial judge is required by decisions of this Court to rule before the defendant testifies in the presence of the jury whether his prior conviction record will be admitted. This Court has said:

> In order to decide his trial strategy, *including whether to testify in his own behalf,* the defendant was absolutely entitled to a ruling whether his record of prior convictions would be admitted against him. [*People v Hayes,* 410 Mich 422, 427; 301 NW2d 828 (1981). Emphasis supplied.]

Where the judge rules that a defendant's prior conviction record is admissible, and the defendant nevertheless chooses to testify, the judge might, during or upon the conclusion of the defendant's testimony—whether the defendant testifies in the presence or outside the presence of the jury—and any rebuttal by the prosecutor, reconsider his prior ruling that the defendant's prior conviction record will be admitted. The judge might then decide that the probative value of the defendant's testimony is such that he should be permitted to testify without incurring the prejudice that would result from admission of his prior conviction record.

Implicit in a judge's initial ruling adverse to the defendant is that the prosecutor indicated to the judge, when the question arose whether reference to prior conviction record would be permitted, that he desired to impeach the defendant, should he testify, by introducing his prior conviction record. The prosecutor, as well as the judge, might, after listening to the defendant's testimony, change his view concerning the importance of introducing evidence of the prior conviction record.

The Court in *Luce* said that when the defendant

does not testify, the reviewing court does not know whether the prosecutor would have actually sought to impeach with the prior conviction record. The Court hypothesized a government case so strong that the prosecutor "might elect not to use an arguably inadmissible prior conviction."[10] If the judge were to affirm his ruling against the defendant after the defendant testifies outside the presence of the jury, the prosecutor could indeed nevertheless change his view and elect not to use an "arguably inadmissible prior conviction."

I do not suggest that the judge or prosecutor should be obliged to reconsider their initial decisions. Rather, to the extent that providing an opportunity to revise an initial decision adverse to the defendant is a purpose of requiring the defendant to testify, this can be accommodated by permitting the defendant to testify outside the presence of the jury as well as by requiring him to testify in the presence of the jury. Any need or desirability of providing the judge with an opportunity to reconsider his initial ruling or the prosecutor an opportunity to reconsider his position, would be served under the proposed alternative permitting the defendant to testify outside the presence of the jury.[11]

VI

If the judge were to revise his ruling after hearing the defendant's testimony outside the presence of the jury or if the prosecutor elects not

[10] *Id.*

[11] The plurality opinion states that "*Luce* was not necessarily intended to benefit the trial judge in reaching the impeachment decision in the first instance. While there may be a peripheral benefit at the trial level as the judge may change the impeachment decision after hearing a defendant's testimony, that benefit is tangential to the fundamental purpose of providing meaningful appellate review." *Ante,* p 517.

to use an "arguably inadmissible prior conviction," the defendant would then, under the proposed alternative, be called upon to repeat in the presence of the jury the testimony he has just given. There would again be cross-examination and possible rebuttal, all repetitive. This repetition would be time consuming and arguably a burden on the judge, the prosecutor, and others who would sit through the testimony a second time. This is indeed inefficient, but it is an inefficiency that results from the judge's initial ruling adverse to the defendant and either his subsequent decision to change his ruling after he hears the defendant's testimony or reassessment by the prosecutor.

Relatively little repetition would actually occur in practice. The judge will recognize that if he changes his ruling, there will be repetition when the defendant testifies in the presence of the jury. The judge is therefore likely to revise his ruling, if at all, after he has listened to the gist of the defendant's testimony long before a full separate record is completed.

VII

Because the defendant is entitled to a ruling by the judge before he decides whether to testify in the presence of the jury, *People v Hayes, supra,* the possibility that the judge might change his ruling after the defendant testifies—whether in the presence or outside the presence of the jury—is unavoidable.

Suppose that the judge changes his initial ruling after the defendant has testified on direct and cross-examination and has been impeached with his prior conviction record in the presence of the jury. The judge might then be obliged to offer the

defendant a mistrial[12] unless he is prepared to say, in advance of closing argument, instructions, and decision by the jury, that his earlier erroneous ruling was harmless.

If the judge offers the defendant a mistrial and he accepts the offer, the entire case must be tried again. That is far more inefficient than merely hearing the testimony of the defendant and any rebuttal witness a second time. Because of the burden on the prosecutor's and defendant's witnesses of a mistrial, requiring the defendant to testify in the presence of the jury might discourage the judge from revising his ruling in light of the defendant's testimony.

VIII

The plurality predicts that were the proposed alternative adopted, a hearing outside the presence of the jury would be held in "every case." They argue that this would be inefficient and that the proposed alternative would fail to discourage defendants' motions to exclude past conviction records made solely to plant error requiring reversal in the event of a conviction.[13]

A well-advised defendant who—although he intends in the event of conviction to appeal an adverse ruling on the use of prior conviction record—intends to testify without regard to the judge's ruling permitting use of prior conviction record will eschew first testifying outside the presence of the jury to avoid providing the prosecutor an opportunity to rehearse his cross-examination

[12] When the prosecutor is permitted to introduce a prior conviction record, defense counsel frequently brings it out on direct examination in an effort to minimize the damage. The judge could caution defense counsel from doing so until the judge affirms his prior ruling after listening to defendant's testimony.

[13] *Ante,* p 521.

outside the presence of the jurors before he cross-examines in their presence.

Nevertheless, before allowing a defendant to testify outside the presence of the jury, the judge could and probably should generally require the defendant to waive testifying in the presence of the jury in the event the judge affirms his initial ruling adverse to the defendant on the use of prior conviction record and the prosecutor still desires to do so.

There thus would not be a separate record hearing in "every case." Only a defendant who waives his right to testify in the presence of the jury would be entitled to testify on a separate record outside the presence of the jury. There would be "inefficient" repetition of testimony only if the judge or prosecutor changes the initial decision or position. There could be no manipulation to plant error because a defendant's election not to testify could be made irrevocable, absolutely or in the discretion of the judge.

IX

The plurality states that the "fundamental purpose" of requiring the defendant to testify is "providing meaningful appellate review."[14] A separate record of a defendant's testimony, cross-examination, and any rebuttal made at a hearing outside the presence of the jury would provide as adequate a basis for determining whether any error in admitting the prior conviction record was harmless as would a record of such testimony made in the presence of the jury.

Under both the procedure mandated by the majority and the proposed alternative, the review-

[14] *Ante*, p 517.

ing court would decide whether the defendant's testimony, unembarrassed by the erroneous admission of the prior conviction record, might have resulted in a jury finding of reasonable doubt and hence acquittal.

When the defendant testifies in the presence of the jury and is found by the appellate court to have been erroneously impeached with his prior conviction record, the reviewing court must *additionally* consider whether the admission of the prior conviction record was so prejudicial that a new trial is required. The reviewing court must then consider the possible improper use by the jury of the prior conviction record to convict the defendant because he is a bad person. This improper use of a prior conviction record by a jury is indeed the reason for excluding reference to such a record:

> The sharpest and most prejudicial impact of the practice of impeachment by conviction (as is true also of cross-examination as to misconduct, see § 42, above) is upon one particular type of witness, namely, the accused in a criminal case who elects to take the stand. If the accused is forced to admit that he has a "record" of past convictions, particularly if the convictions are for crimes similar to the one on trial, there is an obvious danger that *the jury, despite instructions, will give more heed to the past convictions as evidence that the accused is the kind of man who would commit the crime on charge, or even that he ought to be put away without too much concern with present guilt, than they will to the legitimate bearing of the past convictions on credibility.* The accused, who has a "record" but who thinks he has a defense to the present charge, is thus placed in a *grievous dilemma.* If he stays off the stand, his *silence alone will prompt the jury to believe him guilty.* If he elects to testify, *his "record"* becomes provable to impeach him, and this again *is likely to doom his*

*defense.* [McCormick, Evidence (3d ed), § 43, p 99. Emphasis supplied.]

This Court in *People v Hayes, supra,* p 426, said:

> As Chief Justice, then Judge Burger [the author of the *Luce* opinion] recognized:
>
> "A special and even more difficult problem arises when the prior conviction is for the same or substantially the same conduct for which the accused is on trial. Where multiple convictions of various kinds can be shown, strong reasons arise for excluding those which are for the same crime because of the *inevitable pressure on lay jurors to believe that 'if he did it before he probably did so this time.'* As a general guide, those convictions which are for the same crime should be admitted sparingly; one solution might well be that discretion be exercised to limit the impeachment by way of a similar crime to a single conviction and then only when the circumstances indicate strong reasons for disclosure, and where the conviction directly relates to veracity." (Footnote omitted.) *Gordon v United States,* 127 US App DC 343, 347; 383 F2d 936, 940 (1967).
>
> When judges are called upon to balance the "probative value" of a prior conviction for impeachment purposes against its "prejudicial effect," it is manifest that closer attention to possible prejudicial effect is necessary when the witness sought to be impeached is the defendant. [Emphasis supplied.]

If the defendant had testified outside the presence of the jury, the reviewing court would have no need to think about the prejudicial effect of the admission of the prior conviction record, and could focus its inquiry solely on whether the defendant's testimony, unembarrassed by the admission of the prior conviction record, might have created a reasonable doubt. The proposed alternative thus may

make appellate review less difficult for the reviewing court. The procedure mandated by the majority may make the reviewing court's task more complicated than the proposed alternative and thereby increase the risk of error by the reviewing court.

X

While requiring the defendant to testify provides the judge and the prosecutor with opportunities to avoid reversal on the basis of an erroneous ruling and facilitates determination by an appellate court of whether error is harmless, the majority, in addressing the institutional concerns identified in *Luce,* has mandated a procedure that may have an adverse effect on the defendant.

Heretofore, a defendant could, after an adverse ruling on the admission of a prior conviction record, decline to testify and obtain a new trial if the ruling was erroneous.

Under the procedure mandated by the majority, if the judge initially rules that a defendant's prior conviction record will be admitted, the defendant must, to preserve for appeal a claim that the judge's ruling was erroneous, relinquish the right, which he had until today, to refrain from testifying and to rely in lieu of testifying on his due-process rights to be presumed innocent and to be convicted only if the jury is convinced beyond a reasonable doubt.

The procedure mandated by the majority presents the defendant with a dilemma. If he testifies, the jury may ignore instructions on the limited use to be made of prior conviction record and convict him on the basis of his prior conviction record because he is a bad person. McCormick, *supra.* If he does not testify to avoid impeachment

by prior conviction and being convicted as a bad person because of his prior conviction, he runs the risk that the jury will ignore instructions and infer guilt from his failure to testify, but he cannot appeal the adverse ruling that caused him not to testify.

Under the procedure mandated by the majority, a defendant convinced that the admission of his prior conviction record "is likely to doom his defense" (McCormick, *supra*)—that the jury will not find a reasonable doubt if his prior conviction record is admitted—must nevertheless testify or forego challenging the ruling that would so "doom his defense."

Assuming that the institutional concerns identified in *Luce* should take priority, the "grievous dilemma," McCormick, *supra,* facing the defendant should be avoided if there is a means by which the institutional concerns can be accommodated without so tipping the scales against the defendant. The proposed alternative would accommodate the institutional concerns and yet permit a defendant, as before, to preserve his claim that the judge erred in ruling that the defendant's prior conviction record may be admitted in evidence if he testifies without waiving his constitutional right to refrain from testifying in the presence of the jury.

There is no need to present the defendant with this dilemma to accommodate the institutional needs that the procedure mandated by the majority seeks to address. The defendant should be permitted to preserve the issue by testifying outside the presence of the jury.

XI

In sum, considered in terms of the trial judge having an opportunity to revise his ruling and the

prosecutor an opportunity to change his position, permitting a defendant who, absent a revision of the judge's initial ruling or a change in the prosecutor's position, will not testify in the jury's presence, to preserve for appeal a challenge to the correctness of the judge's ruling by testifying outside the presence of the jury, would work just as well as or better (no risk of mistrial) than the procedure mandated by the majority.

The defendant may be required to waive his right to testify in the presence of the jury as a precondition to being allowed to make a separate record to preserve the issue for appeal. There will thus be occasion for repetition in the presence of the jury of separate record testimony only when the judge changes his initial ruling on the admission of prior conviction record or the prosecutor changes his position after they hear the defendant's separate record testimony.

Considered in terms of appellate review, the determination of the harmlessness of the error would be more readily made where the defendant testifies on a separate record because the appellate court would have no need to consider the effect of the erroneous admission of the prior conviction record (the possible improper use by the jury of a prior conviction record to convict the defendant because he is a bad person) and could confine its inquiry simply to whether the defendant's testimony might have created a reasonable doubt, a less complicated inquiry which must be made under either approach.

XII

We concur in Justice BRICKLEY's opinion except for the language of his opinion concurring in the language of the plurality opinion that fails to

recognize that a defendant who wishes to preserve for appeal an adverse ruling on the admission of a prior conviction record may do so by testifying outside the presence of the jury.

ARCHER, J., concurred with LEVIN, J.

## GUIDER v SMITH

Docket Nos. 80577, 80578, 80804. Argued April 5, 1988 (Calendar No. 1). Decided October 24, 1988. Rehearing denied *post,* 1212.

Terrance L. Guider brought an action in the Wayne Circuit Court against Ronald Smith, a Detroit police officer, and the City of Detroit, alleging that the defendants violated his federal civil rights under 42 USC 1983, when Officer Smith shot him in the neck while he was attempting to flee the scene of an apparent breaking and entering, and that the use of deadly force to apprehend him was excessive and unnecessary under the circumstances. In their answer, the defendants raised the defense of qualified immunity, but did not move for summary judgment prior to trial. At the close of the plaintiff's proofs, the court, Paul S. Teranes, J., granted a directed verdict for the city on the ground that the evidence was insufficient to show gross negligence or deliberate indifference on the part of the city in training or supervising its police officers in the use of deadly force, but denied Officer Smith's motion for a directed verdict. Following trial, the court entered judgment on a jury verdict for the plaintiff, awarding compensatory damages and finding that Officer Smith was not entitled to the defense of qualified immunity. The Court of Appeals, C. W. SIMON, J. (MICHAEL J. KELLY, P.J., concurring) (BRONSON, J., not participating), affirmed (Docket Nos. 77323, 79507). The defendant appeals.

In an opinion by Justice BOYLE, joined by Chief Justice RILEY and Justices BRICKLEY, CAVANAGH, and GRIFFIN, the Supreme Court *held:*

The judgment against the defendant should not be reversed on the basis of the defense of qualified immunity. The trial court correctly determined that the defendant was not entitled to an instruction on qualified immunity, and the trial court's

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REFERENCES

Am Jur 2d, Civil Rights §§ 16-18, 268, 269.

Am Jur 2d, States, Territories, and Dependencies §§ 99 *et seq.*

Immunity of public officials from personal liability in civil rights actions brought by public employees under 42 USC 1983. 63 ALR Fed 744.

When is prosecutor entitled to absolute immunity from civil suit for damages under 42 USC 1983: post-Imbler cases. 67 ALR Fed 640.

instructions were responsive to the defendant's actual theory of the case. In addition, the defendant failed to preserve the trial court's denial of his motion for a directed verdict on qualified immunity grounds, contending that the use of force was not excessive rather than that qualified immunity required judgment for him as a matter of law.

1. In addressing the issue of qualified immunity in an action brought under 42 USC 1983, trial courts must consider objective factors: whether the alleged conduct establishes a constitutional violation and whether the constitutional standard was clearly established at the time in question. If the undisputed facts show that the defendant's conduct violated no clearly established constitutional standards, qualified immunity applies as a matter of law. If the law was clearly established, however, the immunity defense will fail unless it can be proved that, because of extraordinary circumstances, the defendant government official neither knew nor should have known the relevant legal standard. The inquiry is whether a reasonable person in the defendant's position could have believed that the actions which violated the right were consistent with the law. Except in extraordinary circumstances, actual knowledge is irrelevant to the determination whether the defendant is entitled to a qualified immunity defense.

2. Ordinarily, the issue of qualified immunity is not appropriate for the jury. The threshold test of a clearly established violation is one of law for the court to decide. If there is a factual dispute, i.e., a genuine issue of material fact, involving an issue on which immunity turns, so that it cannot be determined before trial what the defendants' acts were or whether exceptional circumstances existed, the case should proceed to trial. However, entitlement to the defense of qualified immunity is not lost because of the defendant's failure to move for summary disposition. The properly pleaded defense may be raised prior to, during, or after trial.

3. In this case, the defendant did not move for a directed verdict on qualified immunity grounds, arguing instead that the force used was not excessive and that, therefore, there was no constitutional violation, thus waiving the claim on appeal. The trial court correctly denied the motion on the ground that disputed factual issues regarding probable cause and the reasonableness of the force used by the defendant had been raised by the evidence presented. The instruction of the jury on the question whether the defendant acted in good faith, even if inappropriate, harmed the plaintiff, rather than defendant.

Justice LEVIN concurred in the resolution of the issues of the

defendant's waiver of qualified immunity, the denial of his motion for a directed verdict, and his challenge of the jury instructions.

Justice ARCHER, concurring in the result, stated that the defendant was not entitled to the defense of qualified immunity under 42 USC 1983. Any entitlement to the defense was lost when he failed to move for summary disposition and the case proceeded to trial. To preserve the defense of qualified immunity, a defendant must plead it as an affirmative defense in the first responsive pleading and move for summary disposition prior to trial.

Affirmed.

157 Mich App 92; 403 NW2d 505 (1985) affirmed.

1. CIVIL RIGHTS — PLEADING — GOVERNMENT OFFICIALS — QUALIFIED IMMUNITY.

In addressing the issue of qualified immunity in an action brought under 42 USC 1983, trial courts must consider objective factors: whether the alleged conduct establishes a constitutional violation and whether the constitutional standard was clearly established at the time in question; if the undisputed facts show that the defendant's conduct violated no clearly established constitutional standards, qualified immunity applies as a matter of law; if the law was clearly established, however, the immunity defense will fail unless it can be proved that, because of extraordinary circumstances, the defendant government official neither knew nor should have known the relevant legal standard.

2. CIVIL RIGHTS — PLEADING — GOVERNMENT OFFICIALS — QUALIFIED IMMUNITY.

Ordinarily, the issue of qualified immunity is not appropriate for the jury; the threshold test of a clearly established violation is one of law for the court to decide; if there is a factual dispute, i.e., a genuine issue of material fact, involving an issue on which immunity turns, so that it cannot be determined before trial what the defendants' acts were or whether exceptional circumstances existed, the case should proceed to trial.

3. CIVIL RIGHTS — PLEADING — GOVERNMENT OFFICIALS — QUALIFIED IMMUNITY.

Failure of a defendant government official in an action brought under 42 USC 1983 to move for summary disposition does not waive entitlement to offer the defense of qualified immunity; the properly pleaded defense may be raised prior to, during, or after trial.

*Jaffe, Snider, Raitt & Heuer, P.C.* (by *Brian G. Shannon*), and *Theodore Spearman* for the plaintiff.

*Cooper, Fink & Zausmer, P.C.* (by *Daniel S. Cooper, David H. Fink,* and *Barbara B. Vacketta*), for the defendants.

BOYLE, J. This Court granted leave to consider the issue whether the judgment against the individual defendant should be reversed on the basis of the doctrine of qualified immunity under 42 USC 1983.

This appeal requires the Court to address 1) the substantive law of qualified immunity, and 2) the procedural problems which arise in framing and resolving claims of immunity in civil rights actions against police officers. We hold that the judgment against the defendant should not be reversed on the basis of the defense of qualified immunity.

The trial court correctly determined that the defendant was not entitled to a qualified immunity jury instruction. The trial court's instructions were responsive to the defendant's actual theory of the case. In addition, the defendant failed to preserve the trial court's denial of the motion for directed verdict on qualified immunity grounds, having contended that the use of force was not excessive, rather than that qualified immunity required judgment for the defendant as a matter of law.

The Court of Appeals affirmed the judgment against the defendant. While we affirm the result reached by the Court of Appeals, we do so on different grounds and reject the analysis of the Court of Appeals.

I

Defendant Ronald Smith was a Detroit police

officer assigned to a four-member cruiser unit of the Thirteenth Precinct. On April 20, 1978, defendant Smith's cruiser unit responded to a police radio run: a "priority one" call to "1145 Hague, two Black males, B & E, the rear door." The cruiser drove into the alley adjacent to 1125 Hague.

The officers saw two men coming down the steps of the house carrying items of personal property. The two men were Jeffrey Neely and the plaintiff, Terrance Guider. When the plaintiff and Neely saw the police car, they dropped the items they were carrying and began to run through the back yard. The defendant jumped out of the car and ordered the two men to stop, yelling, "Halt, police." Officer Sparrow, the driver of the police car, also yelled, "Stop, police," as he got out of the car.

As the defendant got to the back yard, he saw Neely running straight ahead and the plaintiff going over the fence. The defendant pursued the plaintiff to the front of the house and again yelled, "Halt, police." He continued to pursue the fleeing plaintiff, who was running toward the freeway, and for the third time, yelled, "Halt, police." The plaintiff kept running and, concluding that all possibilities of capture were exhausted, defendant Smith then fired one shot at the plaintiff. The bullet struck the plaintiff in the back of the neck causing serious injuries.

The defendant did not testify that he believed the plaintiff was armed, only that the plaintiff would have escaped if he had reached the freeway. The plaintiff claimed that, at the time of the incident, he thought he was carrying Neely's belongings from a house that Neely claimed to share with a girl friend. The plaintiff was arraigned on May 16, 1978, and eventually placed in a youthful offender diversion program.

On August 11, 1980, the plaintiff filed a complaint in Wayne Circuit Court against Detroit

police officer Ronald Smith.[1] The plaintiff alleged that the defendant violated his federal civil rights and sought damages pursuant to 42 USC 1983. The plaintiff contended that defendant Smith's use of force was excessive and unnecessary to make the arrest of the plaintiff and thus amounted to a deprivation of plaintiff's constitutional rights to due process, equal protection, and freedom from cruel and unusual punishment.

In response to the complaint, the defendant raised the defense of immunity. A jury trial commenced on September 12, 1983. At the close of plaintiff's proofs, the defendant moved for a directed verdict on the grounds that no constitutional violation occurred and, alternatively, that he was entitled to qualified immunity. The trial court denied the defendant's motion, reasoning that disputed issues of fact remained whether defendant violated the constitutional rights of the plaintiff.[2] The defendant's request for jury instruction regarding a good-faith defense was also denied. The jury returned a verdict in favor of the plaintiff and awarded $472,000 in compensatory damages.

The Court of Appeals affirmed,[3] also reasoning that the defendant was not entitled to a jury instruction regarding qualified immunity. However, the Court of Appeals reasoned that the de-

[1] The original complaint included the City of Detroit as a defendant on the theories 1) that the defendant city's policy to allow the use of deadly force to apprehend a fleeing, breaking and entering suspect was unconstitutional, and 2) that the defendant city was reckless or grossly negligent in training the defendant police officer. At the close of plaintiff's proofs, the trial court granted the city's motion for a directed verdict.

[2] The court decided that fact issues had been raised whether there was probable cause that the defendant would believe the plaintiff was a felon who was fleeing and whether the force used by the defendant was reasonable and necessary under the circumstances.

[3] *Guider v Smith,* 157 Mich App 92; 403 NW2d 505 (1987).

fendant was not entitled to a qualified immunity instruction because he failed to testify that he believed that the shooting was a legal act at the time of the incident. We granted leave to appeal to consider the sole issue whether the judgment against the individual defendant should be reversed on the basis of the doctrine of qualified immunity under 42 USC 1983.[4]

II

The proper test regarding claims of qualified or "good faith" immunity under 42 USC 1983 actions can be found in *Harlow v Fitzgerald,*[5] 457 US 800; 102 S Ct 1717; 73 L Ed 2d 396 (1982). In *Harlow,* the United States Supreme Court altered the substantive law of qualified immunity and established a procedural goal for implementing the defense. Note, *Quick termination of insubstantial civil rights claims: Qualified immunity and procedural fairness,* 38 Vand L R 1543, 1547 (1985). The Court held that a government official performing discretionary functions is entitled to immunity from damages "insofar as [his] conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow, supra,* p 818.

To understand the effect of *Harlow,* it is necessary to examine the development of the qualified immunity doctrine in civil rights litigation. Prior to *Harlow,* under *Pierson v Ray,* 386 US 547; 87 S Ct 1213; 18 L Ed 2d 288 (1967), police officers were entitled to raise an affirmative defense of good

[4] *Guider v Smith,* 429 Mich 858 (1987).

[5] We recognize that *Harlow* and *Anderson v Creighton,* 483 US 635; 107 S Ct 3034; 97 L Ed 2d 523 (1987), have been criticized as unduly expanding the scope of the qualified immunity defense. We must emphasize that our responsibility when resolving claims brought under § 1983 is to adhere to the federal standard.

faith and probable cause to claims of unconstitutional arrests. This qualified immunity defense to liability, for purposes of § 1983 claims, was the equivalent of those previously recognized defenses which could be raised at trial under common law. See 2 Restatement Torts, 2d, § 895D, pp 411-420. Prosser & Keeton, Torts (5th ed), § 132, pp 1056-1060. The defense thus assumed a violation of plaintiff's rights which was excusable.

In *Scheuer v Rhodes,* 416 US 232; 94 S Ct 1683; 40 L Ed 2d 90 (1974), the Court further developed the notion of a qualified, or "good faith" immunity as a defense to liability. The *Scheuer* Court addressed the issue whether the trial court had properly dismissed claims against certain executive officials on the basis that the officials were absolutely immune from suit. The Court rejected the claim of absolute immunity in favor of a qualified immunity standard and held that the qualified immunity defense depended upon a finding of reasonable grounds for a good-faith belief of the public official in the action taken, formed at the time of the incident in question in light of all the circumstances. *Id.,* pp 247-248. Thus, the Court concluded that dismissal was improper because the lower courts had erroneously accepted as a fact the good faith of the executive, and "[t]here was no evidence before the courts from which such a finding of good faith could be properly made . . . ." *Id.,* p 250.

In *Wood v Strickland,* 420 US 308; 95 S Ct 992; 43 L Ed 2d 214 (1975), reh den 421 US 921 (1975), the Court dealt with the immunity issue in the context of a jury trial, again rejecting the defendant's claims of absolute immunity in favor of qualified immunity. The Court held that the appropriate standard to use in deciding whether an official was entitled to qualified immunity encompasses both subjective and objec-

tive factors. *Id.,* p 321. The Court concluded that an officer would not be entitled to immunity if

> he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the student. [*Id.,* p 322.]

While the Court rejected absolute immunity from liability for executive officials in *Pierson, Scheuer,* and *Wood, supra,* the Court also suggested that damage suits, alleging constitutional violations need not proceed to trial, but could be terminated by motion on the basis of qualified immunity. *Butz v Economou,* 438 US 478, 508; 98 S Ct 2894; 57 L Ed 2d 895 (1978). Thus, the Court emphasized that a "firm application of the Federal Rules of Civil Procedure will ensure that federal officials are not harassed by frivolous lawsuits." *Id.*

However, despite this admonition, in actual practice subjective good faith prevented early disposition of litigation because trial courts frequently deemed the subjective component of the defense a question of fact that required resolution by a jury. Balcerzak, *Qualified immunity for government officials: The problem of unconstitutional purpose in civil rights litigation,* 95 Yale L J 126, 132 (1985).

Fifteen years after *Pierson v Ray,* the United States Supreme Court recognized that the *Wood* test for qualified immunity had become disruptive of effective government due to "the costs of trial or the burdens of broad-reaching discovery." *Harlow, supra,* pp 817-818. The Court's response in *Harlow* was to narrowly limit the "subjective element of the good-faith defense," *id.,* p 815, and to redefine

the defense. No longer could qualified immunity be defeated by a bare claim that the defendant acted with the malicious intention to cause injury. Under *Harlow,* government officials are liable for damages only if their conduct violates "clearly established" statutory or constitutional rights of which a reasonable person would have known. If the law governing their actions was not "clearly established," the officers are protected from liability.

Thus, in addressing the qualified immunity question as redefined in *Harlow,* trial courts must consider: 1) whether the alleged conduct establishes a constitutional violation, and 2) whether the constitutional standard was clearly established at the time in question. *Id.,* p 818. If the undisputed facts show that the defendant's conduct violated no clearly established constitutional standards, qualified immunity applies as a matter of law. However, if the law was clearly established, the immunity defense ordinarily would fail unless the official demonstrates extraordinary circumstances, and can prove he neither knew nor should have known the relevant legal standard, in which case the defense should be sustained. *Id.,* p 819. By initially defining the limits of qualified immunity essentially in objective terms, the *Harlow* Court proposed to "avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment." *Id.,* p 818.[6]

[6] As illustrated in *Anderson v Creighton,* n 5 *supra,* 483 US 644, the meaning of *Harlow* was to make the liability issue more susceptible to summary disposition. The relevant inquiry would be whether viewing the facts in the light most favorable to the plaintiffs, a reasonable official in the defendant's position could have believed his conduct to be lawful considering the state of the law as it existed when the defendant took his challenged actions. An affirmative answer would entitle the defendant to dismissal of the claims, but a negative answer would not foreclose summary disposition if the defendant could establish through discovery that the actions he took

Under this new standard, in appropriate circumstances, the defense of qualified immunity functions as an immunity from suit as well as an affirmative defense to ultimate liability.

III

The Court of Appeals determined that the defendant was not entitled to a jury instruction regarding a qualified immunity defense under 42 USC 1983.[7] This decision was based upon the erroneous belief that a defendant's subjective belief in the legality of his actions at the time of the incident is necessary to support a good-faith defense. The Court of Appeals further erred in assuming that the issue of qualified immunity was an issue appropriate for a jury determination.

The Court of Appeals focused on the facts that "the testimony [of the defendant] did not establish that the defendant believed that shooting the plaintiff was lawful," and that "there was no testimony to show it was reasonable for him to believe this." On this basis the Court concluded that the "defendant was not entitled to good-faith immunity instruction." 157 Mich App 101. That focus is subjective and incorrect under *Harlow, supra.*[8] Assuming that there was a violation of a

were different than those alleged and that his actions were reasonable. Justices Stevens, Brennan, and Marshall accused the Court of creating a rule that "stunningly restricts the constitutional accountability of *the police," id.,* 483 US 647. *The Supreme Court, 1986 term: Leading cases,* 101 Harv L R 119, 224 (1987).

[7] The defendant did not preserve the directed verdict motion on qualified immunity grounds. The only directed verdict argument the defendant ever made in the Court of Appeals was that the uncontroverted facts showed no constitutional violation had occurred.

[8] We assume, arguendo, that *Harlow* is applicable in this cause of action. The United States Supreme Court did not apply the *Harlow* objective reasonableness standard to police officers under 42 USC 1983 until *Malley v Briggs,* 475 US 335; 106 S Ct 1092; 89 L Ed 2d 271 (1986).

clearly established constitutional right, the next inquiry under the *Harlow* standard is whether a reasonable man in the defendant's position could have believed his actions were consistent with the law.

We recognize that the subjective faith of a public official in a claim under § 1983 yet may be relevant in the situation in which the controlling substantive law makes an official's state of mind an essential element of the plaintiff's constitutional claim. See *Martin v Dist of Columbia Metropolitan Police Dep't,* 259 US App DC 31; 812 F2d 1425 (1987). The lawfulness of a challenged act may be dependent upon the actor's motive or intent, and, therefore, the purpose for which the act was undertaken must be analyzed. *Gutierrez v Municipal Court of Southeast Judicial Dist,* 838 F2d 1031, 1051 (CA 9, 1988).[9] In these cases, intent, such as purposeful racial discrimination, is an element of the plaintiff's cause of action. *Turner v Dammon,* 848 F2d 440, 445, n 3 (CA 4, 1988).

Here, however, the defendant's motivation or intent is not an essential element of the challenged conduct. It is therefore irrelevant to this

[9] In addition, plaintiffs should be afforded an opportunity to overcome an asserted defense of immunity with offers of proof of an unconstitutional motive. As the United States Court of Appeals for the Sixth Circuit recognized in *Poe v Haydon,* 853 F2d 418, 431 (CA 6, 1988), under *Harlow* it is impermissible to inquire whether the defendant official actually knew that his conduct was unlawful. In this instance, however, the Court noted that "the relevance of motive or intent is especially applicable to *Poe's* claim of sex discrimination in violation of the equal protection clause" and, as a result, "in deciding whether the appellants violated clearly established rights, there must be an inquiry sensitive to their individual motivations." *Id.,* p 432. Subsequently, findings of a genuine issue of material fact concerning a defendant's motivation for a decision and direct evidence that a defendant was motivated by plaintiff's gender would necessitate a trial in order to determine whether the alleged conduct established a constitutional violation. Further, the test is still "the objective reasonableness of an official's conduct." *Id.,* p 430.

plaintiff's claim. Further, while in some instances the defendant's motive or intent may be relevant to a plaintiff's cause of action, it will rarely be relevant to a defendant's claim of qualified immunity under the *Harlow* standard. What the defendant believed at the time of the incident and the failure of the defendant to testify as to his belief is irrelevant to a determination of the threshold question whether the defendant's undisputed conduct violated clearly established law. Further, except in extraordinary circumstances, actual knowledge is irrelevant to a determination whether the defendant was entitled to a qualified immunity defense under 42 USC 1983.[10]

The defendant did not argue that extraordinary circumstances existed to demonstrate he neither knew nor should have known of the relevant legal standard. Thus, the Court of Appeals erred in its decision that the defendant's subjective belief in the legality of the shooting was necessary to support a qualified immunity defense.

Although the application of the defense of qualified immunity has not been fully clarified, it is clear that the defense of qualified immunity is ordinarily not an appropriate issue for the jury.[11] In instances where the right is clear, if the defendant alleges extraordinary circumstances justifying his failure to follow the law, *Harlow* suggests

[10] A subjective inquiry may become relevant where a defendant claims that there were exceptional circumstances which justified his failure to know the clearly settled law. For example, a defendant may claim reliance on advice of counsel, and therefore an inquiry whether there was such reliance would be proper. Nahmod, Civil Rights and Civil Liberties Litigation: The Law of Section 1983 (2d ed), § 8.15, p 508.

[11] The circumstances in which an instruction on good faith would be used seem to be relatively rare. For example, such an instruction would be appropriate in circumstances where a search warrant, albeit an invalid one, is being used. 3 Devitt, Blackmar & Wolff, Federal Jury Practice & Instructions (4th ed), § 103.90, p 30 (1988 Supp).

there could be an issue for the jury.[12] However, since the extraordinary circumstances must be such that the defendant neither knew nor should have known the relevant legal standard, even this exception would turn primarily on objective factors. *Harlow, supra,* p 819.

Again, we recognize that if there is a factual dispute (i.e., a genuine issue of material fact) involving an issue on which immunity turns, such that it cannot be determined before trial what the defendants' acts were, or whether exceptional circumstances existed, the case will proceed to trial.[13] However, it does not follow that any entitlement to a qualified immunity defense was lost when the

[12] It is apparent that the knowledge of the defendant is relevant in extraordinary circumstances. In *Hobson v Wilson,* 237 US App DC 219, 244-245; 737 F2d 1 (1984), the court described the appropriate inquiry as follows:

> [A]ssume plaintiff alleges that defendant violated Right x, and defendant moves for summary judgment on grounds of qualified immunity, claiming Right x was not well-established when the alleged acts were committed and, alternatively, that extraordinary circumstances prevented him both from knowing and having reason to know the relevant legal standard. If the district court judge determines as a matter of law that Right x was well-established, a question of fact might still remain as to whether defendant reasonably neither knew nor should have known of it. The first issue is purely legal and should be susceptible to initial determination on the complaint and summary judgment papers. The latter is potentially an issue for trial, depending on the unique circumstances of each case.

[13] The Court need not (and should not) resolve any disputed questions of material fact. "However, if there are issues of disputed fact upon which the question of immunity turns, . . . the case must proceed to trial." *Green v Carlson,* 826 F2d 647, 652 (CA 7, 1987). Thus, although the immunity issue will frequently be resolved in motion practice, lower federal courts recognize that the qualified immunity defense may be presented in a motion for directed verdict and in a motion for judgment notwithstanding the verdict, i.e., "even after a trial." *Benson v Allphin,* 786 F2d 268, 277, n 19 (CA 7, 1986), cert den 479 US 848; 107 S Ct 172; 93 L Ed 2d 109 (1986) (partial directed verdict and judgment notwithstanding the verdict on qualified immunity grounds); *Saldana v Graza,* 684 F2d 1159 (CA 5, 1982) (directed verdict). See *Bates v Jean,* 745 F2d 1146, 1152 (CA 7, 1984).

defendant failed to move for summary judgment. While the failure to plead qualified immunity in the answer results in a waiver of the defense,[14] *Boyd v Carroll,* 624 F2d 730 (CA 5, 1980), a defendant who properly pleads qualified immunity may raise the issue of a qualified immunity defense prior to, during, or after trial.[15] The threshold test of a clearly established violation is one of law and always will be an issue for the court to decide.

The defense of qualified immunity assumes the occurrence of a violation of a constitutional right.

[14] The purpose of a "raise or waive" rule is to give the opposing party notice of the defense and an opportunity to argue why the claim should not be barred since an affirmative defense may defeat the opposing party's claim. 5 Wright & Miller, Federal Practice and Procedure: Civil (1987 Supp), § 1270, p 69. However, once the defense has pled and the plaintiff is on notice that the issue will be raised, sound policy does not dictate the unique "raise or waive" rule created in the concurring opinion.

[15] The concurring opinion misperceives the language of *Mitchell v Forsyth,* 472 US 511, 526; 105 S Ct 2806; 86 L Ed 2d 411 (1985). When the Court stated that the right "is effectively lost if a case is erroneously permitted to go to trial," it meant that under certain circumstances qualified immunity functions as an immunity from suit, the effectiveness of which is lost if the defendant must go through the time and expense of having to defend insubstantial claims. In concluding that the issue of qualified immunity is immediately appealable, the Court explained the dual nature of qualified immunity as not only "a mere defense to liability" but also "an immunity from suit." *Id.* Thus, the Court's language indicates that the entitlement to immunity from standing trial (as opposed to immunity from liability) would be, as a practical matter, forfeited if appeal on the former issue was delayed until at or after trial on the merits. Nowhere has the Supreme Court stated or implied that immunity from liability must be preserved by way of a summary disposition motion.

As the United States Court of Appeals for the Sixth Circuit has observed, *Mitchell* counsels trial courts to consider three different and relatively independent aspects of immunity: at a motion to dismiss, on motion for summary judgment, and in defense of liability. In *Kennedy v City of Cleveland,* 797 F2d 297, 300 (CA 6, 1986), the court stated:

> *Mitchell* makes it clear that immunity doctrines' protections against liability and against the various burdens of litigating insubstantial claims are conceptually distinct (citation omitted). Consequently, decisions with respect to dismissal or summary judgment, if adverse, do not preclude the interposition of the defense of immunity as a defense . . . .

A determination by a jury that a police officer did not have probable cause to arrest or that excessive force was used in effectuating an arrest would not resolve a qualified immunity question. *Sevigny v Dicksey,* 846 F2d 953, 956 (CA 4, 1988).

A court addressing the issue of qualified immunity must first determine whether the conduct of the police officer violated a plaintiff's rights under the constitution. Then the court must address the issue whether the constitutional standards of the right in question were clearly established. A determination by the court that the alleged conduct of a police officer was a violation of a clearly established right would defeat a defendant's motion for summary disposition on qualified immunity grounds. In appropriate circumstances, the same issue could be raised by a motion for judgment notwithstanding the verdict subsequent to a finding by the jury that, as in the present case, the police officer used excessive force.[16]

Regardless of the stage at which the issue of qualified immunity is addressed, the defense will turn primarily on objective factors, *Harlow, supra,* pp 818-819. Thus, the Court of Appeals discussion of qualified immunity which focused on the defendant's subjective belief is incorrect under *Harlow.*

IV

The narrow issues before this Court are whether the trial court erred in denying the motion for a directed verdict in regard to the defendant police

[16] Under the *Anderson* test, then, if, on objective assessment of the circumstances, an officer situated as the defendant reasonably could have believed that the force used was necessary, the defendant would be granted immunity. In the instant case we must not be concerned with the plaintiff's conduct as this particular defendant perceived it, but as a police officer acting reasonably under the circumstances should have perceived it. *Sevigny v Dicksey, supra,* p 956.

officer, and whether the jury instructions given by the lower court constituted prejudicial error.

In pertinent part, the plaintiff alleged that the use of excessive force by the defendant amounted to a deprivation of constitutional rights to due process, equal protection, and freedom from cruel and unusual punishment. In moving for a directed verdict, defense counsel claimed that there was no violation of a constitutional right. In addition, counsel claimed the defendant was entitled to the directed verdict on the basis of good-faith immunity since a constitutional right to be free from the use of excessive force had not been clearly established at the time of the incident. The trial judge ruled that there may have been a violation of due process[17] if the police officer did not have probable cause or if the force he used was not reasonable under the circumstances.

The trial judge denied the defendant's motion for a directed verdict, explaining that disputed factual issues existed.[18] The trial court believed

[17] The constitutional provision upon which most courts ground a § 1983 claim alleging excessive force is the Fourteenth Amendment—the use of force is treated as a potential deprivation of liberty without due process of law. See *Johnson v Glick,* 481 F2d 1028 (CA 2, 1973) (employing a Fourteenth Amendment substantive due process analysis to analyze an excessive force claim).

Despite the large number of excessive force cases, the Supreme Court has decided only two excessive force cases brought under § 1983. Freyermuth, *Rethinking excessive force,* 1987 Duke L J 692. In *Tennessee v Garner,* 471 US 1; 105 S Ct 1964; 85 L Ed 2d 1 (1985), the Court held that the use of deadly force is a seizure subject to the reasonableness requirements of the Fourth Amendment. In *Whitley v Albers,* 475 US 312; 106 S Ct 1078; 89 L Ed 2d 251 (1986), the Court developed a standard to determine whether the shooting of a prisoner violated the Eighth Amendment. The adherence of circuit courts to substantive due process factors to excessive force cases has been viewed as creating an abstract constitutional right to be free of excessive force.

[18] The trial judge noted, "[t]here are a lot of fact issues that have been raised during the testimony on both the issue of whether or not there was probable cause that Sergeant Smith would believe that plaintiff was a felon who was fleeing the scene, and, secondly, was the

that disputed factual issues were created by the testimony and evidence presented by the plaintiff regarding both the plaintiff's theory of probable cause and his theory of excessive force.[19] On appeal, the defendant challenges only the denial of the directed verdict on excessive force grounds.[20]

Although the United States Supreme Court had not addressed this issue,[21] it appears that the law was clearly established that the use of excessive force[22] violates the Fourteenth Amendment, *Wilson v BeeBe,* 770 F2d 578 (CA 6, 1985) (en banc). Because there remained disputed questions regarding whether the violation occurred, the defendant was not entitled to a directed verdict on the basis of immunity, and the trial court correctly denied the motion.[23] Moreover, the defendant did not

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force of Sergeant Smith reasonable force under the circumstances." The trial judge incorrectly determined that a disputed factual issue existed as to probable cause. However, the defendant has not appealed the denial of his motion on that ground.

[19] The trial judge noted that there were questions regarding the distance between the plaintiff and the defendant, the number of police officers at the scene, the layout of the area, and the way in which the plaintiff could have escaped.

[20] We take no position on whether plaintiff's alternate theory presented factual issues which were properly submitted to the jury.

[21] The United States Supreme Court has failed to clarify whether only its own pronouncements can clearly establish a constitutional right, or whether lower court decisions will have the same effect. The United States Court of Appeals for the Sixth Circuit, however, has held that in order to be clearly established, a right must be decided by the highest court in the state where the case arose, by a United States Court of Appeals, and by the Supreme Court. *Robinson v Bibb,* 840 F2d 349 (CA 6, 1988).

[22] This is not the right recognized in *Tennessee v Garner,* n 17 *supra,* as Judge KELLY noted below, 157 Mich App 92, 114; 403 NW2d 505 (1987). The *Garner* Court did not establish a constitutional right to be free from the use of excessive force, but simply recognized that the application of force implicated a specific Fourth Amendment right and applied the standard developed to protect that right. To the extent that Judge SIMON's opinion suggests that *Tennessee v Garner* applies to the question of defendant Smith's liability, we express no opinion on the merits of that question.

[23] We assume, arguendo, that *Harlow* immunity applies, while

appeal the denial of defendant's motion for a directed verdict on qualified immunity grounds, arguing instead that the force used was not excessive and therefore there was no constitutional violation. Finding no manifest injustice, we decline to depart from our traditional rule that a party waives claims not properly presented for review. See *Napier v Jacobs,* 429 Mich 222; 414 NW2d 862 (1987).

Nor can we agree that the trial court's jury instructions amounted to error requiring reversal. Because defense counsel did not submit proposed instructions, it is unclear whether she believed that defendant's good faith was irrelevant on the proofs submitted or irrelevant on the merits after *Harlow.* While it was error to submit the question of good faith to the jury,[24] the instruction given here imposed the burden of proof on the plaintiff to prove that the defendant did not act in good faith.[25] This instruction may have been inappropriate,[26] yet the party harmed was not the defendant

noting that in *Johnson v Glick,* n 17 *supra,* Judge Friendly set forth four factors for courts to apply, including good faith or a malicious or sadistic purpose.

[24] The defendant did not properly allege or establish that extraordinary circumstances existed to demonstrate that he neither knew nor should have known of the relevant legal standard. Thus, it was not appropriate to submit this question to the jury.

[25] The trial judge recited the following instructions:

> Plaintiff has the burden of proof to prove by a preponderance of the evidence that either the Defendant Ronald Smith did not have probable cause to believe that the crime of breaking and entering an occupied dwelling was committed by the Plaintiff, Terrance Guider, or, that the Defendant Ronald Smith did not honestly believe that the deadly force was necessary to prevent the escape of the Plaintiff Terrance Guider, or if he did honestly believe it, then this belief was unreasonable given the totality of the circumstances—the facts and circumstances the Defendant Ronald Smith was aware of or reasonably should have been aware of at that time.

[26] See *Gomez v Toledo,* 446 US 635; 100 S Ct 1920; 64 L Ed 2d 572 (1980).

but, rather, the plaintiff. The jury found that the defendant's use of deadly force was unreasonable, and the verdict is supported by the evidence.

V

CONCLUSION

Under *Harlow,* a police officer performing discretionary functions is entitled to the defense of qualified immunity when his conduct does not violate clearly established constitutional rights of which a reasonable person would have known. If the law was clearly established, the immunity defense will be sustained only if the officer demonstrates extraordinary circumstances and can prove he neither knew nor should have known the relevant legal standard.

We hold that the defendant in this case was not entitled to a defense of qualified immunity. We therefore affirm the judgment of the trial court and the decision of the Court of Appeals.

RILEY, C.J., and BRICKLEY, CAVANAGH, and GRIFFIN, JJ., concurred with BOYLE, J.

LEVIN, J. I concur in part IV of the opinion of the Court.

ARCHER, J. (*concurring*). We granted leave to appeal to consider the sole issue whether the judgment against the individual defendant should be reversed on the basis of the doctrine of qualified immunity under 42 USC 1983.[1]

[1] 42 USC 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the

The majority holds that the defendant failed to preserve the trial court's denial of the motion for directed verdict on qualified immunity grounds, because he contended that the use of force was not excessive, rather than that qualified immunity required judgment for the defendant as a matter of law. On this basis, the majority holds that the defendant was precluded from raising the defense here. Although I agree with the result reached by the majority, I do so on different grounds.

I would hold that the individual defendant was not entitled to the defense of qualified immunity under § 1983. Any entitlement to the defense was lost when defendant Smith failed to move for summary judgment and the case proceeded to trial. Accordingly, I would also affirm the result reached by the Court of Appeals, but for the reasons outlined below.

## FACTS

On April 20, 1978, plaintiff, then eighteen years old, received a telephone call from his friend, Jeff Neely. Neely requested that the plaintiff assist him in removing his belongings from a house Neely claimed he had been sharing with his girl friend. Under Neely's direction, plaintiff parked his car behind a house that Neely said was his girl friend's. Neither plaintiff nor Neely testified regarding the address of this house. They entered

District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

from the side door. Plaintiff made two trips to the car with Neely's alleged belongings.

Defendant Ronald Smith was a Detroit police officer assigned to a four-member cruiser unit of the Thirteenth Precinct.[2] On the night in question, defendant Smith's cruiser unit responded to a police radio run of "1145 Hague, two Black males, [breaking and entering], the rear door." Defendant was familiar with the address because he knew the owner and had been inside the house on a prior occasion. The officers drove into the alley behind the house with their headlights off.

Plaintiff was making his third trip to the car carrying Neely's alleged belongings when he and Neely observed the police car.[3] Plaintiff and Neely dropped the items they were carrying and began to run through the back yard. The police officers observed the two, who fit the breaking and entering description, and ordered them to stop, by yelling "halt, police." After yelling the third time, "halt, police," defendant Smith fired one shot at the plaintiff, striking him in the back of his neck. No warning shot was ever fired.

Officer Smith testified that he fired because he was afraid he would lose the suspect between two houses where, for his own safety, he would not be able to pursue as fast. Defendant Smith did not see anything that would lead him to believe that the plaintiff was armed.

At that time, Michigan law permitted the use of deadly force, when necessary, to apprehend a flee-

[2] A cruiser car is a four-door sedan with colored high beam headlights and colored spotlights on the left and right sides of the front windshield. There are flashing lights in the rear window. The words "Detroit Police" and the vehicle number appear on each of the front passenger doors. Usually, there are four officers in each unit. One of the four is generally in uniform, the other three wear plain clothes.

[3] Plaintiff thought he was carrying Neely's belongings from the house. However, Neely knew he was taking items owned by the occupants without their consent.

ing felon.[4] The Detroit Police Department's policy on the use of firearms delineated an even narrower scope for the use of firearms by its officers. The policy limited the use of deadly force to seven felonies, of which breaking and entering was included. Accordingly, an internal police department investigation concluded that defendant Smith's use of deadly force was justified.

On August 11, 1980, plaintiff filed a complaint in Wayne Circuit Court against the City of Detroit and Detroit police officer Ronald Smith, alleging that the defendants violated his federal civil rights under 42 USC 1983. Plaintiff's theory of recovery was that defendant Smith's use of deadly force to apprehend him as he fled the scene of an apparent breaking and entering was excessive and unnecessary under the circumstances and amounted to a deprivation of his constitutional rights.[5] In the answer to the complaint, the defendants raised the defense of qualified immunity.

A trial by jury commenced on September 12, 1983, with the Honorable Paul S. Teranes presiding. Prior to trial, defendants did not file a motion for summary judgment. The City of Detroit's motion for directed verdict was granted at the close of plaintiff's proofs on the ground that the evidence was insufficient to show gross negligence or deliberate indifference on the part of the city in training or supervising its police officers in the use of deadly force. The trial court denied defendant Smith's motion for directed verdict because of the remaining questions whether probable cause existed and whether defendant Smith used only reasonable force under the circumstances. The

[4] See, e.g., *Werner v Hartfelder*, 113 Mich App 747, 753; 318 NW2d 825 (1982), lv den 418 Mich 906 (1984).

[5] Subsequently, the trial court granted plaintiff's motion to amend the complaint to explicitly rely on the Fourth Amendment.

trial court considered these questions of fact, to be resolved by the jury.

The case went to the jury concerning the § 1983 liability of defendant Smith. On October 18, 1983, the jury found in favor of the plaintiff and awarded him $472,000 in compensatory damages. Both parties appealed.

The Court of Appeals affirmed the trial court's decision that defendant was not entitled to a qualified immunity defense.[6]

On October 6, 1987, this Court granted leave to appeal to consider the sole issue whether the judgment against the individual defendant should be reversed on the basis of the doctrine of qualified immunity under 42 USC 1983.[7]

ANALYSIS

In *Harlow v Fitzgerald,* 457 US 800; 102 S Ct 2727; 73 L Ed 2d 396 (1982), the United States Supreme Court held that subjective evidence of an officer's good faith is no longer relevant to an analysis of qualified immunity. As stated in *Harlow:*

> Qualified or "good faith" immunity is an affirmative defense that must be pleaded by a defendant official. *Gomez v Toledo,* 446 US 635 [100 S Ct 1920; 64 L Ed 2d 572] (1980). Decisions of this Court have established that the "good faith" defense has both an "objective" and a "subjective" aspect. The objective element involves a presumptive knowledge of and respect for "basic, unquestioned constitutional rights." *Wood v Strickland,* 420 US 308, 322 [95 S Ct 992; 43 L Ed 2d 214] (1975). The subjective component refers to "permissible intentions." . . .

[6] *Guider v Smith,* 157 Mich App 92, 100; 403 NW2d 505 (1987).

[7] *Guider v Smith,* 429 Mich 858 (1987).

> The subjective element of the good-faith defense frequently has proved incompatible with our admonition in *Butz* [*v Economou,* 438 US 478; 98 S Ct 2894; 57 L Ed 2d 895 (1978)], that insubstantial claims should not proceed to trial. . . .
>
> In the context of *Butz'* attempted balancing of competing values, it now is clear that substantial costs attend the litigation of the subjective good faith of government officials. Not only are there the general costs of subjecting officials to the risks of trial—distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service. There are special costs to "subjective" inquiries of this kind. . . . Judicial inquiry into subjective motivation therefore may entail broad-ranging discovery and the deposing of numerous persons, including an official's professional colleagues. Inquiries of this kind can be peculiarly disruptive of effective government.
>
> Consistently with the balance at which we aimed in *Butz,* we conclude today that bare allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery. *We therefore hold that government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.* See *Procunier v Navarette,* 434 US 555, 565 [98 S Ct 855; 55 L Ed 2d 24] (1978); *Wood v Strickland,* 420 US at 322. [*Harlow* at 815-818. Emphasis added.]

*Harlow* set the stage for a new era in the law of qualified immunity. After *Harlow,* qualified immunity is a purely legal question, to be decided by the judge prior to trial.[8] As stated in *Harlow* at 818-819:

[8] *Donta v Hooper,* 774 F2d 716, 719 (CA 6, 1985).

> Reliance on the objective reasonableness of an official's conduct, as measured by reference to clearly established law, should avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment. On summary judgment, the judge appropriately may determine, not only the currently applicable law, but whether that law was clearly established at the time an action occurred. If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to "know" that the law forbade conduct not previously identified as unlawful. Until this threshold immunity question is resolved, discovery should not be allowed. If the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct. Nevertheless, if the official pleading the defense claims extraordinary circumstances and can prove that he neither knew nor should have known of the relevant legal standard, the defense should be sustained. *But again, the defense would turn primarily on objective factors.* [Emphasis added.]

Under the test set forth in *Harlow,* § 1983 defendants are entitled to qualified immunity if their conduct did not violate a clearly established statutory or constitutional right of which a reasonable person would have known. *Harlow* rejected the subjective element of the qualified immunity test in favor of a purely objective standard. We are bound by the United States Supreme Court's construction of § 1983.[9] However, I do not apply the *Harlow* analysis to these facts because the defen-

[9] The construction given to a federal statute by the United States Supreme Court controls in state court. *Lyon v Clark,* 124 Mich 100, 105; 82 NW 1058; 83 NW 694 (1900).

dant forfeited any entitlement to qualified immunity by failing to move for summary judgment.[10]

*Harlow* had been decided over a year prior to the start of trial.[11] In *Harlow,* the Court determined that qualified immunity was a threshold question to be resolved on a motion for summary judgment prior to trial.[12] Notwithstanding defendant's awareness of *Harlow,*[13] defendant did not file a motion for summary judgment prior to trial. The importance of filing a motion for summary judgment in § 1983 actions was reëmphasized by the Court in *Mitchell v Forsyth,* 472 US 511; 105 S Ct 2806; 86 L Ed 2d 411 (1985).

In *Mitchell,* the United States Supreme Court held:

> The entitlement [to qualified immunity] is an *immunity from suit* rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial.[14] [*Id.* at 526.]

[10] The Michigan Court Rules were amended in 1985 to change the name of a summary judgment motion. These motions are now called motions for summary disposition. MCR 2.116.

[11] *Harlow* was decided June 24, 1982. The first day of trial was September 12, 1983.

[12] *Id.* at 818. Additionally, in *Malley v Briggs,* 475 US 335, 341; 106 S Ct 1092; 89 L Ed 2d 271 (1986), the Court reaffirmed its holding in *Harlow,* ruling that the entitlement to qualified immunity is determined by an objective test and that the issue should be resolved on a motion for summary disposition.

[13] Defendant Smith was aware of *Harlow* because the decision was cited by defendant to support his motion for directed verdict at the close of plaintiff's proofs.

[14] Although the focus of the *Mitchell* Court was to resolve the issue whether a lower court ruling on qualified immunity was a "final order" subject to an immediate appeal, the Court nonetheless fashioned its holding with great deference to the basic tenets found in *Harlow.* For example, the text of the opinion preceding the above-quoted language, expresses the following:

> Unless the plaintiff's allegations state a claim of violation of clearly established law, a defendant pleading qualified immu-

In *Kennedy v City of Cleveland,* 797 F2d 297 (CA 6, 1986), cert den 479 US 1103; 107 S Ct 1334; 94 L Ed 2d 185 (1987), the United States Court of Appeals for the Sixth Circuit considered whether a pretrial denial of qualified immunity was immediately appealable. In resolving this issue, the court interpreted *Mitchell* as describing two stages at which the doctrine of immunity may be interposed in a motion for summary judgment. The first instance arises when the complaint is insufficient to describe a violation of a clearly established and objectively well-known statutory or constitutional right, while in the second instance the complaint may be sufficiently descriptive, yet the claim upon which it is based is insubstantial. In contrast to *Mitchell, Kennedy* further stated that "decisions with respect to dismissal of summary judgment, if adverse, do not preclude the interposition of the defense of immunity as a defense to liability on the merits." 797 F2d 300.

Accordingly, to the extent that *Kennedy* alludes to the defendant's right to raise the qualified immunity defense *at any point during the trial,* it is inconsistent with the United States Supreme Court's decision in *Mitchell* and thus, I do not consider it precedent.

In accordance with the United States Supreme Court's holding in *Mitchell,* we hold that Smith effectively lost any right to a qualified immunity

nity is entitled to dismissal before the commencement of discovery. [*Id.* at 526, quoting *Harlow,* 457 US 818.]

Even if the plaintiff's complaint adequately alleges the commission of acts that violated clearly established law, the defendant is entitled to summary disposition if discovery fails to uncover evidence sufficient to create a genuine issue as to whether the defendant in fact committed those acts. *Harlow,* thus recognized an entitlement not to stand trial or face the other burdens of litigation conditioned on the resolution of the essentially legal question whether the conduct of which plaintiff complained violated clearly established law. 472 US 526. Thus, the *Mitchell* Court's interpretation of *Harlow* is indeed congruent to the conclusion reached in the case at bar.

defense when the case proceeded to trial. To avoid this result, defendants in a § 1983 suit must specifically plead qualified immunity in their first responsive pleading as an affirmative defense[15] and move for summary disposition prior to trial. If summary disposition is denied, defendants may pursue an interlocutory appeal of the denial.[16] Accord, *Mitchell,* at 14-15.[17]

[15] Defendants did not specifically employ the words "qualified immunity" in their answer to the complaint. The defense was raised in the section of the answer captioned, "Special and Affirmative Defenses." It states, in part:

> 2. That the individual defendants at all times herein mentioned acted in good faith and without malice and within the scope of their duties as police officers of the City of Detroit and peace officers of the State of Michigan.
>
> * * *
>
> 6. That force, if any, used on the plaintiff(s) was reasonable and necessary under the circumstances to protect themselves so that any injury or damages allegedly suffered by plaintiff(s) were due to and/or misconduct in the unlawful assault and battery committed by the plaintiff(s) upon these defendant(s).
>
> 7. That the actions of the defendant and its employees in all respects were reasonable, proper and legal.

Under *Wood v Strickland,* 420 US 308; 95 S Ct 992; 43 L Ed 2d 214 (1975), reh den 421 US 921 (1975), the qualified immunity defense was unavailable if either: (1) he knew or reasonably should have known that the action he took within the sphere of his official responsibility would violate the plaintiff's clearly established constitutional rights, or (2) he acted with malicious intent to cause a deprivation of constitutional rights or other injury. The defendants' answer was marginally sufficient to address the elements of the *Wood* test for qualified immunity.

However, *Harlow* eliminated the subjective aspects of the *Wood* test. Accordingly, an individual § 1983 defendant must now allege that his actions did not violate a clearly established statutory or constitutional right of which a reasonable person would have known. We reiterate that qualified immunity is an affirmative defense that must be pled by a defendant official. *Harlow* at 815. Defendants who fail to plead the defense with specificity incur the risk of waiving the defense and excluding it from the case. See, e.g., *Satchell v Dilworth,* 745 F2d 781, 784 (CA 2, 1984).

[16] See MCR 2.116(J)(2)(a). See also *United States v Archer-Daniels-Midland Co,* 785 F2d 206, 211 (CA 8, 1986), cert den 481 US 1028; 107 S Ct 1952; 95 L Ed 2d 525 (1987).

[17] See also *Rich v Dollar,* 841 F2d 1558, 1560 (CA 11, 1988).

Defendant moved for a directed verdict at the close of plaintiffs' proofs. This was insufficient to preserve the qualified immunity defense because defendant had already begun to defend the action at trial. By this time, defendant had effectively lost his qualified immunity from suit.[18]

## CONCLUSION

I would hold that the doctrine of qualified immunity does not require a reversal of the judgment against defendant Smith on the facts of this case. Any entitlement to the defense was lost when defendant Smith failed to move for summary judgment and the case proceeded to trial. To preserve the qualified immunity defense, a defendant must plead qualified immunity as an affirmative defense in the first responsive pleading and move for summary disposition prior to trial. The result reached by the Court of Appeals is affirmed.

[18] This holding is consistent with *Harlow*'s requirement that the judge determine whether the law was clearly established at the time an action occurred. If the law at that time was not clearly established then an official is entitled to qualified immunity. If the law was clearly established, the immunity defense ordinarily should fail. Until this threshold immunity question is resolved, discovery should not be allowed. *Harlow* at 818-819.

## PIKE v CITY OF WYOMING

Docket No. 78746. Argued October 7, 1987 (Calendar No. 2). Decided November 10, 1988.

Ronald C. Pike, Sr., was awarded workers' compensation benefits for the loss of the industrial use of his legs. The amount of benefits was increased because of a determination made on the basis of the conclusive presumption of § 353(1)(a)(i) of the workers' compensation act that his wife was his dependent at the time of the injury. Thereafter, a similar conclusive presumption of dependency in a parallel provision of the workers' compensation act was declared to be unconstitutional gender-based discrimination. Subsequently, the City of Wyoming, his employer, and the Second Injury Fund requested that benefits be reduced on the ground that the claimant's wife was not a dependent in fact. A hearing referee dismissed the petition, and the Workers' Compensation Appeal Board affirmed on the basis of res judicata. The Court of Appeals, HOLBROOK, JR., P.J., and BURNS and MACKENZIE, JJ., denied leave to appeal (Docket No. 90953). The Second Injury Fund appeals.

In opinions by Justice GRIFFIN, joined by Chief Justice RILEY and Justice LEVIN, and by Justice BRICKLEY, the Supreme Court *held:*

The doctrine of res judicata does not preclude a redetermination of the dependency of the plaintiff's wife, where the prior finding of dependency was made pursuant to the gender-based conclusive presumption of § 353(1)(a)(i) of the workers' compensation act, which violates the Equal Protection Clause of the Fourteenth Amendment. The decision of the Workers' Compensation Appeal Board is reversed and the case remanded for further proceedings to determine whether the plaintiff's wife was in fact a dependent.

Justice GRIFFIN, joined by Chief Justice RILEY and Justice LEVIN, stated that the gender-based conclusive presumption of § 353(1)(a)(i) of the workers' compensation act is violative of the Equal Protection Clause of the Fourteenth Amendment. The

REFERENCES

Am Jur 2d, Workmen's Compensation §§ 10, 17, 584, 609.

See the Index to Annotations under Worker's Compensation.

doctrine of res judicata does not preclude a redetermination of the dependency of the plaintiff's wife.

1. The doctrine of res judicata, that a final judgment is conclusive as to the rights of the parties with respect to the claim adjudged, while applicable in workers' compensation proceedings, is not always a bar to modifications of workers' compensation awards or subsequent awards where there has been a subsequent change of law. A change in the law may render a prior determination obsolete or erroneous for future purposes. The principles of res judicata do not apply as to a claimant's future condition and do not preclude subsequent awards or subsequent modifications of the original award upon a showing that the claimant's physical condition has changed or that the claimant's status has varied. Neither do they apply to a change in the amount of benefits a claimant eventually may receive. In this case, the plaintiff's eligibility for benefits is not being challenged. Rather, only the amount of his benefits is at issue. Thus, res judicata is inapplicable because relitigation of benefits under § 353 merely would permit a subsequent modification of the amount of the original award.

2. In this case, if the plaintiff's wife is determined on remand not to be his dependent, the invalidity of the statutory presumption should not be applied to require repayment of benefits already received prior to the date of this decision. The purpose of invalidating § 353(1)(a)(i) is to accord equal protection to both spouses. The purpose would not be advanced by requiring the plaintiff to repay dependency benefits already received.

Justice BRICKLEY, concurring, stated that because of the nature and design of the workers' compensation system, the doctrine of res judicata should apply in workers' compensation cases to all payments and benefits awarded or denied pursuant to an earlier determination, but only until such time as a subsequent petition based on changed circumstances that would not have been present at the previous litigation is filed and the issues presented are resolved. Prior to such a second determination, the prior determination controls, and the award or denial of benefits pursuant to the prior determination is not subject to the subsequent determination. The gender-based presumption at issue is unconstitutional; thus, the doctrine of res judicata does not bar a redetermination of the issue of the dependency of the plaintiff's wife.

The case should be remanded for a determination of whether the plaintiff's wife was in fact a dependent at the time of the

plaintiff's injury. If it is determined that she was not, the dependency benefits should be reduced as of the date of the determination.

Reversed and remanded.

Justice BOYLE, joined by Justice CAVANAGH, dissenting, stated that the dismissal of the defendant's petition for benefit reduction as barred by the doctrine of res judicata was proper. The doctrine applies both to issues of fact and law actually litigated and to issues that might have been litigated. A collateral attack on the same claim and the same facts solely on the basis of a judicial decision rendered after a final nonappealed award thus is barred. Historically, the application of res judicata has been determined by reference to an overriding institutional policy of fairness and finality. If that policy is to be abandoned, some justification must be identified apart from the current judicial view of the substance of law upon which the claim or defense is based. Otherwise, there is no law of res judicata.

Justice ARCHER joined in Justice BOYLE's dissent through Part I(A) to the extent that the doctrine of res judicata should be held to bar the defendant's petition for benefit reduction.

WORKERS' COMPENSATION — REDETERMINATION OF DEPENDENCY — RES JUDICATA.

The gender-based conclusive presumption of the workers' compensation act is violative of the Equal Protection Clause of the Fourteenth Amendment; the doctrine of res judicata did not preclude a redetermination of dependency of the wife of an injured worker (US Const, Am XIV; MCL 418.353[1][a][i]; MSA 17.237[353][1][a][i]).

*Williams, Klukowski, Drew & Fotieo, P.C.* (by *Michael P. Szczytko*), for the plaintiff.

*Frank J. Kelley,* Attorney General, *Louis J. Caruso,* Solicitor General, and *Sterling W. Schrock* and *Richard F. Zapala,* Assistant Attorneys General, for defendant Second Injury Fund.

GRIFFIN, J. In this workers' compensation case the plaintiff's benefit award was increased due to a determination that his wife was a dependent at the time of his injury. The determination was not

based on fact finding, but on § 353(1)(a)(i)[1] of the Workers' Disability Compensation Act,[2] which provides that the wife of an injured employee who lives with him "shall be conclusively presumed to be dependent . . . ." Subsequently, in *Day v WA Foote Memorial Hosp,* 412 Mich 698; 316 NW2d 712 (1982), this Court struck down as unconstitutional a similar gender-based presumption of a widow's dependency set forth in § 331(a).[3]

We hold that the gender-based presumption in § 353(1)(a)(i) is also unconstitutional, and that res judicata does not preclude a redetermination of the wife's dependency. Further, in the interest of fairness, we conclude that our holding will not affect dependency payments already made.

I

Plaintiff filed a petition under the WDCA seeking total and permanent disability benefits for the loss of the industrial use of his legs as the result of an injury which occurred January 12, 1979. Plaintiff claimed his wife as a dependent, and in a decision mailed May 21, 1981, a hearing referee found plaintiff to be permanently disabled and his wife to be a dependent at the time of the injury.[4] It was not determined whether plaintiff's wife was dependent in fact because she was conclusively presumed to be a dependent under § 353(1)(a)(i)[5] of the act. There was no appeal.

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[1] MCL 418.353(1)(a)(i); MSA 17.237(353)(1)(a)(i).

[2] MCL 418.101 *et seq.;* MSA 17.237(101) *et seq.*

[3] Currently MCL 418.331(a); MSA 17.237(331)(a).

[4] One section of the act provides in part:

> Questions as to who constitutes dependents and the extent of their dependency shall be determined as of the date of the injury to the employee . . . . [MCL 418.341; MSA 17.237(341).]

[5] MCL 418.353(1)(a)(i); MSA 17.237(353)(1)(a)(i) provides:

Subsequently, on March 2, 1982, a parallel provision[6] of the same act, setting forth a conclusive presumption of dependency in the case of the widow of a deceased employee,[7] was declared by this Court to be "an unconstitutional gender-based discrimination because there [was] no similar presumption for widowers." *Day, supra* at 701. The ruling in *Day,* based on the Equal Protection Clause of the Fourteenth Amendment, followed *Wengler v Druggists Mutual Ins Co,* 446 US 142; 100 S Ct 1540; 64 L Ed 2d 107 (1980), which on the same ground had invalidated a similar provision of the Missouri workers' compensation statute.

Thereafter, on July 11, 1983, defendants city and the Second Injury Fund (SIF) filed a petition, alleging that plaintiff's wife was not a dependent in fact and requesting that plaintiff's benefits be reduced[8] as of the date on which *Day* was issued.

(1) For the purposes of sections 351 to 361, dependency shall be determined as follows:

(a) The following shall be conclusively presumed to be dependent for support upon an injured employee:

(i) The wife of an injured employee living with such employee as such wife at the time of the injury.

[6] MCL 418.331; MSA 17.237(331) provides in pertinent part:

The following persons shall be conclusively presumed to be wholly dependent for support upon a deceased employee:

(a) A wife upon a husband with whom she lives at the time of his death . . . .

[7] When this conclusive presumption was first enacted, it applied equally to both spouses, irrespective of the fact of dependency. *Day, supra* at 705. See also *Finn v Detroit, M C & M C R Co,* 190 Mich 112, 119; 155 NW 721 (1916), and *Flynn v Western Board & Paper Co,* 318 Mich 28, 32; 27 NW2d 332 (1947). By the time the Legislature amended the workers' compensation statute to add the conclusive presumption of dependency in the case of an injured employee's wife, see 1949 PA 238, § 9, the Legislature had changed the conclusive presumption of dependency for the spouse of a deceased employee to apply only to widows. See 1948 CL 412.6; *Day, supra* at 705.

[8] At oral argument the SIF estimated that plaintiff's total benefit

Plaintiff interposed the defense of res judicata. Dismissal of the petition by the hearing referee was affirmed by the Workers' Compensation Appeal Board on the basis of res judicata. After the Court of Appeals denied leave to appeal, the SIF sought review in this Court. We granted leave to appeal. 428 Mich 857 (1987).

II

As already noted, this Court's decision in *Day,* that the conclusive presumption of a widow's dependency was unconstitutional, dealt with a different section of the act. However, at the time *Day* was decided, the United States Supreme Court had already struck down in seven different cases, on equal protection grounds, statutes containing similar gender-based distinctions. See *Wengler, supra; Califano v Goldfarb,* 430 US 199; 97 S Ct 1021; 51 L Ed 2d 270 (1977); *Craig v Boren,* 429 US 190; 97 S Ct 451; 50 L Ed 2d 397 (1976); *Stanton v Stanton,* 421 US 7; 95 S Ct 1373; 43 L Ed 2d 688 (1975); *Weinberger v Wiesenfeld,* 420 US 636; 95 S Ct 1225; 43 L Ed 2d 514 (1975); *Frontiero v Richardson,* 411 US 677; 93 S Ct 1764; 36 L Ed 2d 583 (1973); *Reed v Reed,* 404 US 71; 92 S Ct 251; 30 L Ed 2d 225 (1971). We conclude that the Supremacy Clause compels a conclusion in this case that § 353(1)(a)(i) is likewise unconstitutional because it provides an injured male worker with an increase in benefits if he has a wife living with him at the time of his injury, while no similar provision is made for an injured female worker whose husband lives with her.

As the Court of Appeals observed in *Costa v*

then amounted to approximately $211 a week, of which approximately $5 a week represented the incremental difference attributable to the dependency of plaintiff's wife. This estimate was not disputed.

*Chrysler Corp,* 152 Mich App 530, 535; 394 NW2d 6 (1986), "[t]he wording of § 331(1)(a) which applies to the wife of a 'deceased employee,' is virtually identical to the wording of § 353(1)(a)(i) which applies to the wife of an 'injured employee.' " See also *Williams v Chrysler Corp,* 159 Mich App 8, 13; 406 NW2d 222 (1987).

Thus, on the authority of *Wengler* and *Day,* we hold that the gender-based conclusive presumption of a wife's dependency set forth in § 353(1)(a)(i) violates the Equal Protection Clause of the Fourteenth Amendment.

In light of that holding, we turn now to consider whether res judicata bars redetermination of the unappealed finding that plaintiff's wife was a dependent at the time of plaintiff's injury.

III

That res judicata principles are applicable in the workers' compensation context has been recognized by this Court. *Hlady v Wolverine Bolt Co,* 393 Mich 368, 375; 224 NW2d 856 (1975); *Theodore v Packing Materials, Inc,* 396 Mich 152, 158; 240 NW2d 255 (1976); *Gose v Monroe Auto Equipment Co,* 409 Mich 147, 161; 294 NW2d 165 (1980). However, workers' compensation determinations, which generally involve claims for continuing benefits, are different by their very nature from judgments rendered in tort and most other civil actions. From time to time, this Court has quoted with approval the rule set forth in 58 Am Jur, Workmen's Compensation, § 508:

> "The general rule with respect to the effect upon the application of the principles of res judicata to decisions under workmen's compensation acts, of a provision authorizing the modification of an award

upon a showing of a change in the employee's condition, is that a compensation award is an adjudication as to the condition of the injured workman at the time it is entered, and conclusive of all matters adjudicable at that time, but it is not an adjudication as to the claimant's future condition and does not preclude subsequent awards or subsequent modifications of the original award upon a showing that the employee's physical condition has changed." [See *Hlady, supra* at 375-376; *White v Michigan Consolidated Gas Co,* 352 Mich 201, 211; 89 NW2d 439 (1958).]

Disagreement within our Court surfaced in *Hlady* concerning the applicability of res judicata where there has been a subsequent change in the law, rather than a change in the facts. Justice LEVIN's explanation included the following:

The basis of our disagreement is that, in my opinion, a change of law, like a change of fact, eliminates the bar of res judicata where the claimant seeks continuing benefits under a statute providing "income maintenance."

The law can be changed by legislative enactment or court decision. When the Legislature amends a statute, its applicability to a case previously adjudicated is not analyzed in terms of res judicata. The issue then is one of statutory construction: did the Legislature intend the amendment to have retroactive as well as prospective application? Where the change is effected by court decision the analysis should be the same, whether as a matter of policy the new rule of law should apply retroactively as well as prospectively. [*Hlady, supra* at 387 (LEVIN, J., concurring).]

A

In a non-workers' compensation context this

Court has held res judicata not to be a bar where a subsequent change in the law altered the legal principles upon which the case was to be resolved. The plaintiff in *Socialist Workers Party v Secretary of State,* 412 Mich 571; 371 NW2d 1 (1982), a political party, had argued in a 1976 federal district court action that a Michigan statute unconstitutionally restricted the party's access to the ballot. The federal district court held the statute to be constitutional, and its ruling was summarily affirmed by the United States Supreme Court. *Allen v Austin,* 430 US 924; 97 S Ct 1541; 51 L Ed 2d 769 (1977).

Later, however, in 1980, the same political party filed suit against the same defendant in state circuit court, again challenging the statute on constitutional grounds. The circuit court granted the defendant accelerated judgment on the ground of res judicata; however, this Court granted leave to appeal, and we reversed. Focusing upon the fact that there had been an intervening change by the United States Supreme Court in the legal standard to be applied in determining the constitutionality of legislative restrictions on ballot access, *Illinois State Bd of Elections v Socialist Workers Party,* 440 US 173, 183; 99 S Ct 983; 59 L Ed 2d 230 (1979), this Court held that under such circumstances res judicata did not bar the subsequent action. *Socialist Workers, supra* at 586. See also *Young v Detroit City Clerk,* 389 Mich 333; 207 NW2d 126 (1973).

The construction given to provisions of the Internal Revenue Code is sometimes changed by judicial decision. The United States Supreme Court emphasized in *Internal Revenue Comm'r v Sunnen,* 333 US 591, 599; 68 S Ct 715; 92 L Ed 898 (1948), that res judicata must yield at times to a change in the tax law, at least for *future* purposes:

> A taxpayer may secure a judicial determination of a particular tax matter, a matter which may recur without substantial variation for some years thereafter. But a subsequent modification of the significant facts or a change or development in the controlling legal principles may make that determination obsolete or erroneous, at least *for future purposes.* If such a determination is then perpetuated each succeeding year as to the taxpayer involved in the original litigation, he is accorded a tax treatment different from that given to other taxpayers of the same class. [Emphasis supplied.]

While the analogy is by no means perfect, in some respects the relationship between a taxpayer and the federal government is similar to that of a disabled worker and the provider of workers' compensation. Both involve the payment of money over a period of years, and, moreover, in each case the obligation for, and the level of, payments may be affected from time to time by changes in the underlying law or facts. Thus, as in the tax-law setting, a change in the workers' disability compensation law may render a prior determination obsolete or erroneous *for future purposes.* Generally speaking, in such a situation one employee should not be "accorded a [workers' disability compensation] treatment different from that given to other [employees] of the same class." *Sunnen, supra* at 599. As the *Sunnen* Court observed:

> [The] principle [of res judicata or estoppel by judgment] is designed to prevent repetitious lawsuits over matters which have once been decided and which have remained substantially static, factually and legally. It is not meant to create vested rights in decisions that have become obsolete or erroneous with time, thereby causing inequities . . . . [*Id.*]

As the preceding cases illustrate, res judicata

does not always preclude a redetermination where there has been a subsequent change in the law. Nevertheless, we are not required to rest our decision in this case on so broad a proposition; the issue presented here is narrower and more limited.

B

In this case the defendant SIF is not challenging plaintiff's "eligibility" for workers' compensation benefits; rather, it is only the "amount" of his benefits which is at issue.

In *Leskinen v Employment Security Comm,* 398 Mich 501, 508-509; 247 NW2d 808 (1976), this Court distinguished between determinations concerning an employee's "eligibility" for benefits and the "amount" of benefits which an employee may eventually receive. Although *Leskinen* did not implicate the same provision[9] of the WDCA, the distinction drawn in that case between "eligibility" and "amount" is instructive and applicable:

> *Eligibility* for benefits under the act is established when an employee proves that he has suffered a personal injury which arose "out of and in the course of employment." MCL 418.301(1); MSA 17.237(301)(1). *Van Atta v Henry,* 286 Mich 379; 282 NW 185 (1938). It is only after this threshold determination that the *amount* of benefits is then computed. [Emphasis in original. See also *Medacco v Campbell, Wyant & Cannon Foundry Co,* 48 Mich App 217, 226; 210 NW2d 360 (1973).]

In this case, the hearing referee found that plaintiff suffered from total and permanent disability and ordered defendant SIF to pay benefits beginning on January 1, 1980. Only after such a

[9] In *Leskinen,* the Court was concerned with the construction of MCL 418.371; MSA 17.237(371).

determination did the referee conclude that plaintiff's wife was a dependent in accordance with § 353(1)(a)(i), thereby increasing plaintiff's award. Whether plaintiff's wife was a dependent did not bear on plaintiff's eligibility to receive workers' compensation benefits; however, it was a factor in calculating the amount or level of benefits which he would receive. Accordingly, the addition or deletion of § 353 benefits affects only the "amount" of plaintiff's award, and not his original "eligibility" for workers' compensation benefits.

The amount of benefits awarded to an injured employee is subject to change upon the occurrence of various events. For example, as this Court said in *Goines v Kelsey Hayes Wheel Co,* 294 Mich 156, 158; 292 NW 686 (1940):

> It is an accepted principle of law in this State that an award of compensation may be modified by a showing of a change in the physical condition that affects the earning power of the party receiving such award.

We explained in *Houg v Ford Motor Co,* 288 Mich 478, 481; 285 NW 27 (1939), that

> [t]he doctrine of *res judicata* is limited in its operation when sought to be applied to man's physical condition which constantly changes *and under a statute which provides that weekly payments may be reviewed and ended, diminished, or increased as the facts warrant* . . . . [Emphasis supplied.]

If the employee's condition worsens, his benefits may be increased. See *Murray v Ford Motor Co,* 296 Mich 348, 355; 296 NW 284 (1941); *Webber v Steiger Lumber Co,* 322 Mich 675, 680; 34 NW2d 516 (1948). Of course, if the employee's condition

improves, his employer may file a petition to reduce or terminate payments. See *Dyer v McQuistion,* 273 Mich 327; 263 NW 73 (1935). In *Sauch v Studebaker Corp,* 232 Mich 147; 205 NW 120 (1925), this Court held, under 1915 CL 5449, that an employee's benefits were to be reduced where he failed to show up for a scheduled medical examination.

Further examples demonstrating that the amount of an employee's benefits is subject to change may be found in the WDCA. Under § 352, the award of certain workers injured between September 1, 1965, and December 31, 1979, was enhanced by a weekly cost-of-living supplement beginning January 1, 1982. See *Maglothin v Tryco Steel Corp,* 137 Mich App 640; 357 NW2d 914 (1984). Another provision, § 357, requires that an employee's benefits be reduced five percent each year after he reaches age sixty-five. Under § 353(2), an employee whose benefits are increased because dependent children are living with him, suffers a benefit decrease as each of the children attains the age of eighteen. See *Theodore v Packing Materials, Inc,* 396 Mich 152, 158; 240 NW2d 255 (1976), wherein this Court stated:

> While we recognize that the doctrine of res judicata is applicable to workmen's compensation proceedings, compensation awards represent "an adjudication as to the condition of the injured workman at the time it is entered, and conclusive of all matters adjudicable at that time, but it is not an adjudication as to the claimant's future condition and does not preclude subsequent awards or subsequent modifications of the original award upon a showing that the employee's physical condition has changed." Just as one's *physical condition* may change with the passage of time, so too can one's *status* vary from one day to the next. [Emphasis in original.]

Because the amount of an employee's award is never final, res judicata principles do not apply to a change in the amount of benefits the claimant receives. This is consistent with the flexible nature of the workers' compensation system which permits redetermination of the amount of a claimant's benefits.[10]

Accordingly, we hold that res judicata is inapplicable in the instant case because relitigation of § 353 benefits merely permits a subsequent modification of the amount of plaintiff's award.

IV

Having decided that res judicata is not a bar, we turn next to the question how our ruling is to be applied, particularly if it should be determined that plaintiff's wife was not in fact a dependent.

Defendant SIF argues that our ruling should be applied retroactively so as to require repayment by plaintiff of dependency benefits already received—at least those benefits received after March 2, 1982, the date *Day* was decided. While such notice as *Day* provided may be considered in determining the retroactivity issue, because *Day* focused on a different provision of the act, we do not regard the date of that decision to be controlling in this case.

In 1932, the United States Supreme Court ruled

[10] The dissent claims that we have ignored the legislative direction that issues of dependency are to be determined "as the fact may be at the time of the injury." *Post,* p 619. However, a reading of the full text of § 353 makes clear that a dependency determination under § 353(1)(b), which includes such a direction is made only if the conclusive presumption under § 353(1)(a)(i) does not apply. Therefore, the parties never addressed dependency under § 353(1)(b). In fact, plaintiff and defendant contest whether Mrs. Pike would be a factual dependent under § 353(1)(b). The parties did not litigate dependency under § 353(1)(b), nor could they have, because of the application of § 353(1)(a)(i). Accordingly, § 351(1)(b) does not apply, and even if it does apply, it leads to the conclusion that dependency benefits may be relitigated.

that the federal constitution does not inhibit state courts in determining whether their own law-changing decisions should be applied retroactively or prospectively. *Great Northern R Co v Sunburst Oil & Refining Co,* 287 US 358; 53 S Ct 145; 77 L Ed 360 (1932).

Although it is, of course, not binding on the states, the United States Supreme Court has provided guidance in resolving the retrospective/prospective dilemma by identifying certain factors or considerations to be evaluated. In *Linkletter v Walker,* 381 US 618; 85 S Ct 1731; 14 L Ed 2d 601 (1965), the Court ruled that its lawmaking decision in *Mapp v Ohio,* 367 US 643; 81 S Ct 1684; 6 L Ed 2d 1081 (1961) (requiring states to exclude evidence seized in violation of the Fourth Amendment) should not be applied retrospectively. In reaching that decision, the Court weighed: (1) the purpose to be served by the new rule, (2) the extent of reliance on the old rule, and (3) the effect of retroactivity on the administration of justice.[11]

While this Court has not always articulated the criteria used in reaching decisions in this area, Justice MOODY has commented that

> as a rule [the Michigan Supreme Court] follows the reasoning developed in the United States Supreme Court with emphasis upon the factors present in the three-pronged *Linkletter* test. [Moody, *Retroactive application of law-changing decisions in Michigan,* 28 Wayne L R 439, 462 (1982).]

This Court looked to the *Linkletter* test in deciding *People v Hampton,* 384 Mich 669; 187 NW2d

[11] Thereafter, in a civil case, *Chevron Oil Co v Huson,* 404 US 97, 106-107; 92 S Ct 349; 30 L Ed 2d 296 (1971), the Court applied essentially the same test with the addition of a threshold consideration: Does the decision clearly establish a new principle of law?

404 (1971), and *People v Kamin,* 405 Mich 482; 275 NW2d 777 (1979).

Applying the *Linkletter* test in the instant case, we note that the purpose of the rule we announce today is to accord equal protection to wives and husbands. This purpose would not be advanced by requiring plaintiff to repay dependency benefits already received. The factors of reliance on the old rule and the effect on the administration of justice are often considered together. See *Hampton, supra* at 677; *Kamin, supra* at 495. Without a doubt, reliance on the conclusive presumption of dependency was very great. In addition to providing an intended benefit for persons such as plaintiff, it is apparent that the conclusive statutory presumption was designed as an administrative convenience. The Legislature sought to dispense altogether with the necessity in particular circumstances of adjudicating a wife's factual dependency on a case-by-case basis. Although that design has been frustrated by our holding that the conclusive presumption is invalid, the administration of justice would not be served by requiring the repayment of benefits. While the requirement of case-by-case determination necessarily imposes an additional burden on the administration of justice, we note that the burden would be heavier if our ruling were to be applied retroactively.[12]

After weighing all the circumstances, we would hold in the interest of fairness that plaintiff in this case should not be required to repay dependency benefits received prior to the date of this opinion

[12] Of course, the burden necessarily imposed upon the administration of justice by our decision could be lifted if the Legislature were to see fit to extend the conclusive presumption to husbands and wives on an equal basis.

in the event it should be determined that his wife was not in fact a dependent.[13]

V

We reverse and remand this case to the Workers' Compensation Appeal Board for further proceedings consistent with this opinion.

RILEY, C.J., and LEVIN, J., concurred with GRIFFIN, J.

BRICKLEY, J. (*concurring*). Traditional tort and contract jurisprudence is designed to determine and vest parties' interests for past and future damages completely and finally as of one particular time. It is in this context that the concept of res judicata has been developed. As a component of the theoretical framework of that jurisprudence, res judicata "seeks to lend fairness and finality to the law." *Post,* p 612 (BOYLE, J.).

It is evident, however, that the traditional concept of res judicata cannot be severed from its tort and contract law moorings and transplanted without refinement into the law governing workers' compensation cases. Our statutorily based workers' compensation system contains its own quasi-judicial and administrative structure and is designed to provide injured workers with income maintenance on a continuing basis.[1] "[W]e have . . . consistently emphasized that workers' compensation is a matter of statutory grace." *Selk*

[13] See *Gusler v Fairview Tubular Products,* 412 Mich 270; 315 NW2d 388 (1981).

[1] The attempted application of res judicata has generated inconsistency and confusion at all levels of adjudication and review of workers' compensation cases. See, e.g., *Riley v Northland Geriatric Center,* 431 Mich 632; 433 NW2d 768 (1988) (resolving split in Court of Appeals regarding proper application of res judicata to cases decided prior to *Gusler v Fairview Tubular Products,* 412 Mich 270; 315 NW2d 388 [1981]).

*v Detroit Plastic Products,* 419 Mich 1, 11; 345 NW2d 184 (1984).

As Justice LEVIN emphasized in his concurring opinion in *Franks v White Pine Copper Co,* 422 Mich 636, 683; 375 NW2d 715 (1985), reh den 424 Mich 1202 (1985):

> The nature of workers' compensation is that events after an award of benefits may change the extent of an entitlement to benefits. A disabled worker may cease to be disabled or obtain gainful employment. The number of the worker's dependents may change. The right to receive workers' compensation benefits thus generally depends on one's status, week by week, and is subject to change during any week.[2]

On the other hand, res judicata is designed to prevent the unraveling and relitigation of what was intended to be a final determination of interests without regard to future events.[3] Finality is the goal of res judicata. Finality is not in the design or the interest of the workers' compensation scheme.[4]

In the tort system, a single, vested award is

[2] See, e.g., the following sections of the Workers' Disability Compensation Act, MCL 418.101 *et seq.;* MSA 17.237(101) *et seq.,* specifically §§ 301(5), 351(1), 361(1) and 401(3). Similar considerations would apply in the unemployment compensation context. See MCL 421.32(d); MSA 17.534(d) (providing that the issuance of each benefit check constitutes a determination of qualification and eligibility for unemployment benefits).

[3] See *Federated Dep't Stores, Inc v Moitie,* 452 US 394, 401; 101 S Ct 2424; 69 L Ed 2d 103 (1981).

[4] I recognize that under the WDCA, it is provided for at the time of the initial determination that the future occurrence of certain, specific events will bring about specific consequences for a claimant's eligibility or benefits. In contrast, the present situation involves an unanticipated change in what the law was thought to be. Nevertheless, the provisions of the act which authorize reevaluation and corresponding benefit changes make clear that workers' compensation is a unique system which is designed to keep benefits current and responsive to changing events and circumstances.

made on the basis of a prediction of future damages and needs, so that review of the judgment in light of subsequent events is foreclosed. All parties to a tort judgment thus bear the risk that future events will vary from the prediction embodied therein. By contrast, workers' compensation awards are intended to remain open and subject to modification in the interest of the stability and remedial nature of the system. See *Franks, supra,* 653-654; *Hlady v Wolverine Bolt Co,* 393 Mich 368, 391; 224 NW2d 856 (1975) (LEVIN, J., concurring).

In this light, I see the principle of res judicata as set forth in the opinion of Justice BOYLE playing a useful but limited purpose in the workers' compensation context. Where appropriate, I would apply res judicata in accordance with the principles articulated by Justice BOYLE to all payments and benefits awarded or denied pursuant to an earlier determination, but only until such time as a subsequent petition based on changed circumstances that would not have been present at the previous litigation is filed and the issues presented are resolved. Prior to such a second determination, the prior determination controls and the award or denial of benefits pursuant to the prior determination is not subject to the subsequent determination.

Because of the nature and design of the workers' compensation system, future determinations based on events that have occurred subsequent to the previous litigation should control the award and amount of future benefits.[5]

On the other hand, this Court has continually sought to prevent benefit recipients from being

[5] As noted in n 2, the Legislature has provided for redetermination when certain factual changes occur. A change in the law may be effected either through statutory amendment or judicial decision. In case of the former, our primary task is to ascertain the intent of the Legislature regarding the effect of the change. *Franks, supra.*

twice visited by misfortune and has not required the repayment of benefits already received.[6] The concept of res judicata that I would apply, when a judicial decision changes the law, incorporates such considerations of fairness and protects recipients who have reasonably relied on circumstances prevailing when payments pursuant to the prior determination were made. Accordingly, this concept does not permit the undoing of a determination or adjudication as to benefits already received and therefore "vested." By the same token, the employer is not required to pay benefits which were denied pursuant to the prior determination. This approach comports with the policy underlying the traditional res judicata doctrine, while at the same time taking into account the unique characteristics of income-maintenance schemes.

I agree with Justice BOYLE that the defendants had ample opportunity to raise the constitutional claim at the prior proceedings. Thus, my disagreement does not involve the question whether an exception to res judicata should apply, but rather whether the application of the res judicata concept in cases arising out of income-maintenance systems such as workers' compensation permits redetermination in light of an intervening change in the case law. Because I agree with Justice GRIFFIN's holding regarding the gender-based presumption at issue here, I agree that the doctrine of res judicata does not bar a redetermination of the issue of Ms. Pike's dependency in light of this finding of unconstitutionality. I would therefore remand the case to the WCAB for it to determine whether or not Ms. Pike was in fact a dependent at the time of Mr. Pike's injury. If it is found that she was not in fact a dependent at that time, the

[6] *Ante*, pp 604–605 (GRIFFIN, J.). See also *Gusler*, n 1, *supra*, 298.

dependency benefits should be reduced accordingly as of the date of that determination.[7]

BOYLE, J. (*dissenting*). We are asked to decide in this case whether the determination of a wife's dependency for the purpose of calculating an injured worker's wage-loss compensation benefits may be relitigated when the statutory presumption of dependency applicable at the time of an earlier determination is now alleged to be unconstitutional. The majority, sub silentio, overrules *Hlady v Wolverine Bolt Co,* 393 Mich 368; 224 NW2d 856 (1975), and *Gose v Monroe Auto Equipment Co,* 409 Mich 147; 294 NW2d 165 (1980), while concluding that res judicata does not bar a collateral attack on a final award in workers' compensation proceedings on the basis of an intervening change in the law. The abandonment of the carefully crafted doctrine of res judicata in workers' compensation proceedings is unsupported by treatise, statute, or prior decision of this Court. The dismissal of defendants' petition for benefit reduction was properly granted. I would affirm the judgment of the workers' compensation appeal board.

I

Ronald Pike, already adjudicated a disabled worker, alleged that he qualified as totally and permanently disabled in late fall of 1979. He petitioned the Bureau of Workers' Disability Compen-

[7] As explained above, p 607, a redetermination after a judicial change in the law must be preceded by a *petition* "based on changed circumstances that would not have been present at the previous litigation . . . ." The "changed circumstances" for present purposes are the opinions issued today, which hold the conclusive presumption in § 353(1)(a)(i) to be unconstitutional. In the interest of administrative economy, I would allow the remand to the WCAB in this case to satisfy the above petition requirement.

sation for total and permanent disability benefits on May 14, 1979. The City of Wyoming and the Second Injury Fund contested the claim.

Mr. Pike's petition was put to the test in proceedings before the bureau on October 20, 1980. With the assistance of counsel, Ronald Pike prevailed. A decision of the hearing referee, Erwin Johnson, mailed May 21, 1981, ruled that Mr. Pike was indeed totally and permanently disabled. The defendants chose not to appeal that decision. Thus, under § 851 of the act,[1] the decision of the bureau became final on June 4, 1981.

Ronald Pike's final award of wage loss benefits included five dollars per week for the dependency of his wife. Mrs. Pike's dependency had not been factually established during the litigation before the bureau because the act provides that Mrs. Pike is "conclusively presumed" a dependent, MCL 418.353(1)(a)(i); MSA 17.237(353)(1)(a)(i). The defendants chose not to contest the validity of that provision in those proceedings.

On July 11, 1983, two years after the order of the bureau was final, the defendants attempted to reopen this litigation. The defendants claimed that the conclusive presumption of Mrs. Pike's dependency violated the Equal Protection Clause of US Const, Am XIV. Quite reasonably, both the bureau[2] and the workers' compensation appeal board[3] refused to entertain further litigation of this matter. Both cited the final, unappealed order of the bureau and the doctrine of res judicata. The Court of Appeals denied the defendants' application for leave to appeal.[4]

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[1] MCL 418.851; MSA 17.237(851).

[2] Order of the hearing referee, Erwin Johnson, mailed December 8, 1983.

[3] 1986 WCABO 63.

[4] Order of the Michigan Court of Appeals dated May 9, 1986.

A

Today, a majority of this Court holds that the conclusive presumption of Mrs. Pike's dependency is unconstitutional. The same majority holds, as an afterthought, that res judicata does not preclude the reopening of this litigation by the defendants. In doing so, the majority abandons the principle of finality in workers' compensation proceedings. Henceforth, the final orders of the bureau, the appeal board and presumably even the orders of this Court, are valid only for that period of time required for a change in the decisional law allegedly entitling a losing party to relief in a new petition before the bureau.

The change in decisional law to which the defendant here refers is this Court's ruling in *Day v W A Foote Memorial Hosp,* 412 Mich 698, 703; 316 NW2d 712 (1982), in which we found the statutory presumption of dependency for widows in MCL 418.331(a); MSA 17.237(331)(a)[5] violative of the Equal Protection Clause as applicable under the Fourteenth Amendment.[6]

The majority accepts this analysis and concludes that the statute is unconstitutional without first answering whether defendants can raise this question by a collateral attack on a final order. It should be obvious that the status of plaintiff's

[5] MCL 418.331; MSA 17.237(331) provides in part:

> The following persons shall be conclusively presumed to be wholly dependent for support upon a deceased employee:
> (a) A wife upon a husband with whom she lives at the time of his death, or from whom, at the time of his death, a hearing referee or worker's compensation magistrate, as applicable, shall find the wife was living apart for justifiable cause or because he had deserted her.

[6] See *Wengler v Druggists Mutual Ins Co,* 446 US 142; 100 S Ct 1540; 64 L Ed 2d 107 (1980).

wife's dependency can become an issue in this case only if two preconditions are satisfied; first, that these defendants can challenge the constitutionality of § 353(1)(a)(i) and, second, that § 353(1)(a)(i) is unconstitutional. It is simply a non sequiter to conclude, as does the lead opinion, that the gender-based presumption is unconstitutional and "in light of that holding" to then consider "whether res judicata bars redetermination of the unappealed finding that plaintiff's wife was a dependent at the time of plaintiff's injury." *Ante,* p 595.

The majority does not contest the applicability of the doctrine of res judicata in workers' compensation cases. Nor does the majority explicitly confront the fact that this Court has repeatedly held that an intervening change in the law is not an exception to res judicata. *Gose* and *Hlady, supra.* That doctrine prevents the relitigation of facts and law "between the same parties or their privies." *Curry v Detroit,* 394 Mich 327, 331; 231 NW2d 57 (1975), citing *Tucker v Rohrback,* 13 Mich 73 (1864). Its purpose is to "relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication." *Allen v McCurry,* 449 US 90, 94; 101 S Ct 411; 66 L Ed 2d 308 (1980). In short, res judicata seeks to lend fairness and finality to the law. See also *Hackley v Hackley,* 426 Mich 582, 585; 395 NW2d 906 (1986).

In Michigan, the scope of the doctrine is well defined. It applies not only to issues of fact and law which were actually litigated and decided, but also to any issue which might have been litigated at that time. *Curry, supra,* p 332; *Gursten v Kenney,* 375 Mich 330; 134 NW2d 764 (1965). See also *Hackley, supra.* Therefore, if during the adjudication of

a dispute a pertinent issue of law or fact is raised and decided, or properly should have been raised, res judicata will bar the relitigation of that issue in a subsequent action.

The rule of res judicata appeals to common sense and is familiar to all students of the law. As formulated in 1 Restatement Judgments, 2d, § 18(2), p 152, the rule provides:

> In an action upon the judgment, the defendant cannot avail himself of defenses he might have interposed, or did interpose, in the first action.

It is indisputable that the law of judgments applies to workers' compensation. The Legislature has provided:

> Any party may present a certified copy of an order of a hearing referee, the director or the board in any compensation proceeding to the circuit court of the circuit in which the injury occurred, or to the circuit court of the county of Ingham if the injury was sustained outside this state. The court, after 7 days' notice to the opposite party or parties, shall render judgment in accordance therewith unless proof of payment is made. The judgment shall have the same effect as though rendered in an action tried and determined in the court and shall be entered and docketed with like effect. [MCL 418.863; MSA 17.237(863). See also *Theodore v Packing Materials,* 396 Mich 152; 240 NW2d 255 (1976), and *Gose, supra.*]

The parties agree that the issue of law regarding the constitutionality of § 353(1)(a)(i) was not raised in the original unappealed action. There is no question that the constitutionality of § 353(1)(a)(i) was pertinent in the first proceeding and that the defendants' failure to raise the issue is not excusable. In light of the fact that defendants now chose

to contest the issue, it cannot be successfully claimed that a constitutional challenge at the first proceeding would have been unusual or burdensome. The issue was clearly foreseeable.

In *Wengler v Druggists Mutual Ins Co,* 446 US 142; 100 S Ct 1540; 64 L Ed 2d 107 (1980), on which we relied in *Day, supra,* the Court struck down a widow dependency provision similar to that found in § 331(a) as violative of the Equal Protection Clause. *Wengler* had been the law for over one year when the issue of dependency in this case was contestable. Additionally, given the fact that the United States Supreme Court, prior to *Wengler,* had invalidated at least six statutes containing, or practices founded upon, gender-based classifications,[7] it could not be argued that a gender-based challenge at the initial proceedings would have been either novel or extraordinary.[8] Moreover, the defendants were clearly bound by a rule articulated five years before the final order in this case (reaffirmed by six members of this Court three years before that order) that a change in decisional law does not permit a relitigation of a final award of compensation benefits, *Hlady, supra; Gose, supra.*

In *Hlady,* p 380, we observed in words equally applicable to these defendants,

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[7] *Califano v Goldfarb,* 430 US 199; 97 S Ct 1021; 51 L Ed 2d 170 (1977); *Craig v Boren,* 429 US 190; 97 S Ct 451; 50 L Ed 2d 397 (1976); *Stanton v Stanton,* 421 US 7; 95 S Ct 1373; 43 L Ed 2d 688 (1975); *Weinberger v Wiesenfeld,* 420 US 636; 95 S Ct 1225; 43 L Ed 2d 514 (1975); *Frontiero v Richardson,* 411 US 677; 93 S Ct 1764; 36 L Ed 583 (1973); *Reed v Reed,* 404 US 71; 92 S Ct 251; 30 L Ed 2d 225 (1971).

[8] See also 4 Davis, Administrative Law (2d ed), § 26:6, pp 434-441. By statute, the bureau is empowered to resolve "[a]ny dispute or controversy concerning compensation or other benefits . . . ." MCL 418.841(1); MSA 17.237(841)(1). While admittedly constitutional questions "are beyond the purview of the WCAB," *Williams v Hofley Mfg Co,* 430 Mich 603, 624, n 27; 424 NW2d 278 (1988), they are not beyond the purview of the Court of Appeals or this Court.

> Plaintiff may not concede an issue, necessarily determinative of and included in the judgment of this Court, and then, after another has successfully raised the issue she did not wish to contest, ask the Court again for relief. The doctrine of res judicata bars this from happening. Mary Hlady could have as easily raised this issue as Peter Van Dorpel. It was, in fact, incumbent upon her to do so if she wished to avail herself of that interpretation.

In simple fact, the defendants ask us to permit an attack on a final award despite the fact that the constitutionality of § 353(1)(a)(i) was not raised before the referee and the defendants opted not to appeal to the WCAB, the Court of Appeals, or this Court. Only two years after this case finally was decided, did the defendants seek to contest the validity of § 353(1)(a)(i). "The doctrine of res judicata bars this from happening." *Hlady, supra,* p 380.

B

As I have previously noted, no one explicitly contests the applicability of the doctrine of res judicata in workers' compensation cases. The lead opinion ostensibly reaffirms application of the doctrine when it states:

> That res judicata principles are applicable in the workers' compensation context has been recognized by this Court. *Hlady v Wolverine Bolt Co,* 393 Mich 368, 375; 224 NW2d 856 (1975); *Theodore v Packing Materials, Inc,* 396 Mich 152, 158; 240 NW2d 255 (1976); *Gose v Monroe Auto Equipment Co,* 409 Mich 147, 161; 294 NW2d 165 (1980). [*Ante,* p 595.]

Nevertheless, it fails to acknowledge that our prior

decisions do not permit today's result and makes no effort to distinguish or expressly overrule them.

The majority fails to acknowledge that the facts of *Hlady* are indistinguishable from those of this case. Hlady lost four fingers in a punch press accident and received the statutory one hundred weeks of compensation for the specific loss of her hand. See MCL 418.361(2)(h); MSA 17.237(361)(2)(h) (now 215 weeks). At expiration of the one-hundred-week statutory period, Hlady sought further disability compensation. Despite her continuing disability in fact, Hlady was denied continuing disability benefits. See *Hlady, supra,* p 373. Subsequently, Hlady again sought continuing disability benefits on the basis of an alleged change in decisional law allowing continuing benefits after the expiration of the statutory period for specific losses. This Court denied continuing benefits, explaining:

> Mary Hlady's physical condition has not changed since her 1945 injury. The only change has been in the law applied to cases of this nature. However, it has long been the law of this state, starting with the leading case of *Jacobson v Miller,* 41 Mich 90; 1 NW 1013 (1879), that the doctrine of res judicata applies not only to facts previously litigated, but also to points of law which were necessarily adjudicated in determining and deciding the subject matter of the litigation. [*Hlady, supra,* p 376.]

There is no principled distinction between *Hlady* and the instant case. In both cases, unsuccessful litigants have sought to reopen a final workers' compensation decision to take advantage of an alleged intervening change of law. It is plain that the majority, sub silentio, overrules *Hlady.*

*Theodore v Packing Materials, supra,* also cited

by the lead opinion, in fact holds that the Court will permit a redetermination of dependency *where a statutory exception applies,* but that res judicata bars an unappealed dependency determination that does not fall within a statutory exception. In *Theodore,* the Court reviewed a collateral attack by a second petition initiated after the defendant had failed to appeal the initial hearing referee's decision that the natural children of a deceased employee were conclusively presumed to be his dependents. The defendant's petition to terminate death benefits alleged both that the children had been legally adopted prior to the employee's death and that they had reached the age of sixteen, the date on which the presumption terminated under law. Notwithstanding the fact that we stated that "in future cases" adopted children should not be found to be dependents, the Court held that the referee's ruling had become final and res judicata barred the defendant's attempts to terminate, on grounds of adoption, payments owed to the children up to the age of sixteen. On the other hand, pursuant to the express language in the statute, the *Theodore* defendant was allowed to challenge the fact that the recipients were over sixteen and no longer dependents. 396 Mich 154.[9]

[9] The relevant sections of the statute in *Theodore,* similar to those of the current act § 353(1)(a)(ii), provided that children under the age of sixteen, unless physically or mentally incapacitated, were entitled to the presumption of dependency under the act subject to the exception that on attaining the age of sixteen, the issue of dependency may be reconsidered. Thus, the Legislature specifically excepted a child's dependency status redetermination upon the occurrence of certain triggering events. No such redetermination, however, is provided for under the act in the case of a conclusively dependent spouse. Under § 353(1)(a)(i), the wife of an injured employee is conclusively presumed to be the dependent of her injured husband regardless of any future change in her status. Consequently, our ruling in *Theodore* actually supports the rule that, apart from statutorily provided exceptions, res judicata is applicable to workers' compensation pro-

Similarly, in *Gose, supra,* a five-member majority of this Court[10] refused to allow relitigation of the plaintiff's claim for benefits on the basis of insanity when it had been previously fully and finally litigated on the basis of a physical injury. In the companion case of *Sanders v General Motors Corp,* 409 Mich 147; 294 NW2d 165 (1980), six members of this Court refused, in the absence of a change of physical condition, to allow the plaintiff to relitigate her claim for total and permanent disability benefits on the basis of "a subsequent change in the law," *Gose, supra,* p 181 (WILLIAMS, J., and MOODY, J., concurring).

Thus, under the prior rulings of this Court, the doctrine of res judicata bars relitigation of this matter.

C

En route to its conclusion, the majority also observes that the workers' compensation act provides for modification of an award under certain circumstances. However, the exceptions recognized by the Legislature do not support the majority's conclusion. Thus, the majority does not acknowledge the fact that the act provides for modification of a disability award only under clearly defined circumstances and that the act does not provide for redetermination of dependency in this circumstance.

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ceedings and operates in this case to bar the relitigation of plaintiff's wife's dependency when no provision under the act provides for the relitigation of this issue.

*Theodore* and *Hlady* also demonstrate that it is immaterial whether the parties actually litigated the issue or did not do so because of § 353(1)(a)(i).

[10] A sixth member of the *Gose* Court, Justice WILLIAMS, agreed that res judicata was generally applicable in workers' compensation proceedings, but believed that it was not applicable under the facts presented.

Initially the majority fails to recognize that the Legislature does not characterize dependency as continuously contestable. Unlike MCL 418.351; MSA 17.237(351), which allows for the redetermination of the question of total and permanent disability after a period of eight hundred weeks on the basis of a change of facts, the Legislature has not provided for general redetermination of dependency questions. In fact, the Legislature has expressly provided that all issues of dependency are to be determined: "as the fact may be at the time of the injury . . . ."[11]

The clear intention of the Legislature is that issues of dependency are not to be redetermined except in the case of self-support of a minor between sixteen and eighteen years of age or the divorce or death of a dependent spouse, § 353(2). No other exception is provided for the relitigation of dependency. Thus, the act provides no support for the conclusion that a legislative distinction between eligibility and the level of benefits to which a claimant is entitled permits the relitigation of issues concerning the "amount" of one's benefits. In fact, this conclusion ignores the legislative direction that issues of dependency are to be determined "as the fact may be at the time of the injury."[12]

The majority's construction of § 353 produces the incongruous result that dependency resolu-

[11] MCL 418.353(1)(b); MSA 17.237(353)(1)(b). This rule is consistent with MCL 418.341; MSA 17.237(341), which requires that dependency issues concerning death benefit recipients are decided as of the date of injury to the employee.

[12] This directive is not contradicted by the conclusion of the lead opinion that § 353(1)(b) applies only if the dependency presumption in § 353(1)(a)(i) is inapplicable. Rather, the full text of § 353 expresses the legislative view that, regardless of whether dependency is found through the presumption in § 353(1)(a)(i) or through a factual determination under § 353(1)(b), dependency issues are to be finally decided no later than the appellate stage before the WCAB.

tions under § 353(1)(b) are made as the facts "may be at the time of the injury," but dependency based on the legislatively created presumption is indefinitely contestable. This construction also is inconsistent with the parallel dependency provisions for death benefit recipients, that after likewise providing for conclusive benefits for a wife, for dependency in fact, and for specific exceptions (§§ 321, 331 and 335) provide:

> Questions of dependency shall be determined as of the date of the injury to the employee, and their right to any death benefit shall become fixed as of such time, irrespective of any subsequent changes in conditions . . . (except as noted above).

There also is no basis in law for the conclusion that the principle of finality applies only to rulings as to eligibility and not to rulings regarding the amount of benefits. The case law cited by the lead opinion lends no support to the proposition that only "eligibility" is subject to the law of res judicata. *Leskinen v Employment Security Comm,* 398 Mich 501; 247 NW2d 808 (1976), includes no discussion of res judicata. Indeed, at the time that our decision was released in *Leskinen,* there had been no final decision. Res judicata *could not* have been at issue. The distinction between eligibility and the amount of benefits for which the majority cites *Leskinen* was relevant only to the Court's discussion of earning capacity.[13]

*Goines v Kelsey Hayes Wheel Co,* 294 Mich 156; 292 NW 686 (1940), is also distinguishable in that it involved the well-established exception to res judicata in workers' compensation proceedings for

[13] The citation of *Medacco v Campbell, Wyant & Cannon Foundry Co,* 48 Mich App 217, 226; 210 NW2d 360 (1973), is similarly misplaced because it too only identifies the significance of an injured worker's wage-earning differential as affecting wage-earning capacity as opposed to one's eligibility for benefits.

a change of physical condition. Moreover, no change of condition was found in *Goines* and therefore, even this narrow exception was held to be inapplicable. Indeed, as the facts and holding of *Goines* demonstrate, even if this exception were applicable, it would not apply to the *amount* of benefits, but to the plaintiff's *eligibility.*[14] In my view, this narrow exception for a change of condition serves only to provide additional support for the continuing validity of the rule of res judicata.

Finally, the fundamental logical flaw in this analysis is the assumption that the rule of res judicata follows from the distinction between an entitlement and a benefit. Even if the Legislature had said, which it clearly has not, that dependency is generally contestable on *a change in facts,* it would not follow that a second petition could be filed on the basis *of the identical facts* resolved in a prior determination that had become final. The issue in this case is not whether benefit levels remain open, but rather whether the defendants may challenge this final award on the basis of an alleged change in constitutional law. As *Theodore, Hlady,* and *Gose* demonstrate, a collateral attack *on the same claim and the same facts* solely on the basis of a judicial decision rendered after a final nonappealed award is barred by the doctrine of res judicata. Therefore, it does not follow from the fact that the Legislature permits an issue (whether of entitlement or benefits) to remain subject to challenge on the basis of new facts, that a collateral attack is permitted on a final award on *the same claim based upon the identical facts.*

[14] Similarly, in *Houg v Ford Motor Co,* 288 Mich 478; 285 NW 27 (1939), *Murray v Ford Motor Co,* 296 Mich 348; 296 NW 284 (1941), *Webber v Steiger Lumber Co,* 322 Mich 675; 34 NW2d 516 (1948), *Dyer v McQuistion,* 273 Mich 327; 263 NW 73 (1935), and *Sauch v Studebaker Corp,* 232 Mich 147; 205 NW 120 (1925), also cited by the majority, the issue was a change of physical condition.

D

Turning to our prior decisions outside of the context of workers' compensation, the lead opinion cites *Socialist Workers Party* v *Secretary of State,* 412 Mich 571, 585; 317 NW2d 1 (1982), for the rule that res judicata does not bar the relitigation of an issue previously decided when there has been a change in the law or facts upon which that issue was decided. The *Socialist Workers Party* majority relied on what is now § 28(2)(b) of the Restatement to find an exception to the bar of res judicata. That section reads in part:

> Although an issue is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, relitigation of the issue in a subsequent action between the parties is not precluded in the following circumstances:
>
> * * *
>
> (2) The issue is one of law and (a) the two actions involve claims that are substantially unrelated, or (b) a new determination is warranted in order to take account of an intervening change in the applicable legal context or otherwise to avoid inequitable administration of the laws . . . . [1 Restatement Judgments, 2d, § 28, p 273.]

Section 28(2)(b), however, has no bearing on this case. It is a rule of *issue* preclusion or collateral estoppel, rather than a restatement of the principles of claim preclusion, or merger and bar, under res judicata.[15] The Restatement is quite clear on this distinction as noted in § 13:

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[15] See *Hlady, supra,* p 377, citing with approval the decision of the United States Supreme Court in *Partmar Corp* v *Paramount Pictures Theatres Corp,* 347 US 89, 90-91; 74 S Ct 414; 98 L Ed 532 (1954), which distinguished the rules of res judicata and collateral estoppel:

> " 'We have often held that under the doctrine of *res judicata*

> The rules of res judicata are applicable only when a final judgment is rendered. However, for purposes of issue preclusion (as distinguished from merger and bar), "final judgment" includes any prior adjudication of an issue in another action that is determined to be sufficiently firm to be accorded conclusive effect. [*Id.*, p 132.]

When, as in this case, an award is entered in favor of the plaintiff, "the claim is extinguished and merged in the judgment and a new claim may arise on the judgment." 1 Restatement Judgments, 2d, § 17(2), p 148. Thereafter, parties may not seek to relitigate the original claim or any part of that claim. Specifically, § 18(2) of 1 Restatement Judgments, 2d, provides:

> In an action upon the judgment, the defendant cannot avail himself of defenses he might have interposed, or did interpose, in the first action. [*Id.*, p 152.]

The lead opinion thus has failed to recognize that *Socialist Workers Party* does not support the conclusion that res judicata does not bar the defendant's claim.[16]

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a judgment entered in an action conclusively settles that action as to all matters that were *or might have been litigated or adjudged therein.* But a prior judgment between the parties has been held to operate as an estoppel in a suit on a cause of action different from that forming the basis for the original suit "only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered." This latter aspect of *res judicata* is the doctrine of collateral estoppel by judgment, established as a procedure for carrying out the public policy of avoiding repetitious litigation.' " [Emphasis added.]

[16] Issue preclusion under the Restatement is set out in § 27:

E

Finding no support for its holding in the law of this state, the lead opinion turns to federal precedent. There is, however, no support in federal law for the conclusion that res judicata must "yield" in this situation to a change in the law. The lead opinion cites *Internal Revenue Comm'r v Sunnen,* 333 US 591; 68 S Ct 715; 92 L Ed 898 (1948), for this proposition, while acknowledging that "the analogy is by no means perfect," and that the decision does not rest on this basis.

The lead opinion's reliance on *Sunnen* is misplaced. In *Sunnen,* the United States Supreme Court held that royalty payments arising from

> When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim. [*Id.,* p 250.]

The introductory note to this title underscores the necessary distinction between issue preclusion and res judicata, stating that issue preclusion is applicable only when "the claim is not precluded by the doctrines of merger or bar." *Id.,* p 249. The rules of merger and bar are set out in § 17:

> A valid and final personal judgment is conclusive between the parties, except on appeal or other direct review, to the following extent:
>
> (1) If the judgment is in favor of the plaintiff, the claim is extinguished and merged in the judgment and a new claim may arise on the judgment (see § 18);
>
> (2) If the judgment is in favor of the defendant, the claim is extinguished and the judgment bars a subsequent action on that claim (see § 19);
>
> (3) A judgment in favor of either the plaintiff or the defendant is conclusive, in a subsequent action between them on the same or a different claim, with respect to any issue actually litigated and determined if its determination was essential to that judgment (see § 27). [*Id.,* p 148.]

Under the Restatement view, a judgment for either a plaintiff or a defendant is conclusive with respect to any essential point actually litigated.

certain license contracts not involved in an earlier tax proceeding, and which concerned different tax years, were "free from the effects of the collateral estoppel doctrine." *Id.,* p 602. Thus, *Sunnen* is neither binding nor persuasive precedent because it did not involve the application of res judicata. Even if we were to assume that the case at bar involved the doctrine of collateral estoppel, the Supreme Court's decision in *United States v Moser,* 266 US 236, 242; 45 S Ct 66; 69 L Ed 262 (1924), clearly illustrates that the defendants' claim must fail. In holding that the federal government was estopped from relitigating whether service as a military cadet constituted "service during the Civil War" for the purpose of calculating the claimant's retirement benefits, the Court stated:

> [A] *fact, question* or *right* distinctly adjudged in the original action cannot be disputed in a subsequent action, even though the determination was reached upon an erroneous view or by an erroneous application of the law. That would be to affirm the principle in respect of the thing adjudged but, at the same time, deny it all efficacy by sustaining a challenge to the grounds upon which the judgment was based. A determination in respect of the status of an individual upon which his right to recover depends is as conclusive as a decision upon any other matter. [Emphasis in the original, citations omitted.]

More significantly, and more recently, in *United States v Stauffer Chemical Co,* 464 US 165, 172-173, n 5; 104 S Ct 575; 78 L Ed 2d 388 (1984), the United States Supreme Court refused to extend the *Sunnen* rule beyond its applicability in tax cases "reject[ing] its general applicability outside of [sic] that context." Thus, the lead opinion's attempt to extend *Sunnen* by analogy to the facts

in this case should be rejected. The *Sunnen* rule has been recognized by the United States Supreme Court to be sui generis in the context of tax litigation. The case does not provide support for the lead opinion's construction of the applicability of res judicata in a workers' compensation proceeding.

II

The actual basis for the lead opinion's conclusion appears to be neither federal or state precedent nor a legislative distinction between benefits or entitlement. Rather, the basis for the majority result appears to be the reasoning in the *Hlady* concurrence:

> The law can be changed by legislative enactment or court decision. When the Legislature amends a statute, its applicability to a case previously adjudicated is not analyzed in terms of res judicata. The issue then is one of statutory construction: did the Legislature intend the amendment to have retroactive as well as prospective application? Where the change is effected by court decision the analysis should be the same, whether as a matter of policy the new rule of law should apply retroactively as well as prospectively. [*Hlady, supra,* p 387.]

This statement is in direct conflict with the majority's articulation of the rule of res judicata in *Hlady* and *Gose.* More importantly, however, the unsupported proposition that the power of the Court is coextensive with that of the Legislature is devoid of the judicial restraint necessary for recognition of the fundamental principles of fairness and repose that are the basis for the rule of res judicata.

The decisions of the United States Supreme Court, as well as our own, teach the error of an ad hoc judicial policy of reopening final judgments except in the most compelling circumstances.[17] The United States Supreme Court has ably articulated the policy basis for res judicata in *Federated Dep't Stores, Inc v Moitie,* 452 US 394; 101 S Ct 2424; 69 L Ed 2d 103 (1981):

> [T]he res judicata consequences of a final, unappealed judgment on the merits [are not] altered by the fact that the judgment may have been wrong or rested on a legal principle subsequently overruled in another case. . . . "A judgment merely voidable because based upon an erroneous view of the law is not open to collateral attack, but can be corrected only by a direct review and not by bringing another action upon the same cause [of action.]" [*Id.,* p 398.]
>
> [W]e do not see the grave injustice which would be done by the application of accepted principles of res judicata. "Simple justice" is achieved when a complex body of law developed over a period of years is evenhandedly applied. The doctrine of res judicata serves vital public interests beyond any individual judge's ad hoc determination of the equities in a particular case. . . . The Court of Appeals' reliance on "public policy" is similarly misplaced. This Court has long recognized that "[p]ublic policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and

[17] We realize that in certain instances of a compelling nature public policy may require the recognition of exceptions to res judicata. See, e.g., 18 Wright, Miller & Cooper, Federal Practice and Procedure, § 4415, pp 121-135, citing *McCarty v First of Georgia Ins Co,* 713 F2d 609, 612-613 (CA 10, 1983) (res judicata not applicable when fraudulent concealment of true facts by defendant prevents plaintiff from showing cause of action); *Fehlhaber v Fehlhaber,* 681 F2d 1015, 1027 (CA 5, 1982) (res judicata not applicable when enforcement of prior judgment would amount to a denial of due process); MCR 2.612(C) (grounds for relief from judgment).

> that matters once tried shall be considered forever settled as between the parties." We have stressed that "[the] doctrine of *res judicata* is not a mere matter of practice or procedure inherited from a more technical time than ours. *It is a rule of fundamental and substantial justice, 'of public policy and of private peace,' which should be cordially regarded and enforced by the courts . . . .*" [*Id.,* p 401. Citations omitted. Emphasis added.]

It is in the nature of decision making, whether judicial or legislative, that lines must be drawn. Thus, there is an unfortunate but inescapable arbitrary aspect to all rules of finality, including res judicata, waiver, or the application of statutory amendment. Perfect justice may not be possible in each case. What *is* possible is the fairness, repose and predictability that results when all are subject to the same rules. What is also possible, and of equal importance, is a certainty in the law to which all may conform their conduct. These qualities are lost when the rules of finality are changed in each proceeding. Confidence and respect for the courts erodes when the rules are changed with each new set of litigants before the court or with each new announcement by a court as to why res judicata is not "appropriate" in a given case. (BRICKLEY, J., concurring, *ante,* pp 606-607.) It is as uncertain that perfect justice may be gained in any particular case by deviating from the established rules of finality as it is that any majority of this or any court is able to define perfect justice. Here, for example, the majority forecloses the presumed dependents under § 353(1)(a)(i) from ever litigating the constitutionality of the provision and, indeed, even from contesting the lead opinion's unique rule of res judicata.

Historically, the application of res judicata has been determined by reference to an overriding

institutional policy of fairness and finality. If that policy is to be abandoned, some justification must be identified apart from the current judicial view of the substance of law upon which the defense is based. Otherwise, there is no law of res judicata. The majority completely fails to identify any such policy in the instant case.

Giving due deference to the principle of separation of powers, we must presume that each legislative enactment is based upon an important social policy. It is undisputed and must not be forgotten that Ronald Pike has been adjudicated totally and permanently disabled. For these severe cases, the Legislature has presented a conclusive presumption of total and permanent disability for eight hundred weeks. See MCL 418.351(2); MSA 17.237(351)(2). Within that time frame, not even a change of physical condition presents a basis for reopening a final order. It cannot be seriously contended that the Legislature nevertheless envisioned a reopening of the issue of Mrs. Pike's dependency at five dollars per week.[18]

[18] The majority, perhaps inadvertently, has created today a serious barrier to plaintiffs in these proceedings. Generally, plaintiffs' counsel in workers' compensation proceedings are retained on a contingency fee basis in the amount of thirty percent of the accrued amount of a final bureau order. See 1980 AACS, R 408.44. However, there is no accrued amount in the case in which defendants, such as these defendants, petition the bureau to reduce or stop compensation. As one commentator has explained:

> An attorney is sometimes required to expend a lot of time and effort, and perhaps invest in substantial costs, for a case that does not lead to any recovery of accrued benefits. A *petition to stop* is a typical example of such a case. As discussed in § 20.10 *supra,* when there is an order to pay continuing compensation benefits, an employer can challenge the continuing disability of the plaintiff by filing a petition to stop. This is often litigated in the same way as the worker's original petition for hearing. The plaintiff's attorney must meet with his or her client many times, take several medical depositions, and perhaps even schedule one or more physical examinations. Throughout this time, however, the defendant continues to pay

It is ironic that the object of this alteration of the rule of finality in workers' compensation proceedings is a worker whom the Legislature sought most to protect from the hazards of relitigation. Indeed, it is doubly ironic, since the issue which the defendants seek to raise also was given legislative protection from protracted litigation by way of a conclusive presumption. The majority has overridden this policy and consigned the rule of res judicata to ad hoc determination of "fairness" by this Court. On policy grounds, today's decision is simply indefensible.

There may be matters of public policy so extraordinary as to justify a departure from res judicata principles. However, a court's vague notion of "fairness"[19]—though motivated by benevo-

benefits. When the case is over, therefore, there are no accrued benefits from which attorney fees can be paid, even if the plaintiff prevails. In *Gross v Great Atlantic & Pacific Tea Co,* 87 Mich App 448; 274 NW2d 817 (1978), the plaintiff sought payment for his attorney fees from the defendant employer. The court of appeals indicated that "the equities in this case are with [the] plaintiff," yet ruled that it had no authority to require a defendant employer to pay the plaintiff's attorney fee in such a case. *Id.* at 451; 274 NW2d at 819. Theoretically, the plaintiff's attorney is entitled to recover 30 percent of the amount the worker received from the time the defendant attempted to terminate benefits until the case was concluded. The practical problem, however, is that most workers find it difficult to support themselves and their families even on the entire amount of benefits they receive. It would be extremely difficult for them to set aside 30 percent to pay their attorneys at some future date. In most such cases, the same attorney represented the worker in the original claim and received a substantial fee. Most plaintiffs' attorneys simply feel that it "comes with the territory" to represent the same client in the subsequent litigation without the assurance of any reimbursement. [Welch, Worker's Compensation in Michigan: Law & Practice, § 24.01, pp 347-348. Emphasis in the original.]

[19] The lead opinion concludes "that plaintiff in this case should not be required to repay dependency benefits received prior to the date of this opinion . . . ." Opinion of GRIFFIN, J., *ante,* p 604. However, the lead opinion does not foreclose the possibility that this Court, in future cases, will attempt to force previously paid benefits from

lence in a particular case—does not justify the substantial injustice that results when finally decided cases are reopened. Such a view negates the expectations of the bar on which client advice is predicated and corrupts the decision-making process of a court.

The doctrine of res judicata bars the relitigation of the dependency issue. The defendants' petition for a benefit reduction was properly dismissed. The decision of the workers' compensation appeal board should be affirmed.

CAVANAGH, J., concurred with BOYLE, J.

ARCHER, J. I concur in Justice BOYLE's opinion through part I-A.

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injured workers. This apparently distinguishes Justice BRICKLEY's opinion which retains a blush of res judicata for benefits previously received. Furthermore, while the lead opinion suggests that either a change in law or the possibility that the subsequent petition would change only the *amount* of benefits, is the basis for its holding, Justice BRICKLEY's "disagreement does not involve the question whether an exception to res judicata should apply, but rather whether the application of the res judicata concept in cases arising out of income-maintenance systems such as workers' compensation permits redetermination in light of an intervening change in the case law." Concurring opinion of BRICKLEY, J., *ante,* pp 608. While it is clear that the traditional rule of res judicata in workers' compensation proceedings has been abandoned, absent a majority for the rationale for today's result, it remains unclear whether the plurality's rule will control in future litigation.

RILEY v NORTHLAND GERIATRIC CENTER (AFTER REMAND)

JUNCAJ v C & H INDUSTRIES (AFTER REMAND)

MOORE v DETROIT BOARD OF EDUCATION (AFTER REMAND)

Docket Nos. 81129, 81325, 81689. Argued May 4, 1988 (Calendar Nos. 3-5). Decided November 10, 1988. Judgment order in *Juncaj* amended 432 Mich 1219.

Geneva Riley was awarded workers' compensation benefits for injuries arising out of and in the course of her employment with Northland Geriatric Center. Following the decision by the Supreme Court in *Gusler v Fairview Tubular Products,* 412 Mich 270 (1981), that the annual adjustment provision of the workers' compensation act applied only to maximum benefits, a hearing referee reduced the plaintiff's minimum weekly benefits. The Workers' Compensation Appeal Board reversed, concluding that the doctrine of res judicata barred the reduction. The Court of Appeals, SHEPHERD, P.J., and MACKENZIE and P. NICOLICH, JJ., affirmed, holding that *Gusler* which was relied upon by the referee was not precedent because rehearing had been granted in that case and it subsequently was dismissed by stipulation of the parties, rendering the decision a nullity (Docket No. 75937). The Supreme Court reversed, holding that *Gusler* is binding precedent, 425 Mich 668 (1986), and remanded *Riley* to the Court of Appeals for consideration of the issues of res judicata and retroactivity. On remand, the Court of Appeals, DANHOF, C.J., and MACKENZIE and SHEPHERD, JJ., affirmed in an opinion per curiam, holding that res judicata barred a reduction of benefits (Docket No. 94913). The defendants appeal.

Ljena Juncaj was awarded workers' compensation for injuries arising out of her employment with C & H Industries. Following the decision in *Gusler,* C & H's insurer reduced the claimant's level of benefits. A hearing referee found the reduction proper under *Gusler.* The WCAB reversed, and the Court of Appeals, R. B. BURNS, P.J., and ALLEN and T. M. BURNS, JJ., denied leave to appeal (Docket No. 85295). The Supreme Court ordered the case held in abeyance pending the decision of *Riley,*

REFERENCES

Am Jur 2d, Workmen's Compensation §§ 469 *et seq.,* 584, 598.

See the Index to Annotations under Worker's Compensation.

and thereafter remanded the case to the Court of Appeals for consideration of the issues of res judicata and retroactivity. On remand, the Court of Appeals, HOOD, P.J., and WEAVER and M. WARSHAWSKY, JJ., reversed in an opinion per curiam, holding that res judicata is not a bar and that *Gusler* applies to all payments made after the date of its decision (Docket No. 95587). The plaintiff appeals.

Katherine Moore was awarded workers' compensation for injuries arising out of her employment with the Detroit Board of Education. Following the decision in *Gusler,* the WCAB initially granted the board's motion to reduce her benefits, but later reinstated the original award following the decision of the Court of Appeals in *Riley* that *Gusler* was not binding precedent. The Court of Appeals, CYNAR, P.J., and T. M. BURNS and M. E. KOBZA, JJ., reversed in an unpublished opinion per curiam (Docket No. 86579). The Supreme Court remanded the case to the Court of Appeals to address the issue of the retroactive application of *Gusler.* On remand, the Court of Appeals, CYNAR, P.J., and WAHLS and HOOD, JJ., affirmed its earlier decision in an opinion per curiam (Docket No. 99822). The plaintiff appeals.

In opinions by Justice GRIFFIN, joined by Chief Justice RILEY and Justice LEVIN, and by Justice BRICKLEY, the Supreme Court *held:*

The doctrine of res judicata does not bar application of the rule of *Gusler v Fairview Tubular Products,* that the provision of § 355 of the workers' compensation act for annual adjustment of weekly benefit rates applies only to maximum, and not minimum, rates, to all benefits due or paid after December 30, 1981, the date of decision in *Gusler.*

Justice GRIFFIN, joined by Chief Justice RILEY and Justice LEVIN, explained:

1. Workers' compensation benefits are a form of income maintenance, entitlement to which depends upon a claimant's circumstances at the time of application and the time of payment. Because the amount of a claimant's award is never final and redetermination of the amount of benefits is permitted, the principles of res judicata do not apply to a change in the amount of benefits.

2. The adjustment provisions of § 355 of the workers' compensation act, as interpreted in *Gusler,* clearly were intended to apply to payments made after December 30, 1981, the date of the Court's decision, regardless of whether the award was made before or after that date.

Justice BRICKLEY, concurring, stated that the doctrine of res

judicata should be held to bar relitigation as to all payments and benefits awarded or denied pursuant to an earlier determination, but only until a subsequent petition based on changed circumstances is filed and the issues presented are resolved. Thus, application of the rule of *Gusler* regarding the annual adjustment of maximum weekly benefit rates to payments made after *Gusler*'s date of decision, regardless of when the award of benefits was made, should not be barred under the doctrine of res judicata.

In *Riley* and *Juncaj,* the referees ruled correctly in approving the reduction of future benefits. However, *Juncaj,* should be remanded to the WCAB for a determination whether the unilateral reduction of benefits by the employer was improper and, if so, the extent to which the claimant should recover benefits improperly withheld. In *Moore,* because the case was pending before the WCAB when *Gusler* was decided, there was no final determination which would require an analysis under the doctrine of res judicata. The *Gusler* issue was adequately preserved when it was raised before the WCAB.

*Riley,* reversed.

*Juncaj* and *Moore,* affirmed.

Justice BOYLE, joined by Justice CAVANAGH, concurring in part and dissenting in part, agreed that, because in *Moore* there was no final judgment, the doctrine of res judicata is inapplicable, but would not hold that the defendant waived a challenge regarding minimum benefits by failing to raise it before the referee.

In *Riley* and *Juncaj,* application of the doctrine of res judicata to preclude a reopening of the litigation is technically correct and manifestly just. Collateral attacks upon the amount of compensation, as opposed to eligibility, are not always permissible. Ignoring the doctrine of res judicata will result in the summary alteration of benefits or liability for many litigants who have never been afforded an opportunity to address the issue in any court or administrative proceeding.

Justice ARCHER, dissenting, stated that the doctrine of res judicata should bar relitigation of the plaintiffs' minimum benefit levels, requiring affirmance in *Riley* and reversal in *Juncaj* and rendering unnecessary consideration of the issue of the retroactive application of *Gusler* in those cases. In *Moore,* the decision of the Court of Appeals should be reversed. The defendant waived the § 355 issue by its failure to assert it before the WCAB prior to the release date of *Gusler,* and, thus,

*Gusler* should not be retroactively applied.

160 Mich App 507; 408 NW2d 489 (1987) reversed.

161 Mich App 724; 411 NW2d 839 (1987) affirmed.

163 Mich App 130; 414 NW2d 160 (1987) affirmed.

WORKERS' COMPENSATION — ADJUSTMENT OF MAXIMUM BENEFITS — RES JUDICATA.

The doctrine of res judicata does not bar application of the rule that the provision of § 355 of the workers' compensation act for annual adjustment of weekly benefit rates applies only to maximum, and not minimum, rates, to all benefits due or paid after December 30, 1981 (MCL 418.351[1], 418.355; MSA 17.237[351][1], 17.237[355]).

*Bockoff & Zamler, P.C.* (by *Anne K. Flaherty* and *Joel W. Jonas*), for plaintiffs Riley and Moore.

*Sachs, Nunn, Kates, Kadushin, O'Hare, Helveston & Waldman, P.C.* (by *Melvyn J. Kates* and *Granner S. Ries*), for plaintiff Juncaj.

*Lacey & Jones* (by *Gerald M. Marcinkoski*) for defendants Northland Geriatric Center and Michigan Mutual Insurance Company.

*Sinn, Day, Felker, Chinitz & Lovernick, P.C.* (by *Gilbert M. Chinitz*), for defendants C & H Industries and Allstate Insurance Company.

*Law Offices of Charfoos, Reiter, Peterson, Krut & Jones, P.C.* (by *Kenneth E. Jones*), for defendant Detroit Board of Education.

AFTER REMAND

GRIFFIN, J. We granted leave in these workers' compensation cases to resolve a conflict among panels of the Court of Appeals concerning the application of *Gusler v Fairview Tubular Products,* 412 Mich 270; 315 NW2d 388 (1981), reh gtd 414 Mich 1102 (1982), app dis 414 Mich 1102 (1983). Overruling *Jolliff v American Advertising Distributors, Inc,* 49 Mich App 1; 211 NW2d 260 (1973),

we held in *Gusler* that the adjustment provisions of § 355[1] of the Workers' Disability Compensation Act[2] apply only to the maximum, and not to the minimum, weekly rates established in § 351(1)[3] of the act.

Taking into account the reliance on *Jolliff* during an interim of more than eight years, this Court determined that its ruling in *Gusler* should be implemented as follows:

> In the interest of fairness we do not believe our holding should affect any disability compensation payments already made. Consequently, no recipient will be obligated to repay sums already received by reason of the erroneous computation formula we have nullified today. However, any benefits due and not yet paid or to be awarded after the date of this opinion shall be in accord with this ruling. [*Id.* at 298.]

The principal issue raised is whether the directed correction of *Jolliff*'s error with respect to "benefits due and not yet paid" after *Gusler* is precluded by the doctrine of res judicata. We conclude that res judicata is not a bar. We further hold that *Gusler* applies to all benefits due or paid after December 30, 1981, the date of our opinion in that case, including benefits paid pursuant to awards entered prior to that date.

I

Before turning to a discussion of the issues, we shall examine the facts and the interrelated procedural history of these cases.

A. *RILEY*

On October 6, 1981, a referee awarded the plain-

[1] MCL 418.355; MSA 17.237(355).

[2] MCL 418.101 *et seq.*; MSA 17.237(101) *et seq.*

[3] MCL 418.351(1); MSA 17.237(351)(1).

tiff compensation of $119 per week on the basis of a rate determined in accordance with *Jolliff.* No appeal was taken. Two months later, this Court decided *Gusler,* and defendant petitioned for a reduction in plaintiff's compensation in accordance with *Gusler,* which the referee granted.

Thereafter, the Workers' Compensation Appeal Board reversed, and its decision was affirmed by the Court of Appeals, but on the ground that this Court's decision in *Gusler* is not binding precedent. The *Riley* panel noted that, after filing and entering its opinion in *Gusler,* this Court granted a motion for rehearing and thereafter dismissed the appeal upon stipulation. It was the conclusion of the *Riley* panel that our *Gusler* opinion had never been "issued" in accordance with then GCR 1963, 866. *Riley v Northland Geriatric Center,* 140 Mich App 72; 362 NW2d 894 (1985).

On appeal, this Court reversed on that point and held that our opinion in *Gusler* became binding precedent when it was filed on December 30, 1981, notwithstanding the subsequent grant of rehearing and dismissal. In addition, we remanded the case to the Court of Appeals for consideration of res judicata and retroactivity issues which had not been addressed in the earlier appeal. *Riley v Northland Geriatric Center,* 425 Mich 668; 391 NW2d 331 (1986).

On remand, the Court of Appeals held that res judicata barred a reduction of plaintiff's benefits. *Riley v Northland Geriatric Center (On Remand),* 160 Mich App 507; 408 NW2d 489 (1987).[4] We then granted leave to appeal. 429 Mich 885 (1987).

### B. *JUNCAJ*

In *Juncaj,* plaintiff was awarded benefits of $79

[4] Riley died after commencement of this action and her son, Melvin King, personal representative of her estate, has been substituted as plaintiff.

per week on the basis of *Jolliff,* and the award was not appealed. Thereafter this Court decided *Gusler,* and defendant's insurer reduced plaintiff's level of benefits. Plaintiff then requested a hearing and argued that res judicata barred such a reduction. The referee denied relief, finding the reduction proper under *Gusler.* On appeal, however, the WCAB reversed, relying on the Court of Appeals decision in *Riley* that *Gusler* is not binding precedent.

After the Court of Appeals denied leave to appeal, defendant applied to this Court, and we ordered the case held in abeyance pending our decision in *Riley.* Once we had decided *Riley,* we remanded the case to the Court of Appeals for consideration of res judicata and retroactivity issues raised by plaintiff. On remand, the *Juncaj* panel held, contrary to the Court of Appeals decision in *Riley (On Remand),* that res judicata is not a bar and that *Gusler* applies to all payments after December 30, 1981, the date of our opinion in that case. *Juncaj v C & H Industries,* 161 Mich App 724; 411 NW2d 839 (1987). We granted plaintiff's application for leave to appeal. 429 Mich 885 (1987).

### C. *MOORE*

On March 26, 1981, a referee awarded plaintiff Moore $108 per week, the rate applicable under *Jolliff.* While defendant's appeal to the WCAB was pending, this Court decided *Gusler,* and the WCAB then granted defendant's motion to reduce plaintiff's benefits in accordance with *Gusler.* However, the Court of Appeals thereafter held in *Riley,* that *Gusler* is not binding precedent. The WCAB then affirmed a decision by the referee which reinstated the original award to plaintiff.

While a second appeal to the Court of Appeals was pending, this Court held in *Riley* that our December 30, 1981, decision in *Gusler* is binding precedent. The Court of Appeals then reversed the WCAB and ordered a reduction in plaintiff's benefit rate in accordance with *Gusler*. *Moore v Detroit Bd of Ed,* unpublished opinion of the Court of Appeals, decided December 3, 1986 (Docket No. 86579).

On appeal, we remanded the case to the Court of Appeals with instructions to consider whether *Gusler* should be given retroactive effect. Thereafter, the *Moore* panel opined that *Gusler* applies to all payments made after December 30, 1981 (the date of *Gusler*), even though a case may have been decided prior to that date, relying on the implementing language set forth in our *Gusler* opinion. *Moore v Detroit Bd of Ed (On Remand),* 163 Mich App 130; 414 NW2d 160 (1987). After the *Moore* panel certified a conflict with the decision of the *Riley* remand panel, we granted leave to appeal. 429 Mich 885 (1987).

II

In *Riley* and *Juncaj,* plaintiffs point out that their compensation rates were set prior to *Gusler* by decisions that were not appealed, and they argue that any post-*Gusler* reduction in benefits is barred by res judicata.[5]

The applicability of res judicata principles in workers' compensation cases has been recognized. See *Hlady v Wolverine Bolt Co,* 393 Mich 368, 375; 224 NW2d 856 (1975); *Theodore v Packing Materials, Inc,* 396 Mich 152, 158; 240 NW2d 255 (1976); *Gose*

[5] In *Moore* there is no res judicata issue, as there has been no final award. *Gusler* was decided by this Court while defendant's appeal to the WCAB was pending.

*v Monroe Auto Equip Co,* 409 Mich 147, 161; 294 NW2d 165 (1980).

Nevertheless, in considering how res judicata is to be applied in that context, we have not overlooked that there is a fundamental difference between the lump-sum judgment in a tort action and the award of continuing weekly benefits in a workers' compensation case. This difference was noted by Justice LEVIN who wrote, concurring, in *Hlady, supra* at 391:

> Workmen's compensation disability benefits, like social security and unemployment compensation benefits, are a form of income maintenance for persons whose wage-earning capacity has been suspended or terminated. A claimant's entitlement to such benefits depends on the circumstances at the time of application and payment.

Res judicata is a judicially created doctrine which reflects appropriate concern for the use of judicial resources and the finality of litigation. However, it is not an inflexible doctrine, and its applicability depends in part upon the legal context in which a determination is made.

In a wide variety of circumstances, an employee's *future* rate of workers' compensation benefits is subject to change. Events in the future may operate to increase or decrease the amount of benefits to which he is entitled. For example, as a consequence of 1980 PA 357, certain employees injured between September 1, 1965, and December 31, 1979, became entitled after January 1, 1982, to receive a supplemental benefit under § 352 to offset increases in the cost of living. Furthermore, if a disabled worker recovers, or later works at a less lucrative job, the amount of his compensation is subject to adjustment, and res judicata is not a bar.

Recently, in *Pike v City of Wyoming,* 431 Mich 589; 433 NW2d 768 (1988), this Court faced a question similar in important respects to the issue presented in the cases now before us. In *Pike,* the amount of plaintiff's award was increased because his wife was conclusively presumed to be a dependent under one provision[6] of the Workers' Disability Compensation Act, and there was no appeal from that determination. Thereafter, this Court declared unconstitutional a similar gender-based presumption for widows under a different provision[7] of the act. The defendant in *Pike* then sought a reduction in the level of plaintiff's benefits, alleging that plaintiff's wife was not in fact dependent. The plaintiff argued that res judicata barred any redetermination of his award. We held that res judicata did not preclude an adjustment in the amount of the employee's benefit:

> Because the amount of an employee's award is never final, res judicata principles do not apply to a change in the amount of benefits the claimant receives. This is consistent with the flexible nature of the workers' compensation system which permits redetermination of the amount of a claimant's benefits. [*Pike,* p 602.]

As in *Pike,* a new determination in these cases made on the basis of *Gusler* would affect only the amount of plaintiffs' benefits and not their eligibility for workers' compensation. As in *Pike,* we conclude that res judicata does not bar a redetermination of the amount of benefits to which plaintiffs are entitled.

Furthermore, we doubt that the Legislature could have intended the unfairness that would

[6] MCL 418.353(1)(a)(i); MSA 17.237(353)(1)(a)(i).

[7] MCL 418.331(1)(a); MSA 17.237(331)(1)(a).

result if the position urged by plaintiffs in the instant cases were to be adopted. Under plaintiffs' theory, many employees whose *Jolliff*-based rates were paid voluntarily by their employers before *Gusler* would be subject to post-*Gusler* reductions, while other employees whose employers happened to contest the rate before *Gusler* would not be affected.

We are satisfied that this Court was conscious of such considerations when it wrote, "In the interest of fairness we do not believe our holding should affect any disability compensation payments already made. . . . However, *any* benefits due and not yet paid *or* to be awarded after the date of this opinion shall be in accord with this ruling." *Gusler, supra* at 298 (emphasis added). Likewise, if the effect of *Gusler* had been to increase benefits from and after the date of the opinion, res judicata would not have precluded plaintiffs from obtaining the increase.

We conclude that, by directing that its "new rule" was to apply to any benefits due and not yet paid, the *Gusler* Court implicitly stated that res judicata would not preclude adjustment of benefits after the date of its opinion. In so concluding, we are in agreement with Justice LEVIN's separate statement in *Riley,* 425 Mich 690:

> Were this Court to give preclusive effect to a prior adjudication that was based on *Jolliff* as to payments of workers' compensation benefits after *Gusler* it would perpetuate, in the name of a judicial doctrine, a judicial error in construing a statute that thwarts legislative intent.

Accordingly, we conclude that post-*Gusler* adjustment of compensation rates as directed in *Gusler* is not barred by res judicata.

III

We next consider how the change of law announced in *Gusler* is to be applied in the instant cases.

Sometimes a court which announces a change of law will refrain from going the next step to indicate how its new rule is to be applied. See *Ross v Consumers Power Co (On Rehearing),* 420 Mich 567; 363 NW2d 641 (1984), *Day v W A Foote Memorial Hosp,* 412 Mich 698; 316 NW2d 712 (1982), and *Parker v Highland Park,* 404 Mich 183; 273 NW2d 413 (1978). In such a situation, the prospective-retroactive issue is left for decision in a later case.

In *Gusler,* however, we did not delay that decision. This Court proceeded to provide specific and precise directions concerning the applicability of the "new rule," stating:

> Although our holding is based on what we perceive to have been the intent of the Legislature at the time of enactment of the provisions discussed, in practical effect, given the contrary interpretations of the law by the Director of the Bureau of Workers' Compensation and the bureau's subdivisions, the Workers' Compensation Appeal Board and its hearing referees, and the Court of Appeals, today's holding is not unlike the announcement of a new rule of law. Its application therefore should be treated accordingly. See *Whetro v Awkerman,* 383 Mich 235; 174 NW2d 783 (1970); *Parker v Port Huron Hospital,* 361 Mich 1; 105 NW2d 1 (1960); *Bricker v Green,* 313 Mich 218; 21 NW2d 105 (1946).
>
> In the interest of fairness we do not believe our holding should affect any disability compensation payments already made. Consequently, no recipient will be obligated to repay sums already received by reason of the erroneous computation

formula we have nullified today. However, any benefits due and not yet paid or to be awarded after the date of this opinion shall be in accord with this ruling. [*Id.* at 298.]

In *Great Northern R Co v Sunburst Oil & Refining Co,* 287 US 358; 53 S Ct 145; 77 L Ed 360 (1932), the United States Supreme Court made clear that state courts are not precluded by the federal constitution from determining whether their own law-changing decisions should be applied retroactively or prospectively. The Court stated:

> We think the federal constitution has no voice upon the subject. A state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward. It may say that decisions of its highest court, though later overruled, are law none the less for intermediate transactions. . . . On the other hand, it may hold to the ancient dogma that the law declared by its courts had a Platonic or ideal existence before the act of declaration, in which event the discredited declaration will be viewed as if it had never been, and the reconsidered declaration as law from the beginning. . . . The alternative is the same whether the subject of the new decision is common law . . . or statute. . . . The choice for any state may be determined by the juristic philosophy of the judges of her courts, their conceptions of law, its origin and nature. We review not the wisdom of their philosophies, but the legality of their acts. [*Id.* at 364-365.]

Courts have acknowledged that resolution of the retrospective-prospective issue ultimately turns on considerations of fairness and public policy. *Peter-*

*son v Superior Court,* 31 Cal 3d 147, 152; 181 Cal Rptr 784; 624 P2d 1305 (1982). In *Placek v Sterling Heights,* 405 Mich 638, 665; 275 NW2d 511 (1979), reh den 406 Mich 1119 (1979), this Court said:

> This Court has overruled prior precedent many times in the past. In each such instance the Court must take into account the total situation confronting it and seek a just and realistic solution of the problems occasioned by the change.

We believe fairness requires that *Gusler* be applied to workers' compensation awards made after December 30, 1981, the date *Gusler* was decided, and to all benefits due and not yet paid after that date where the award preceded the date of the opinion. Such a holding is fair because it allows employers to reduce their payments in accordance with the Legislature's intent while protecting employees with respect to payments received before *Gusler.*

While fairness is a goal, certain rules or principles have evolved which provide guidance in resolving the retroactive-prospective dilemma. In *People v Hampton,* 384 Mich 669, 674; 187 NW2d 404 (1971), this Court adopted the three-part test set forth in *Linkletter v Walker,* 381 US 618; 85 S Ct 1731; 14 L Ed 2d 601 (1965). In *Linkletter* the United States Supreme Court ruled that its decision in *Mapp v Ohio,* 367 US 643; 81 S Ct 1684; 6 L Ed 2d 1081 (1961) (requiring states to exclude evidence seized in violation of the Fourth Amendment) should not be applied retroactively. In reaching that result, the Court weighed (1) the purpose to be served by the new rule, (2) the

extent of reliance on the old rule, and (3) the effect of retroactivity on the administration of justice.[8]

Application of the *Linkletter* test, also leads to the conclusion that *Gusler* be applied to awards made after December 30, 1981, and benefits due and not yet paid after December 30, 1981. Under *Linkletter,* we look first to the purpose of the "new rule" laid down in *Gusler.* It was to correct a serious error in the interpretation of a statute under which employees were being paid benefits in excess of the rate intended by the Legislature. We believe this purpose would best be furthered by applying *Gusler* only to payments made after the opinion's date.

Second, we take account of the fact that employees and employers relied for more than eight years on the *Jolliff* holding that minimum as well as maximum rates were adjustable under § 355. *Gusler's* implementing language appropriately recognizes that reliance, and it safeguards employees by not requiring repayment of any portion of benefits received prior to *Gusler.*

Finally, by applying the new rule only to payments after December 30, 1981, *Gusler* was designed to have a minimum effect upon the administration of justice. Cf. *People v Auer,* 393 Mich 667, 677; 227 NW2d 528 (1975), reh den 394 Mich 944 (1975).[9]

In *Riley* and *Moore* plaintiffs claim that by

[8] In a civil case, *Chevron Oil Co v Huson,* 404 US 97, 106-107; 92 S Ct 399; 30 L Ed 2d 296 (1971), the Court applied essentially the same test with the addition of a threshold question: Does the decision clearly establish a new principle of law?

[9] In *Auer,* this Court addressed the retroactivity of the then recently adopted objective test of entrapment. In holding that the new rule was to be prospective, this Court expressed concern about the effect retroactive application would have on the administration of justice, noting that "retrospective application would require in many cases new trials with the tremendous obstacle of reassembling now stale evidence." *Id.* at 677.

citing *Whetro, Parker,* and *Bricker, supra,* the *Gusler* Court indicated an intent that *Gusler* should apply only to cases commenced after December 30, 1981, and to cases pending on that date in the Bureau of Workers' Disability Compensation, the WCAB, or the Court of Appeals in which the minimum rate adjustment issue was raised. Plaintiff in *Juncaj* argues that *Gusler* should apply only to cases in which the injury occurred after December 30, 1981. We are not persuaded that the citations were for that purpose.

In *Whetro,* wherein this Court adopted the "positional risk" rule in workers' compensation cases, we determined that the new rule would apply to claims arising after the date of that decision but would not apply to pending cases other than the case then at bar. Likewise, in *Parker,* this Court held that a new rule abolishing charitable immunity would apply only to that case and to cases arising after the opinion's date. However, in *Bricker,* this Court stated that its law change abrogating imputed negligence was to apply to "pending" as well as to "future" cases.

We believe the *Whetro, Parker,* and *Bricker* decisions were cited to demonstrate that this Court has not always applied the general rule that law changing judicial decisions are to be given complete retroactive effect.[10] Obviously, the three cases did not follow the same pattern. Accordingly, we conclude that the Court's reference to the three cases was for a general purpose and not the specific purpose for which plaintiffs contend.

[10] See *Martin v White Pine Copper Co,* 378 Mich 37, 44; 142 NW2d 681 (1966). While this is the general rule for judicial decisions which make a substantive change in preëxisting law, legislative changes in preëxisting law are generally held to be prospective, unless a contrary legislative intent is clearly manifested, or unless the statute is procedural or remedial. *Selk v Detroit Plastic Products,* 419 Mich 1, 9-10; 345 NW2d 184 (1984).

Furthermore, our interpretation is justified and required by the clear and unambiguous implementing language which this Court provided in the concluding paragraph of our *Gusler* opinion. As Justice LEVIN wrote in *Riley, supra,* 425 Mich 688-689:

> There is nothing unfair in applying the rule stated in *Gusler,* which appears to have been reaffirmed today on varying analyses, from and after the date of the announcement of the opinions of the justices in *Gusler.*
>
> The statement in the . . . concluding paragraph of the majority opinion in *Gusler* was surely adequate notice to the workers' compensation department, the WCAB, bench and bar, that *Jolliff* should no longer be followed. . . . It would not be "unfair" to hold in the instant case that, as declared in *Gusler,* "any benefits due and not yet paid or to be awarded after the date of [the *Gusler* opinion] shall be in accord with th[e] ruling" stated in *Gusler* that the minimum rates are not subject to adjustment.

If we were to accept the interpretation urged by plaintiffs, we would effectively nullify that part of the implementing language which states that any benefits due and not yet paid after the date of *Gusler* shall be paid in accord with *Gusler.* Contrary to the argument advanced by plaintiffs, this Court did not limit its holding to cases commenced after December 30, 1981, and to cases pending on that date in the Bureau of Workers' Disability, the WCAB, or an appellate court in which the minimum rate adjustment issue was raised. Rather, *Gusler* clearly stated that its holding "not unlike . . . a new rule of law," was to apply to "*any benefits* due and not yet paid *or* to be

awarded *after the date* [that *Gusler* was decided] . . . ." *Id.* at 298 (emphasis added).[11]

We conclude that the implementing language means what it says, and that payments after December 30, 1981, are to be adjusted in accord with *Gusler,* whether the award was made before or after *Gusler.*

IV

Although plaintiffs encourage us to reconsider and overturn our decision in *Gusler,* we decline the invitation to do so. We remain convinced that *Gusler* was correctly decided.

V

In *Riley,* we reverse the judgment of the Court of Appeals. In *Juncaj* and *Moore,* we affirm the judgment of the Court of Appeals.

RILEY, C.J., and LEVIN, J., concurred with GRIFFIN, J.

BRICKLEY, J. (*concurring*).

A. INTRODUCTION

Concurring in *Pike v City of Wyoming,* 431 Mich 589; 433 NW2d 768 (1988), I expressed the view that the traditional concept of res judicata must be tailored to meet the special needs of income-main-

[11] In view of our holding concerning the applicability of *Gusler,* we find no merit in the argument advanced that defendant in *Moore* waived its right to relief because it did not raise the rate adjustment issue prior to December 30, 1981. As noted in n 5, defendant's appeal from the referee's decision in *Moore* was pending before the WCAB when this Court decided *Gusler.* Furthermore, defendant moved promptly after *Gusler* for relief in accordance with its holding. We also note that both the WCAB and the Court of Appeals addressed the rate adjustment issue in *Moore.*

tenance systems such as workers' compensation. Specifically, I proposed a "hybrid" res judicata concept that should be applied when the law governing such systems is changed by judicial decision: The doctrine of res judicata bars relitigation as to "all payments and benefits awarded or denied pursuant to an earlier determination, but only until such time as a subsequent petition based on changed circumstances that would not have been present at the previous litigation is filed and the issues presented are resolved." *Id.,* p 607.

### B. *RILEY* AND *JUNCAJ*

The application of this principle in *Riley* and *Juncaj* is straightforward. In both cases, claimants were awarded and paid minimum benefits in accordance with *Jolliff v American Advertising Distributors, Inc,* 49 Mich App 1; 211 NW2d 260 (1973). Subsequently, *Jolliff* was overruled by *Gusler v Fairview Tubular Products,* 412 Mich 270; 315 NW2d 388 (1981), and new proceedings were instituted in order to determine whether future benefits should be reduced accordingly. Referees in both cases approved the reduction. Because I believe that the doctrine of res judicata is not a bar under such circumstances, I agree with the lead opinion's conclusion that the referees ruled correctly.

*Gusler* itself supports this result. In the first of two paragraphs addressing the application of *Gusler* to other cases, we noted that *Gusler* was to be treated as a new rule of law. *Id.,* 298. We cited three cases as general authority for the treatment of new rules in other contexts. *Whetro v Awkerman,* 383 Mich 235; 174 NW2d 783 (1970), *Parker v Port Huron Hosp,* 361 Mich 1; 105 NW2d 1

(1960), and *Bricker v Green,* 313 Mich 218; 21 NW2d 105 (1946). Of these decisions, *Parker* and *Bricker* illustrate the application of new rules in general civil litigation, while *Whetro,* the only workers' compensation case of the three, is illustrative of the prospective effect to be accorded changes which address eligibility or qualification for benefits.

The penultimate paragraph of *Gusler* explains precisely the effect to be given that decision, which affected only the *amount* of benefits to which a claimant is entitled. We held that *Gusler* could not be applied so as to require repayment of payments already made under the *Jolliff* rule, but that payments due but not yet paid should be computed under the *Gusler* standard. *Id.,* 298. Significantly, we did not limit the award of *Gusler* minimum benefits to cases in which awards were made after the date *Gusler* was issued.

A further question raised in *Juncaj,* but not answered below, is whether the employer acted properly in unilaterally reducing the claimant's benefits without prior administrative approval. Given that *Gusler* was correctly decided, *Juncaj* should be remanded to the WCAB in order for it to consider the propriety of the employer's implementation of *Gusler.* Specifically, the WCAB should determine (1) whether the unilateral reduction of benefits by the employer was improper, and, if so, (2) the extent to which the claimant should recover benefits improperly withheld.

### C. *MOORE*

Because *Moore* was still pending before the WCAB when *Gusler* was decided, there was no final determination which would trigger a res judicata

analysis.[1] Justice ARCHER would hold that the employer, by waiting until after *Gusler* had been decided to raise the issue before the WCAB, waived its right to contest the future payment of *Jolliff* minimum benefits. I agree, however, with the conclusion reached in Justice GRIFFIN's opinion. Additional evidence submitted by the parties may be considered by the WCAB.[2] While the WCAB is not required to consider the new material, where, as here, it exercises its discretion to do so, the issue has been adequately preserved.[3]

Furthermore, from the perspective of administrative economy, I believe it would be unwise either to require parties to burden administrative decisionmakers with a claim or defense that has not yet been recognized, or to prevent the WCAB from immediately considering a recent judicial decision which by its terms is to be accorded immediate effect.

### D. CONCLUSION

For the foregoing reasons, I concur in the result reached in Justice GRIFFIN's opinion. In addition, I conclude that *Juncaj* should be remanded to the WCAB in order for it to determine (1) whether the unilateral reduction of benefits by the employer was improper, and, if so, (2) the extent to which the claimant should recover benefits improperly withheld.

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[1] MCL 418.851; MSA 17.237(851).

[2] MCL 418.859; MSA 17.237(859).

[3] Even if an intervening judicial decision may not technically be "evidence" under § 859, there is no reason to draw a distinction between such a decision and other types of evidence, particularly in light of the informal nature of workers' compensation proceedings. Moreover, even courts, bound by the Michigan Rules of Evidence, may take judicial notice of the common law. MRE 202(a). In workers' compensation proceedings, strict adherence to the Michigan Rules of Evidence is not required. MCL 418.841(6); MSA 17.237(841)(6).

BOYLE, J. (*concurring in part and dissenting in part*). I concur in the majority's holding in *Moore,* but do so for different reasons. In my view, Justice ARCHER has correctly observed that there was no final judgment in *Moore* and therefore the doctrine of res judicata is inapplicable. See 1 Restatement Judgments, 2d, § 24(1), p 196; *Cohen v Home Life Ins Co,* 273 Mich 469, 473; 263 NW 857 (1935). However, unlike Justice ARCHER, I am not persuaded that the defendant waived the challenge regarding minimum benefits by failing to raise it before the hearing referee. It appears that the defendant raised and preserved the benefit rate issue in these proceedings or the proceedings below[1] and that *Gusler v Fairview Tubular Products,* 412 Mich 270; 315 NW2d 388 (1981), in terms applies to payments made after December 30, 1981. However, it appears that the plaintiff herself failed to raise and preserve the issue of defendant's waiver. I would therefore affirm the decision of the Court of Appeals in *Moore.*

On the other hand, I agree with both Justice ARCHER's reasoning and holding in *Riley* and *Juncaj.* I write separately only to add a few of my own observations as to the course of the majority opinion in these cases.

The majority asserts that the basis of its holding regarding the effect of res judicata in these cases is the continuing nature of an award of workers' compensation disability, or wage loss, benefits. The majority contrasts workers' compensation benefits in this regard with tort or contract damages. In my view, however, as proper analysis of the dependency provision in *Pike v City of Wyoming,* 431 Mich 589; 433 NW2d 768 (1988), illustrates, the continuing nature of these payments is relevant in

[1] *Thompson v Continental Motors Corp,* 320 Mich 219, 226; 30 NW2d 844 (1948).

only a few instances, such as a change of physical condition[2] or specific exceptions in the act.[3] These are well-established exceptions to the general rule of res judicata in workers' compensation proceedings repeatedly recognized in the decisions of this Court. See, e.g., *Theodore v Packing Materials, Inc,* 396 Mich 152; 240 NW2d 255 (1976); *Hlady v Wolverine Bolt Co,* 393 Mich 368; 224 NW2d 856 (1975). Beyond these carefully crafted exceptions, there is no principled distinction between a final tort or contract judgment and a final decision of the bureau[4]—regardless of how many times this dubious principle may be repeated in dissenting or concurring opinions. The nominal distinction upon which the majority has seized is simply the vehicle for this majority's voiding of the accrued and adjudged rights of these workers. Certainly nothing on these facts justifies a departure from the doctrine of res judicata by an ad hoc ruling of this Court.

The majority relies for its result on the concurrence in *Hlady, supra.* In addition to the fact that the majority fails to acknowledge that its reliance on Justice LEVIN's view of res judicata, sub silentio, overrules holdings in *Hlady* and *Gose v Monroe Auto Equipment Co,* 409 Mich 147; 294 NW2d 165 (1980), the majority focuses on Justice LEVIN's view that an intervening change of law eliminates the bar of res judicata as to "a claim for *continuing* disability benefits," *Hlady, supra,* p 385 (emphasis in the original). Because the Legislature has said that changes in facts may *in certain circumstances* permit a change in benefits, the majority

[2] See, e.g., *Hebert v Ford Motor Co,* 285 Mich 607; 281 NW 374 (1938).

[3] See MCL 418.353; MSA 17.237(353).

[4] Indeed, a final order of the bureau is enforceable as a judgment in circuit court. See MCL 418.863; MSA 17.237(863).

concludes that this Court as a matter of its own policy determination can permit relitigation where the *facts* have been finally adjudicated and the new litigation is based on a subsequent change in the law. From this incorrect premise the majority reaches the final result that *Gusler* "implicitly stated" that res judicata would not preclude the reduction of benefits in finally adjudicated unappealed litigation, cases, it must again be emphasized, that do not involve any change in facts. As this Court held in *Hlady, supra,* p 380, "res judicata bars this from happening."

I cannot agree that the language in *Gusler* regarding the prospective application of the decision was intended to implicitly overrule the holding in *Hlady* that res judicata precludes a collateral attack on a claim for continuing benefits with a later change in law. *Hlady* is not even cited in *Gusler,* and two members of the *Hlady* majority joined the *Gusler* result. Indeed, were I to conclude that the broad dictum of the "penultimate" paragraph of *Gusler* could be so construed, *Gusler* would be precedent of the most questionable sort.[5]

For the reasons stated in my dissent in *Pike, supra,* I cannot accept the majority's conclusion that collateral attacks upon the *amount* of compensation, as opposed to *eligibility,* are always permissible. There is neither a theoretical basis for this distinction nor a practical limit to its application. In truth, the majority's conclusion in this case, as well as in the concurring opinion of Justice BRICKLEY[6] and the concurring opinion of Jus-

[5] I, of course, take no position in the context of this case, on the substantive ruling of *Gusler* regarding adjusted minimum benefits.

[6] While Justice BRICKLEY nominally endorses a "hybrid" rule of res judicata in workers' compensation proceedings, finality exists only until " 'a subsequent petition based on changed circumstances that would not have been present at the previous litigation is filed . . . .' "

tice LEVIN in *Hlady*,[7] turns the matter of collateral attack on an award of continuing benefits into a question of policy to be decided on an ad hoc basis by four members of this Court. The bench and bar are therefore without guidance as to how this exception will be applied. This case and *Pike* suggest that the refinements of this rule will emerge in the process of finding either that any change in governing law permits reopening of a final award or that some collateral attacks are more fair than others. In either event, the ultimate result is an unwarranted alteration of the doctrine of res judicata in workers' compensation proceedings.

This is nowhere more apparent than in the majority's quotation from Justice LEVIN in *Riley:*

> Were this Court to give preclusive effect to a prior adjudication that was based on *Jolliff* [*v American Advertising Distributors, Inc,* 49 Mich App 1; 211 NW2d 260 (1973)] as to payments of workers' compensation benefits after *Gusler* it would perpetuate, in the name of a judicial doctrine, a judicial error in construing a statute that thwarts legislative intent. [*Riley v Northland Geriatric Center,* 425 Mich 668, 690; 391 NW2d 331 (1986).]

The same could be said about *any* application of

[7] In *Hlady, supra,* p 387, Justice LEVIN stated:

> The law can be changed by legislative enactment or court decision. When the Legislature amends a statute, its applicability to a case previously adjudicated is not analyzed in terms of res judicata. The issue then is one of statutory construction: did the Legislature intend the amendment to have retroactive as well as prospective application? Where the change is effected by court decision the analysis should be the same, whether as a matter of policy the new rule of law should apply retroactively as well as prospectively.

the doctrine of res judicata involving a prior construction of the Workers' Disability Compensation Act. I would respond that ignoring the doctrine of res judicata results in the summary alteration of benefits for many litigants who have never been given an opportunity to address the issue in any court or administrative proceedings. It is not erroneous to apply the doctrine of res judicata in this instance. To the contrary, an application of this doctrine to preclude a reopening of this litigation is both technically correct and manifestly just.

I therefore dissent in *Riley* and *Juncaj.*

CAVANAGH, J., concurred with BOYLE, J.

ARCHER, J. (*dissenting*). The majority resolves the conflict present in the Court of Appeals application of this Court's decision in *Gusler v Fairview Tubular Products,* 412 Mich 270; 315 NW2d 388 (1981), by holding that (1) the doctrine of res judicata does not bar relitigation of the plaintiff's minimum weekly benefit rate under § 351(1), and (2) our decision in *Gusler* is retroactively applicable to those parties receiving minimum rate benefits at the time of the decision's release irrespective of their date of injury.

I respectfully dissent and would hold that res judicata bars relitigation of the plaintiffs' minimum benefit levels. I would affirm the decision of the Court of Appeals in *Riley,* while I would reverse its decision in *Juncaj.* Accordingly, I find it unnecessary to address the retroactive application of the *Gusler* decision in these two cases. However, with regard to *Moore,* I would hold that *Gusler* is not retroactively applicable because the defendant waived the § 355 issue by its failure to assert it before the WCAB prior to December 30, 1981, *Gusler's* release date.

I

The doctrine of res judicata bars relitigation of all matters factual and legal, which were either adjudicated or adjudicable at the time of trial:

> The doctrine of res judicata operates to prevent the relitigation of facts and law between the same parties or their privies. The plea of res judicata applies to points previously litigated and decided as well as to points " 'which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.' " [*Socialist Workers Party v Secretary of State,* 412 Mich 571, 583-584; 317 NW2d 1 (1982). Citations omitted.]

The lead opinion argues, and I agree, that the doctrine of res judicata is not to be mechanistically applied. However, this Court should be hesitant in deviating from the doctrine where it would serve to reward dilatory parties.

I find the instant case indistinguishable from our decision in *Hlady v Wolverine Bolt Co,* 393 Mich 368; 224 NW2d 856 (1975). In 1947, Hlady was awarded specific loss benefits for the amputation of four fingers under the predecessor of § 361 of the WDCA, MCL 418.361; MSA 17.237(361). Once the specific loss benefits expired, existing precedent disallowed continuing general disability benefits premised upon a condition deemed "normally resultant" from an amputation. This Court and the WCAB denied plaintiff continuing benefits, finding her postamputation condition did not exceed the "normally resultant" standard. *Hlady v Wolverine Bolt Co,* 325 Mich 23; 37 NW2d 576 (1949). However, in *Van Dorpel v Haven-Busch Co,* 350 Mich 135; 85 NW2d 97 (1957), an evenly divided court found plaintiff's class of recipients were enti-

tled to continuing benefits. Nearly three decades after her original award, *Hlady* again appealed, seeking continuing general disability benefits, apparently in light of *Van Dorpel*'s challenge to the "normally resultant" standard. Although the Court adopted the *Van Dorpel* position, we nonetheless denied plaintiff's claim upon res judicata grounds:

> Mary Hlady's physical condition has not changed since her 1945 injury. The only change has been in the law applied to cases of this nature. However, it has long been the law of this state, starting with the leading case of *Jacobson v Miller,* 41 Mich 90; 1 NW 1013 (1879), that the doctrine of res judicata applies not only to facts previously litigated, but also to points of law which were necessarily adjudicated in determining and deciding the subject matter of the litigation.
>
> * * *
>
> Plaintiff may not concede an issue, necessarily determinative of and included in the judgment of this Court, and then, after another has successfully raised the issue she did not wish to contest, ask the Court again for relief. The doctrine of res judicata bars this from happening. Mary Hlady could have as easily raised this issue as Peter Van Dorpel. It was, in fact, incumbent upon her to do so if she wished to avail herself of that interpretation. [393 Mich 376, 380.]

As in *Hlady,* two of the three instant defendants seek to evade res judicata so as to revisit the *same* case and merely apply new law upon an adjudicated issue that was never reserved for appeal. On November 20, 1979, this Court specifically granted leave to appeal upon the issue whether § 355 applied to the minimum as well as maximum weekly rates for total disability as available under § 351 of the WDCA:

> The parties are directed to include among the issues to be briefed whether the cost-of-living increases in workers' disability compensation benefits, provided for in MCL 418.355; MSA 17.237(355), apply to the *minimum* as well as the maximum weekly rates for total disability, as set forth in MCL 418.351; MSA 17.237(351)? [*Gusler v Fairview Tubular Products,* 407 Mich 926 (1979).]

Clearly, our published and issue-specific grant of leave to appeal placed the parties on notice as to the viability of challenging § 355's application to minimum-rate benefits. In *Riley,* the Court's order in *Gusler* was issued prior to the plaintiff's original hearing before the hearing referee in 1981,[1] although the defendant neither raised the issue before the hearing referee nor appealed. In *Juncaj,* although the Court's order was not available at the time of the original hearing,[2] the defendant also failed to appeal.

This Court should be hesitant to extend the defendants an additional opportunity to raise this defense. It is not incumbent upon this Court to reward any other party's inaction. Accord *Pike v City of Wyoming,* 431 Mich 589; 433 NW2d 768 (1988) (BOYLE, J., dissenting); *Hackley v Hackley,* 426 Mich 582; 395 NW2d 906 (1986).

> A compensation award represents " 'an adjudication as to the condition of the injured workman at the time it is entered.' " *Theodore v Packing Materials, Inc,* 396 Mich 152, 158; 240 NW2d 255 (1976), citing 58 Am Jur [Workmen's Compensation, § 508]. Disability benefits "are a form of income maintenance for persons whose wage-earning capacity has been suspended or terminated. A claimant's entitlement to such benefits depends on the

[1] The opinion of the hearing referee was released on October 6, 1981.

[2] The decision of the hearing referee was released on July 19, 1978.

circumstances at the time of application and payment." *Hlady, supra,* 391 (LEVIN, J., concurring).

The requirement that he present all of his available claims in a single proceeding is consistent with this purpose of adjudicating the worker's needs. *The remedial character of the legislation, if affected at all by this rubric, would scarcely be enhanced by a construction which would authorize piecemeal compensation for an injury.* [*Gose v Monroe Auto Equipment Co,* 409 Mich 147, 161-162; 294 NW2d 165 (1980). Emphasis added.]

I find our rationale in *Gose* equally calls for employers to timely submit all available defenses. Therefore, I would hold that the plaintiffs should not be subjected to the relitigation of their minimum benefit rates and should enjoy the finality res judicata affords.

II

However, in *Moore,* I agree with the defendants that the doctrine of res judicata is inapplicable. In *Moore,* the defendant had an appeal pending before the WCAB at the time that our decision in *Gusler* was released. Because this appeal was timely filed, there is no question that there was not a final decision upon plaintiff's benefit award. Nonetheless, I find that the defendant's failure to state the § 355 issue with specificity, effectively waived its entitlement to the *Gusler* defense.

In this regard, I would adopt the position advocated by the Court of Appeals in *Riley v Northland Geriatric Center (On Remand),* 160 Mich App 507, 513; 408 NW2d 489 (1987), which states, in pertinent part:

We believe that when our opinion today is read with the above-quoted language of *Gusler,* the net effect is that *Gusler* will apply to all cases com-

menced after December 30, 1981, the date that opinion was issued, and to those cases pending in the Bureau of Workers' Disability Compensation, the WCAB, or an appellate court on December 30, 1981, in which the issue of § 355 reductions was raised.

Defendant argues that it was sufficient that its case was pending before the WCAB at the time the Court's decision was released in *Gusler*. I disagree. I believe the more important question is whether the defendant raised the issue at the time the appeal was filed or at any time prior to the release of the Court's decision on December 30, 1981. The answer to this question is "no." On January 27, 1982, the defendant addressed a letter to the WCAB asking whether its appeal would be dismissed if the defendant reduced its payments in reliance upon *Gusler*. This same letter contained an "amendment to answer," claiming *Gusler* as a defense. Thus, it is obvious that at the time the defendant had raised its appeal, it did not raise the minimum benefit levels addressed in *Gusler*. Therefore, I would hold that the defendant's failure to specifically raise the § 355 issue does not entitle it to raise the defense at this date.

III

Accordingly, I would affirm the decision of the Court of Appeals in *Riley*. However, I would reverse its decisions in *Juncaj* and *Moore*, and affirm the decisions of the Workers' Compensation Appeal Board.

TATUM v GOVERNMENT EMPLOYEES INSURANCE COMPANY

Docket No. 80378. Argued March 8, 1988 (Calendar No. 5). Decided November 16, 1988. Rehearing denied *post,* 1212.

Calvin Tatum brought an action in the Wayne Circuit Court against the Government Employees Insurance Company, seeking no-fault personal protection benefits for injuries suffered as a result of an automobile accident while operating an automobile owned by the federal government. At the time of the accident, the plaintiff was on active duty with the United States Air Force and was the owner of an automobile not involved in the accident that was insured by the defendant. The Air Force paid the plaintiff's hospital expenses, and the plaintiff then sought additional benefits under his personal insurance policy with GEICO. GEICO refused to pay, invoking the mandatory set-off provision of § 3109(1) of the no-fault act. The plaintiff argued that the amounts paid by the federal government were "other health or accident coverage" under § 3109a of the act, and that because he had not been offered a coördinated policy for a reduced premium GEICO was not entitled to invoke the set-off provision. The court, Clarice Jobes, J., granted summary judgment for the plaintiff, ruling that while the medical benefits provided by the federal government were required to be set off under § 3109(1) of the no-fault act, because the plaintiff had not been offered the option of coördination of benefits, the defendant had forfeited the right to setoff. The Court of Appeals, BURNS, P.J., and WAHLS and THOMAS, JJ., reversed in an unpublished opinion per curiam reasoning that § 3109(1) mandated setoff and refusing to address whether military medical benefits were "other health and accident coverage" under § 3109a that could be coördinated with no-fault benefits at the option of an insured (Docket No. 70001). The plaintiff appeals.

In a unanimous opinion per curiam, the Supreme Court *held:*

Medical benefits paid by the federal government to a member of the armed forces pursuant to 10 USC 1071 *et seq.* for injuries suffered in an automobile accident constitute "other health and accident coverage" under § 3109a of the no-fault act. Where benefits of an insured fall within §§ 3109a and 3109(1), an insurer must offer a coördinated policy.

1. Section 3109(1) of the no-fault act provides that medical

benefits provided under the laws of any state or the federal government must be subtracted from personal protection benefits otherwise payable for the same injury. Military medical benefits provided by the federal government under 10 USC 1071 *et seq.* have been held to serve the same purpose as no-fault medical benefits, and, where they are provided as a result of the same accident, they are required to be subtracted from no-fault benefits otherwise payable.

2. Section 3109a of the no-fault act requires an insurer providing personal protection insurance benefits to offer appropriately reduced premium rates for coördination of benefits with other health and accident coverage of an insured. Military medical benefits provided under 10 USC 1071 *et seq.* are "other health and accident coverage" within the meaning of § 3109a, requiring the offer of a coördinated no-fault policy. Because in this case, such an offer was not made, the setoff mandated by § 3109(1) may not be employed.

Reversed.

*Lipton, Papista, Cohen & Alli, P.C.* (by *Shoms Alli*), for the plaintiff.

*Kohl, Secrest, Wardle, Lynch, Clark & Hampton* (by *Mark E. Morley* and *Timothy F. Casey*) for the defendant.

Amicus Curiae:

*Brandt, Hanlon, Becker, Lanctot, McCutcheon, Martin & Schoolmaster* (by *Charles T. McCutcheon*); *(Gromek, Bendure & Thomas,* by *John A. Lydick,* of counsel) for Auto Club Insurance Association.

PER CURIAM.

INTRODUCTION

In this case the plaintiff was involved in an automobile accident and was severely injured. At the time of the injury, plaintiff was a member of the armed forces on active duty and qualified for

federal military medical benefits pursuant to 10 USC 1071 *et seq.* He was also the owner of an automobile insured by the defendant, Government Employees Insurance Company (GEICO), and therefore qualified for no-fault insurance benefits. We are asked to decide whether the defendant is permitted to set off under MCL 500.3109(1); MSA 24.13109(1) of the no-fault act the medical benefits provided by the federal government. While not included in this Court's order granting leave to appeal, we are also asked to decide whether the federal benefits at issue constitute "other health and accident coverage" under MCL 500.3109a; MSA 24.13109(1), and, if so, whether the fact that the defendant failed to offer plaintiff coördination of his no-fault coverage requires nullification of the set-off provision of § 3109(1).

We hold that medical benefits paid pursuant to 10 USC 1071 *et seq.* constitute "other health and accident coverage" under the no-fault act. We further hold that when benefits of an insured fall within § 3109(1) and § 3109a of the act, an insurer must offer a coördinated policy.

The decision of the Court of Appeals reversing the trial court's order of partial summary judgment is reversed.

I

The plaintiff, Calvin Tatum, was involved in an automobile accident while operating a motor vehicle owned by the federal government. At the time of the accident, plaintiff was a member of the United States Air Force on active duty. The accident left him permanently paralyzed. He was hospitalized at Henry Ford Hospital from September 24, 1981, until October 5, 1981, at which time he was transferred to the Veteran's Hospital located in Cleveland, Ohio, where he remained until May 10, 1982.

Pursuant to 10 USC 1071 *et seq.*,[1] the United States Air Force paid $96,326.25 for plaintiff's hospital expenses. Thereafter, plaintiff filed suit against GEICO, alleging that because plaintiff was the registered owner of an automobile insured by GEICO on the date of the accident it was responsible for his hospital expenses.[2] After a period of discovery, plaintiff filed a motion for partial summary judgment against GEICO, alleging that amounts paid by the federal government were "other health or accident coverage" pursuant to § 3109a of the no-fault act. Plaintiff further alleged that because he was not offered a coördinated policy for a reduced premium GEICO was not entitled to invoke the set-off provision of § 3109(1).[3]

GEICO argued that plaintiff's federal benefits were subject to mandatory setoff under § 3109(1), making it irrelevant whether plaintiff was offered a coördinated policy. Further, GEICO argued that the record did not indicate that plaintiff had not, in fact, been offered a coördinated policy, but only that his policy did not contain a coördination provision. Finally, GEICO claimed that, in any

[1] See 10 USC 1074(a): "a member of a uniformed service who is on active duty is entitled to medical and dental care in any facility of any uniformed service."

[2] The federal government is not required to carry no-fault insurance on its automobiles and thus, plaintiff's primary claim was against his own no-fault insurer. Plaintiff also added the Travelers Insurance Company as a defendant by a first amended complaint because GEICO had disclaimed responsibility for plaintiff's claim, and Travelers was next in order of priority because it was the assigned insurer by the assigned claims facility. GEICO also filed a cross-claim against Travelers. Travelers filed a motion for summary judgment against plaintiff and GEICO which was granted by the trial court. The order was affirmed in the Court of Appeals and is not part of this appeal.

[3] The plaintiff filed an affidavit specifically averring that he did not pay a reduced premium reflecting coördinated coverage. The defendant failed to counter this claim with a responsive affidavit. Further, to certain requests for admissions filed by the plaintiff, the defendant admitted that plaintiff's policy did not contain a coördination of benefits clause, and that the plaintiff was not paying a reduced premium in return for a coördinated policy.

event, plaintiff's policy automatically reflected a lower premium rate by virtue of his military status.

The trial court ruled that the medical benefits provided under 10 USC 1074(a) were required to be set off under § 3109(1), but because plaintiff was not offered the option of coördination of benefits, GEICO had forfeited the right to setoff.

In an unpublished per curiam opinion, the Court of Appeals reversed the trial court's order, reasoning that § 3109(1) mandated the setoff claimed by GEICO. The Court specifically refused to address plaintiff's assertion that military medical benefits constitute "other health and accident coverage" under § 3109a that may be coördinated with no-fault benefits at the option of the insured. *LeBlanc v State Farm Mutual Automobile Ins Co,* 410 Mich 173; 301 NW2d 775 (1981).

Plaintiff's application for leave to appeal was held in abeyance for our decision in *Crowley v DAIIE,* 428 Mich 270; 407 NW2d 372 (1987). The decision in *Crowley* was limited to the question whether benefits paid pursuant to 10 USC 1071 *et seq.* were subject to setoff under § 3109(1) when the injured party was not the owner of the vehicle subject to coverage under the no-fault act. Thus, our decision in *Crowley* was not dispositive of the issues raised in this appeal. We granted leave to appeal. 429 Mich 857 (1987).

II

A

Section 3109(1) of the no-fault act provides:

> Benefits provided or required to be provided under the laws of any state or the federal government shall be subtracted from the personal protec-

tion insurance benefits otherwise payable for the injury.

In *Crowley, supra,* p 276, we concluded that medical benefits provided by the federal government under 10 USC 1071 *et seq.,* "serve the same purpose as no-fault medical benefits, and that such benefits are provided as a result of the same accident."[4] Consequently, such benefits "are required to be subtracted from no-fault benefits otherwise payable because they [are] benefits provided or required to be provided under the laws of this state or the federal government." *Crowley, supra,* p 275.

In this case, plaintiff was on active duty in the Air Force at the time of the accident and received benefits pursuant to 10 USC 1074. Those benefits would normally be set off from his personal protection insurance benefits payable under his no-fault policy with GEICO. Plaintiff argues, however, that § 3109a also applies in this instance and that because he was not offered the opportunity to coördinate his policy as mandated in that provision GEICO may not avail itself of the setoff provided by § 3109(1). We thus turn to that issue to consider whether § 3109a requires a different result.

B

Section 3109a of the no-fault act provides:

[4] See *Jarosz v DAIIE,* 418 Mich 565, 577; 345 NW2d 563 (1984):

> We conclude that the correct test is: state or federal benefits "provided or required to be provided" must be deducted from no-fault benefits under § 3109(1) if they:
>
> 1) Serve the same purpose as the no-fault benefits, and
>
> 2) Are provided or are required to be provided as a result of the same accident.

> An insurer providing personal protection insurance benefits shall offer, at appropriately reduced premium rates, deductibles and exclusions reasonably related to other health and accident coverage on the insured. The deductibles and exclusions required to be offered by this section shall be subject to prior approval by the commissioner and shall apply only to benefits payable to the person named in the policy, the spouse of the insured and any relative of either domiciled in the same household.

Plaintiff's position is that this section was intended to modify § 3109(1) and that the two statutes must be read together. Plaintiff submits that because he was not offered coördination under § 3109a, the set-off provision of § 3109(1) is inoperable and defendant is liable to plaintiff for an amount equal to that paid for hospital expenses. To address this claim, we first must determine whether § 3109a is applicable in this instance.

C

The defendant argues that military medical benefits are not "other health and accident coverage" because § 3109a applies only to private health-care benefits. See *O'Donnell v State Farm Mutual Automobile Ins Co,* 404 Mich 524; 273 NW2d 829 (1979). In *LeBlanc,* this Court specifically rejected the claim that Medicare benefits were not health and accident coverage within the meaning of § 3109a, reasoning that the legislative history of § 3109a does not indicate an intent to differentiate between public and private benefits in furthering the purpose of reducing premiums commensurate with reduced coverage. Thus, in this instance, the claim that § 3109a is inapplicable must turn on another rationale.

The defendant further argues that the military

medical benefits involved in this case are unlike the Medicare benefits at issue in *LeBlanc,* and, therefore fall outside of the scope of § 3109a. We disagree. This Court has concluded that Blue Cross-Blue Shield benefits constitute "other health and accident coverage" under § 3109a. *Nyquist v Aetna Ins Co,* 84 Mich App 589, 592; 269 NW2d 687 (1978), aff'd 404 Mich 817; 280 NW2d 792 (1979). We reached the same conclusion as to Medicare benefits in *LeBlanc, supra.* Military medical coverage is similar to both Blue Cross-Blue Shield and Medicare in the sense that, in various forms, each is comprehensive coverage of eligible individuals for their medical and hospitalization costs. Further, Blue Cross-Blue Shield coverage, when provided through one's employer, can parallel that which is provided to active military personnel by the federal government under 10 USC 1071 *et seq.* We can perceive no rational basis for concluding that military medical benefits, which essentially serve the same purpose as Blue Cross-Blue Shield and Medicare benefits, are not "health and accident coverage" within the meaning of § 3109a.

In short, pursuant to § 3109(1), plaintiff's military medical benefits normally must be subtracted from his no-fault insurance benefits. Further, our resolution of *Nyquist* and our decision in *LeBlanc*[5] require the conclusion that plaintiff's military medical benefits constitute "other health and accident coverage" pursuant to § 3109a, requiring defendant to offer plaintiff a coördinated no-fault policy. The defendant has conceded that this did

[5] Were we writing on a clean slate, we might well conclude that only those benefits that are health and accident benefits directly financed by the insured are within the coverage of § 3109a. See separate opinion of RYAN, J., in *LeBlanc.* We are not. Moreover, although we are not bound to follow prior precedent if convinced it is incorrect, we are not convinced that *LeBlanc* was wrongly decided.

not occur. Therefore, as in *LeBlanc,* the setoff mandated by § 3109(1) may not be employed.

We recognize that our resolution of this case may provide a windfall to the insured if, as claimed by the defendant, the plaintiff purchased a policy with reduced premiums in light of his military status.[6] However, we are unable to conclude that this was a coördinated policy.[7]

We do not suggest that insurers must sell uncoördinated policies to parties who are eligible for § 3109(1)-type governmental benefits. However, § 3109a does modify § 3109(1) to the extent that the policy offered by insurers to such parties must be coördinated in the same manner as coördinated

[6] Defendant's Michigan Information and Option Form specifically provides:

> A special lower military Personal Injury Protection rate has been established which takes into consideration the benefits provided for military personnel. Therefore, neither the $300 deductible nor the coördination of benefits options described above may be selected by armed forces personnel.

However, nowhere in this form or in the defendant's policy is it stated the actual amount of this reduced premium or if it equals that which plaintiff would have received under a coördinated plan.

We note that under the Insurance Code a no-fault insurer is required to file with the Insurance Commissioner its rating plan, but that commissioner approval of that plan need not be obtained. See MCL 500.2105-500.2111; MSA 24.12105-24.12111.

[7] We recognize that the Commissioner of Insurance has issued guidelines for the implementation of § 3109a which include:

> "The act applies to commercial and personal automobile insurance, but to the extent commercial rates have already been reduced to take account of workmen's compensation benefits or other statutorily required benefits, no further reductions would be required." [*LeBlanc, supra,* p 219 (LEVIN, J., *dissenting*), quoting Bulletin AD 74-2 (issued as ED-1), April 15, 1974.]

Admittedly this guideline would suggest that § 3109a is satisfied by an automatic coördination plan as offered by defendant. However, § 3109a mandates that an insurer offer the insured a coördinated policy, as well as appropriately reduced premium rates to reflect the health and accident coverage on the insured. We cannot read this guideline to negate the plain language of § 3109a.

policies are offered to other purchasers who may have overlapping benefits.

III

The decision of the Court of Appeals is reversed. The trial court's order granting partial summary judgment to plaintiff is reinstated.

RILEY, C.J., and LEVIN, BRICKLEY, CAVANAGH, BOYLE, ARCHER, and GRIFFIN, JJ., concurred.

LEVIN, J. I have signed the opinion of the Court but continue to adhere to the view expressed in dissent in *LeBlanc*.

PEOPLE v SLIGH

Docket No. 81963. Decided November 17, 1988.

Stanley L. Sligh was convicted by a jury in Detroit Recorder's Court, Geraldine Bledsoe Ford, J., of second-degree murder. The Court of Appeals, GRIBBS, P.J., and HOLBROOK, JR., and N. J. LAMBROS, JJ., reversed in an unpublished opinion per curiam and remanded the case for a new trial (Docket No. 93016). The people applied for leave to appeal, and the Supreme Court, in lieu of granting leave to appeal, ordered the application held in abeyance pending decision in other cases before the Court. Thereafter, the defendant moved for release on personal recognizance pending final disposition of the people's application and for immediate consideration of his motion for release.

In a unanimous opinion per curiam, the Supreme Court *held:*

During the pendency of a plaintiff's application for leave to appeal in the Supreme Court from a Court of Appeals reversal of a criminal conviction, a motion by the defendant for bond pending appeal is governed by §§ 8 and 9 or 9a of Chapter 10 of the Code of Criminal Procedure.

Sections 8 and 9 of the Code were amended by 1977 PA 34 to provide that a defendant may be admitted to bail pending appeal, provided the offense charged is bailable and is not an assaultive crime as defined by § 9a. The obvious primary purpose of the amendments was to enact restrictive preconditions on admission to bail on appeal by defendants convicted of assaultive crimes, creating an implication that the statute is to apply in situations such as the instant case. Changes in terminology also imply that a defendant need not be an appellant in a postconviction appeal for the provisions to apply. The amendments additionally are consistent with § 12.

The defendant's motion for immediate consideration is granted and his motion for release on personal recognizance is denied.

*Frank J. Kelley,* Attorney General, *Louis J. Caruso,* Solicitor General, *John D. O'Hair,* Prosecuting Attorney, and *Jeffrey Caminsky,* Assistant Prosecuting Attorney, for the people.

*Robert M. Morgan* for the defendant.

PER CURIAM. The issue in this case is which statute applies to a defendant's motion for bond pending a prosecutor's appeal to this Court from a decision of the Court of Appeals which reverses a defendant's felony conviction and remands for a new trial. Defendant argues that the applicable statute is that covering appeals by the people from a court of record, MCL 765.7; MSA 28.894. Plaintiff argues for application of the statutes covering postconviction appeals, MCL 770.8; MSA 28.1105, MCL 770.9; MSA 28.1106, and MCL 770.9a; MSA 28.1106(1). While none of these statutes was written with the present situation in mind, we hold that the statutes covering postconviction appeals are more apt.

I

Defendant was tried on a charge of second-degree murder before a jury of the Recorder's Court of the City of Detroit. The victim was a former roommate of defendant. The victim's body was found outside defendant's house. Part of the evidence used against defendant was a statement given by defendant to police several hours after his arrest. In it, defendant said he had been sleeping on his couch when he was awakened by an intruder. Claiming to have been fearful for his life, defendant admitted beating the victim with a table leg. The trial court instructed the jury on second-degree murder and self-defense, but refused a defense request to instruct on manslaughter. The jury found defendant guilty of second-degree murder.

Defendant appealed in the Court of Appeals, which reversed in an unpublished per curiam

opinion decided October 14, 1987 (Docket No. 93016). The Court found that two preserved claims of error required reversal: the failure to instruct on voluntary manslaughter, and an argument by the trial prosecutor about defendant's failure to tell his story to police at the time of his arrest.

Plaintiff filed a timely application for leave to appeal in this Court. We ordered the application held in abeyance for cases pending before this Court.[1]

Defendant has filed a motion for release on personal recognizance, pending final disposition of plaintiff's application,[2] and a motion for immediate consideration of the motion for release.

II

Defendant argues that he is no longer incarcerated pursuant to a presumptively valid conviction. He argues that he should be treated as if he were an incarcerated defendant who has been awaiting trial since the date of the Court of Appeals decision. Defendant argues that he has a right to post bail on personal recognizance under Const 1963, art 1, §§ 15 and 16[3] and MCL 765.7; MSA 28.894.

[1] The cases are *People v McReavy*, 429 Mich 857 (1987), *People v Sutton*, 429 Mich 858 (1987), and *People v Cetlinski*, 429 Mich 858 (1987).

[2] A similar motion was considered and denied by the trial court.

[3] Const 1963, art 1, § 15 provides:

> No person shall be subject for the same offense to be twice put in jeopardy. All persons shall, before conviction, be bailable by sufficient sureties, except that bail may be denied for the following persons when the proof is evident or the presumption great:
>
> (a) A person who, within the 15 years immediately preceding a motion for bail pending the disposition of an indictment for a violent felony or of an arraignment on a warrant charging a violent felony, has been convicted of 2 or more violent felonies under the laws of this state or under substantially similar laws

MCL 765.7; MSA 28.894 provides:

> If an appeal is taken by or on behalf of the people of the state of Michigan from a court of record, the defendant shall be permitted to post bail on his or her own recognizance, pending the prosecution and determination of the appeal, unless the trial court determines and certifies that the character of the offense, the respondent, and the questions involved in the appeal, render it advisable that bail be required.

Plaintiff argues that admission to bail in any

of the United States or another state, or a combination thereof, only if the prior felony convictions arose out of at least 2 separate incidents, events, or transactions.

(b) A person who is indicted for, or arraigned on a warrant charging, murder or treason.

(c) A person who is indicted for, or arraigned on a warrant charging, criminal sexual conduct in the first degree, armed robbery, or kidnapping with intent to extort money or other valuable thing thereby, unless the court finds by clear and convincing evidence that the defendant is not likely to flee or present a danger to any other person.

(d) A person who is indicted for, or arraigned on a warrant charging, a violent felony which is alleged to have been committed while the person was on bail, pending the disposition of a prior violent felony charge or while the person was on probation or parole as a result of a prior conviction for a violent felony.

If a person is denied admission to bail under this section, the trial of the person shall be commenced not more than 90 days after the date on which admission to bail is denied. If the trial is not commenced within 90 days after the date on which admission to bail is denied and the delay is not attributable to the defense, the court shall immediately schedule a bail hearing and shall set the amount of bail for the person.

As used in this section, "violent felony" means a felony, an element of which involves a violent act or threat of a violent act against any other person.

Const 1963, art 1, § 16 provides:

> Excessive bail shall not be required; excessive fines shall not be imposed; cruel or unusual punishment shall not be inflicted; nor shall witnesses be unreasonably detained.

postconviction appeal is governed by MCL 770.8; MSA 28.1105 and MCL 770.9; MSA 28.1106 (for nonassaultive crimes) or MCL 770.9a; MSA 28.1106(1) (for assaultive crimes). The last-cited statute requires, as a precondition for admission to bail, proof by clear and convincing evidence that the defendant is not likely to pose a danger to other persons and that the appeal or application raises a substantial question of law or fact.

III

The statutes cited by the parties were written prior to the creation of the Court of Appeals. Neither of the statutes, as originally enacted, contains any reference to admission to bail pending further review of an intermediate appellate court reversal of a conviction. However, amendments of the statutes relied on by plaintiff contain slight but sufficient indications of legislative intent to apply to this situation.

The statute relied on by defendant, MCL 765.7; MSA 28.894, was first enacted as § 7 of Chapter 5 of the Code of Criminal Procedure in 1927 PA 175. The other sections of that chapter refer to pretrial bail procedures, MCL 765.1 *et seq.;* MSA 28.888 *et seq.,* former 1929 CL 17163 *et seq.*[4]

The statutes relied on by plaintiff, MCL 770.8; MSA 28.1105, MCL 770.9; MSA 28.1106, and MCL 770.9a; MSA 28.1106(1) are §§ 8, 9, and 9a of Chapter 10 of the Code of Criminal Procedure.

[4] 1929 CL 17366 granted the prosecutor the right to take a writ of error from a decision quashing an indictment, arresting judgment, or directing a judgment of acquittal "where such decision is based upon the invalidity or construction of the statute upon which such indictment is founded." That section indicated: "The right of defendant to bail upon issuance of a writ of error under the provisions of this section shall be governed by the provisions of chapter five of this act." Similar provisions were found at former MCL 770.12; MSA 28.1109 prior to amendment by 1988 PA 66.

Chapter 10 deals with postconviction procedures. Prior to their amendment by 1977 PA 34, §§ 8 and 9 provided:

> Sec. 8. During the time between judgment and the decision of the supreme court or any justice thereof on the application for a writ of error under this act, the trial judge may, in his discretion, admit the defendant to bail, if the offense charged is bailable.
>
> Sec. 9. Upon granting application for a writ of error the appellant may, in the discretion of the supreme court or any justice thereof, be admitted to bail, if the offense charged be bailable.

These sections and that relied on by defendant were written almost forty years prior to creation of the Court of Appeals. There is nothing to suggest that they were intended to deal with the possibility of a further appeal after a reversal by a then-nonexistent intermediate appellate court.

Sections 8 and 9 of Chapter 10 were amended and § 9a was added by 1977 PA 34. These now provide:

> Sec. 8. During the time between the trial court judgment and the decision of the court to which an appeal is taken, the trial judge may admit the defendant to bail, if the offense charged is bailable and if the offense is not an assaultive crime as defined in section 9a of this chapter.
>
> Sec. 9. During the pendency of an appeal or application for leave to appeal, a justice or judge of the court in which the appeal or application is filed may admit the defendant to bail, if the offense charged is bailable and if the offense is not an assaultive crime as defined in section 9a of this chapter.
>
> Sec. 9a. (1) A defendant convicted of an assaultive crime and awaiting sentence shall be detained and shall not be admitted to bail, unless the trial

court finds by clear and convincing evidence that the defendant is not likely to pose a danger to other persons.

(2) A defendant convicted of an assaultive crime and sentenced to a term of imprisonment who has filed an appeal or an application for leave to appeal shall be detained and shall not be admitted to bail, unless the trial court or the court to which the appeal is taken finds by clear and convincing evidence that both of the following exist:

(a) The defendant is not likely to pose a danger to other persons.

(b) The appeal or application raises a substantial question of law or fact.

(3) As used in this section, "assaultive crime" means an offense against a person described in any of the following sections: 82 to 89, 316, 317, 321, 349 to 350, 397, 520a to 520g, 529, and 530 of Act No. 328 of the Public Acts of 1931, as amended, being sections 750.82 to 750.89, 750.316, 750.317, 750.321, 750.349 to 750.350, 750.397, 750.520a to 750.520g, 750.529, and 750.530 of the Michigan Compiled Laws.

(4) The appeal or application for leave to appeal filed by a person denied bail under this section shall be expedited pursuant to rules adopted for that purpose by the supreme court.

The obvious primary purpose of the amendments was to enact restrictive preconditions on admission to bail on appeal by defendants convicted of assaultive crimes.[5] There are, however, three changes that create an implication that the Legislature intended the statute to apply in the instant situation. First, § 9 was amended to refer to a "judge of the court in which the appeal or application is filed." The former language referred to a

[5] The amendment does not suggest that factors such as those listed in *People v Giacalone,* 16 Mich App 352; 167 NW2d 871 (1969), do not have continued relevance to all crimes, assaultive or not. See also anno: *Right of defendant in state court to bail pending appeal from conviction—Modern cases,* 28 ALR4th 227.

"justice" and "the supreme court." This change of language implies recognition of the existence of the Court of Appeals. There is no mention of the applicability of the statute to a reversal of a conviction by the Court of Appeals and subsequent appeal to this Court.

Second, the amendment also changed terminology from "appellant"[6] in the former statute to "defendant." This change implies that the defendant need not be the appellant in a postconviction appeal for the provisions of the sections to apply. This argument supports plaintiff's position. It is based on a rather subtle, ambiguous way to deal with a situation which could easily be addressed by a direct statement on whether the statutes apply.

Third, 1977 PA 34 amended subsection (2) of § 12, MCL 770.12; MSA 28.1109 (the prosecutor's appeal section), to provide:

> The right of the defendant to bail upon appeal under this section shall be governed by section 9a of this chapter and section 7 of chapter 5 [MCL 765.7; MSA 28.894].

This language[7] directly evidences a legislative in-

[6] In the former statute "appellant" could only refer to defendant.

[7] As amended by 1977 PA 34, MCL 770.12; MSA 28.1109, provided the people with the following right of appeal:

> (1) An appeal may be taken by and on behalf of the people of this state from a court of record in all criminal cases, in any of the following instances:
>
> (a) From a decision or judgment quashing or setting aside an indictment, information, or other charging instrument, or a count thereof, where that decision or judgment is based upon the invalidity or construction of the statute upon which the indictment, information, or other charging instrument is founded.
>
> (b) From a decision arresting a judgment of conviction or directing a judgment of acquittal for insufficiency of the indict-

tent that bail for a defendant convicted of an assaultive crime be determined under § 9a, even when the plaintiff is the appellant. That intent would apply to this case. The language is ambiguous. It refers to appeals permitted the people under § 12. Prior to the change effected by 1988 PA 66 the statute did not include appeal by the people of an intermediate appellate court reversal of a conviction.

The Legislature's expression of its intent to apply § 9a to the instant situation is clear enough that it should be given effect despite the imperfection of the language used.[8] We hold today that,

> ment, information, or other charging instrument, where the decision is based upon the invalidity or construction of the statute upon which the indictment, information, or other charging instrument is founded.
>
> (c) From a decision or judgment sustaining a special plea in bar, when the defendant has not been put in jeopardy, or from another order of the court relative to admission of evidence or proceedings had or made before the defendant is put in jeopardy.

This portion of § 12 was further amended by 1988 PA 66, which applies only to crimes committed on or after March 30, 1988. Generally, the section now permits appeals consistent with double jeopardy limitations. It is now broad enough to include the present situation. However, as with 1977 PA 34, there is no direct comment on the issue before us.

[8] We note that the intent indicated by the Legislature in 1977 PA 34 is consistent with the limitation placed on preconviction bail by the amendment of Const 1963, art 1, § 15, adopted at the general election of 1978. Prior to the amendment, the constitution contained restrictions on preconviction admission to bail only when the charge was murder or treason. After amendment, extensive restrictions were added for other violent felonies, see n 3. While the constitutional provision is different from § 9a, the differences are not critical because we cite the constitutional provision only by analogy. By its terms, the constitutional provision applies to bail before conviction. Defendant has been convicted. That conviction shows that the trial court and jury, if any, were convinced of defendant's factual guilt. The same evidence should suffice for a showing that "the proof is evident or the presumption great" under the constitutional provision. Even if the constitutional provision applied, this defendant would not automatically qualify for bail because he is charged with murder. Const 1963, art 1, § 15(b).

during the pendency of a plaintiff's application for leave to appeal to this Court from a Court of Appeals reversal of a criminal conviction, a motion by the defendant for bond pending appeal will be governed by §§ 8 and 9 or 9a, as applicable, of Chapter 10 of the Code of Criminal Procedure. Defendant does not argue that he qualifies for bond under those conditions.[9] We therefore grant defendant's motion for immediate consideration and deny his motion for release on personal recognizance.

RILEY, C.J., and LEVIN, BRICKLEY, CAVANAGH, BOYLE, ARCHER, and GRIFFIN, JJ., concurred.

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[9] See n 8.

PEOPLE v JOHNSON

Docket No. 81352. Argued April 6, 1988 (Calendar No. 9). Decided November 18, 1988.

John R. Johnson was convicted by a jury in the Washtenaw Circuit Court, Ross W. Campbell, J., of assault and battery. The Court of Appeals, HOOD, P.J., and MACKENZIE and R. M. PAJTAS, JJ., reversed in an opinion per curiam, holding that the warrant to search for and seize the defendant was invalid, and that photographs taken of the defendant while in custody and used in a photographic line-up should not have been admitted into evidence (Docket No. 89246). The people appeal.

In an opinion by Justice BRICKLEY, joined by Chief Justice RILEY and Justices CAVANAGH, ARCHER, and GRIFFIN, the Supreme Court *held:*

The search warrant issued by the magistrate in this case was not provided for by MCL 780.652; MSA 28.1259(2). However, its issuance did interpose a determination of probable cause to search, which along with the presence of probable cause to arrest thereby removed any Fourth Amendment barrier to the arrest of the defendant in his residence.

The question whether the identification procedure used by the police was consistent with Michigan law was not clearly considered below or briefed in the Supreme Court, requiring remand to the Court of Appeals for reconsideration of the issue whether the use of a photographic line-up was proper where the defendant without the advice of counsel was photographed while under arrest, but released prior to the line-up. If the Court of Appeals determines that the procedure was not consistent with Michigan law, it should further determine whether there was an independent basis for the complainant's in-court identification of the defendant and whether the improper admission of the results of the photographic line-up was harmless.

Justice LEVIN concurred in the result.

Justice BOYLE, concurring, stated that the proper focus of the inquiry regarding the admissibility of the evidence at issue is whether it was seized in compliance with the Fourth Amendment. While neither the search warrant statute nor the warrant in this case authorized the seizure of the defendant as

evidence, the warrant protected the defendant's privacy interest in being free from an unreasonable search, and there was probable cause to justify his arrest without a warrant.

Reversed and remanded.

161 Mich App 205; 409 NW2d 784 (1987) remanded.

*Frank J. Kelley,* Attorney General, *Louis J. Caruso,* Solicitor General, *William F. Delhey,* Prosecuting Attorney, and *David A. King,* Assistant Prosecuting Attorney, for the people.

*McCoy & McDaniel* (by *Timothy E. McDaniel*) for the defendant.

BRICKLEY, J. In this case, the police obtained a search warrant to search a mobile home for the presence of the prime suspect in a case being investigated.

I

The record indicates that there was probable cause to believe that the defendant had committed the crime in question which occurred a few days earlier at a local store. The complainant, a nine-year-old girl, claimed that defendant touched her on the buttocks while in a Meijer store. Immediately after she was touched, she turned to see who had touched her and the only person she saw was the person she later identified as defendant Johnson. She testified that when she looked at him, he was laughing.

The complainant then went to her mother, who was in a neighboring section of the store. She told her mother what had happened, and her mother looked for the perpetrator in the area, did not see him, and so had a clerk call security. The complainant, her mother and brother, and a clerk began looking for the man in an area of the store in which the complainant's brother had seen him.

The complainant spotted him as he was approaching an exit of the store, and they followed him out of the store. At about that time, security guards arrived. Defendant then engaged in behavior thought to indicate that he was trying to avoid detection in that he had his son get in their car, but then returned to the store for some time. When he came back out, he returned to his car and left. The security guards followed him for some time and copied down the license plate number of the car he was driving.

The case was then referred to the police, who traced the license number and determined that the car belonged to a certain woman who lived in a mobile home park. The complainant had given a description of her assailant to the security guard. The police summarized her description as follows:

> [M]ale, six (6) feet tall, two hundred and thirty-five (235) pounds, race believed to be Iranian or Asian, curly collar-length black hair, approximately forty (40) years old, wearing a green Army type jacket with sleeves rolled up, brown tee shirt, tennis shoes, brown pants, dark blue fishing type hat.

The police contacted the manager of the park, who told them that a man fitting the description lived in a mobile home in the park with the woman to whom the car was registered.

On the basis of this information, a police detective telephoned the defendant at the mobile home and asked him to allow himself to be photographed. He refused. The detective therefore sought and obtained a search warrant which stated:

> The person, place or thing to be searched is described as and located at:

Lot 186 and the mobile home thereon of the Lakeview Trailer Park, located at 9942 Geraldine, Ypsilanti Township, Washtenaw County

The property to be searched for and seized, if found, is specifically described as:

The person of John Robert Johnson, aka Edward Woods.

The affidavit supporting the warrant contained nine subsections. Seven of those subsections provided the information described above, i.e., the grounds or the probable cause for the search. At the end of the affidavit, two subsections were included which read as follows:

G). I wish to conduct a lineup, either live or photographic, at the pleasure of Mr. Woods, to determine the identity of the suspect.

H). If the lineup is live, I wish the court to require Mr. Woods' attendance at the Washtenaw County Sheriff's Department for no more than four hours on a convenient date before June 15, 1984.

The record is unfortunately not completely clear as to what occurred when the detective arrived at the mobile home with the warrant. Apparently, defendant answered the knock, but stayed inside the home. There is no testimony as to how many officers were present or the manner in which they confronted defendant.

The detective told defendant that he could either appear in a physical line-up or allow his photograph to be taken. Defendant apparently stated that he did not wish to do either, and the detective then "indicated to him [that] he had to do one or the other . . . ." At the preliminary examination, the detective testified that "when we made contact with him that morning, he refused to participate in a

physical line-up. At which time I explained to him I would be taking photographs." Defendant was then ordered to leave his trailer and was required, against his will, to be photographed.

The complainant identified the defendant's photograph and later identified him at trial. Defendant was convicted of assault and battery[1] and appealed as of right. The Court of Appeals reversed the conviction, holding that the photographs taken while defendant was in custody and the resulting photographic line-up identification should have been suppressed because MCL 780.652(d); MSA 28.1259(2)(d) did not provide for search warrants for the purpose of photographing a suspect. We granted leave, inter alia, to review whether or not suppression was required.

II

The language of the warrant makes clear that the "object or thing" being searched for was the defendant. The warrant itself makes no mention of the taking of photographs. Since the object of the search warrant was the person of the defendant, it provides little guidance to inquire, as did the Court of Appeals, whether there was a "nexus" between the photographs taken and the crime in question.[2]

This mischaracterization of the object of the search warrant is also apparent in this Court's order granting leave to appeal which mirrored the Court of Appeals analysis. The order granting leave to appeal stated the primary issue as follows:

> [W]hether, under MCL 780.652(d); MSA 28.1259(2)(d), a search warrant may be issued to

[1] MCL 750.81; MSA 28.276.

[2] See *Warden v Hayden*, 387 US 294; 87 S Ct 1642; 18 L Ed 2d 782 (1967).

compel a person to participate in a line-up or to be photographed . . . .

The confusion inherent in the question as phrased above is evident in the Court of Appeals opinion. That Court attempted to distinguish between searches for "incriminating" as opposed to "identifying" evidence and stated that there is no nexus between a photograph that is obtained for use in a photographic line-up and criminal behavior.[3]

By viewing the photograph as the object of the search, the Court of Appeals failed to address the fact that the defendant was taken into custody, as well as the relationship of that custody to the subsequent use of the photograph in an identification line-up which occurred after defendant was released from custody.

The examination of whether the police procedure in this case was lawful must therefore encompass two questions which are subsumed with the issue defined in our order granting leave. First, was the arrest of defendant lawful? Second, once he was arrested and a photograph was taken, was

[3] The evidence obtained in [*People v Lovett*, 85 Mich App 534; 272 NW2d 126 (1978)] was incriminating and tended to identify the defendant, but it did not identify him in the "pure" sense of a pretrial line-up. In the instant case, the evidence seized with the search warrant was used solely to identify defendant, not to incriminate him. The case law cited by the prosecution does not support its contention that the photograph was evidence of a criminal activity. In abolishing the "mere evidence" rule, the United States Supreme Court stated that, in order for an item to be subject to seizure, there must be a nexus between the item and the criminal behavior. *Warden v Hayden*, 387 US 294, 306-307; 87 S Ct 1642; 18 L Ed 2d 782 (1967). There is no nexus between a photograph that is obtained for use in a photographic line-up and criminal behavior. Therefore, the search warrant was issued for an improper purpose and is invalid. [*People v Johnson*, 161 Mich App 205, 209; 409 NW2d 784 (1987).]

the identification procedure employed consistent with the evidentiary principles of our jurisprudence?

III

The statute governing the scope of search warrants which may be issued by the courts of this state, MCL 780.652; MSA 28.1259(2), reads as follows:

> A warrant may be issued to search for and seize any property or other thing which is either:
> (a) Stolen or embezzled in violation of any law of this state.
> (b) Designed and intended for use or which is or has been used as the means of committing a criminal offense.
> (c) Possessed, controlled or used wholly or partially in violation of any law of this state.
> (d) Evidence of crime or criminal conduct on the part of any person.
> (e) Contraband.
> (f) The bodies or persons of human beings or of animals, who may be the victims of a criminal offense.
> (g) The object of a search warrant under any other law of this state providing for the same. If a conflict exists between this act and any other search warrant law, this act shall be deemed controlling.

This statute does not provide for the seizure of criminal suspects. It explicitly limits its scope to "property or other thing[s]." Similarly, the search warrant itself defined the defendant as "the property to be searched for and seized." In addition, the probable cause determination made by a magistrate considering a search warrant application is not identical to that made by a magistrate when

deciding whether or not to issue an arrest warrant. The difference has been described as follows:

> It is generally assumed that the same quantum of evidence is required whether one is concerned with probable cause to arrest or probable cause to search. But even if this is so, it does not follow that probable cause for arrest and probable cause for search are identical in all respects. Each requires a showing of probabilities as to somewhat different facts and circumstances, and thus one can exist without the other. In search cases, "two conclusions necessary to the issuance of the warrant must be supported by substantial evidence: that the items sought are in fact seizable by virtue of being connected with criminal activity, and that the items will be found in the place to be searched." It is *not* also necessary that a particular person be implicated in the crime under investigation. By comparison, in arrest cases there must be probable cause that a crime has been committed and that the person to be arrested committed it, which of course can exist without any showing that evidence of the crime will be found at premises under that person's control. [1 LaFave & Israel, Criminal Procedure, § 3.3, pp 184-185.]

Since it cannot be assured that magistrates would make a finding as to the existence of probable cause to arrest when deciding whether or not to issue a search warrant, it would be unwise to treat the presence of a search warrant for a suspect as a judicial finding of probable cause to arrest.

In spite of our recognition that MCL 780.652(d); MSA 28.1259(2)(d) does not provide for search warrants, the objects of which are persons other than victims of crime, we nevertheless find that the arrest of the defendant was lawful on the basis of the information possessed by the police prior to seeking or executing the warrant. A warrant is generally not required to accomplish a felony ar-

rest in and of itself. Indeed, MCL 764.15; MSA 28.874 makes clear that in most cases an arrest warrant is not required so long as there is probable cause to believe that defendant committed a felony.[4] Nevertheless, the arrest occurred in the defendant's residence, and therefore both the federal and the state constitutions require that special protections be afforded. *Payton v New York,* 445 US 573; 100 S Ct 1371; 63 L Ed 2d 639 (1980); *People v Oliver,* 417 Mich 366, 378-379; 338 NW2d 167 (1983).

In *Payton,* the United States Supreme Court held that absent a warrant, the fruits of an arrest of a suspect in his residence must be suppressed. The purpose of this holding was to protect the suspect's Fourth Amendment privacy interests in the location of the arrest, i.e., his own home.[5] The *Payton* Court did not foreclose the possibility that

[4] The statute reads in part:

(1) A peace officer may, without a warrant, arrest a person in the following situations:

(a) When a felony, misdemeanor, or ordinance violation is committed in the peace officer's presence.

(b) When the person has committed a felony although not in the presence of the peace officer.

(c) When a felony in fact has been committed and the peace officer has reasonable cause to believe that the person has committed it.

(d) When the peace officer has reasonable cause to believe that a felony has been committed and reasonable cause to believe that the person has committed it.

[5] It is a "basic principle of Fourth Amendment law" that searches and seizures inside a home without a warrant are presumptively unreasonable. Yet it is also well settled that objects such as weapons or contraband found in a public place may be seized by the police without a warrant. The seizure of property in plain view involves no invasion of privacy and is presumptively reasonable, assuming that there is probable cause to associate the property with criminal activity. . . .

* * *

[T]his distinction has equal force when the seizure of a

a search warrant could be used to protect that interest.[6] As stated by the dissenters in the New York Court of Appeals decision,[7] which was reversed by the United States Supreme Court, what underlies the *Payton* problem is the "necessity of prior judicial approval [of] any contemplated entry, regardless of the purpose for which entry is sought."[8]

We conclude that defendant's privacy interest in his home was adequately protected in this case. While we have stated above that a search warrant cannot serve as the sole basis for the seizure of a suspect, a neutral magistrate did make a determination that there was probable cause to believe that defendant resided and would be present at the place to be searched. This, combined with the

person is involved. Writing on the constitutional issue now before us for the United States Court of Appeals for the District of Columbia Circuit sitting en banc, *Dorman v United States*, 140 US App DC 313; 435 F2d 385 (1970), Judge Leventhal first noted the settled rule that warrantless arrests in public places are valid. He immediately recognized, however, that

"[a] greater burden is placed . . . on officials who enter a home or dwelling without consent. Freedom from intrusion into the home or dwelling is the archetype of the privacy protection secured by the Fourth Amendment." *Id.*, at 317; 435 F2d, at 389. (Footnote omitted.)

[Judge Leventhal] reasoned that the constitutional protection afforded to the individual's interest in the privacy of his own home is equally applicable to a warrantless entry for the purpose of arresting a resident of the house; for it is inherent in such an entry that a search for the suspect may be required before he can be apprehended. [He] concluded that an entry to arrest and an entry to search for and to seize property implicate the same interest in preserving the privacy and the sanctity of the home, and justify the same level of constitutional protection. [*Payton, supra,* 445 US 586-588.]

[6] Given the existence of probable cause to arrest, the *Payton* Court noted that "an arrest warrant requirement may afford less protection [of the privacy interest in one's home] than a search warrant requirement . . . ." *Payton, supra,* 445 US 602.

[7] *New York v Payton,* 45 NY2d 300; 380 NE2d 224 (1978).

[8] *Id.* at 321 (Cooke, J., dissenting).

pre-warrant existence of probable cause to arrest, leads us to conclude that the fruits of defendant's arrest, i.e., the photographs, need not be suppressed.[9] We need not hold that the search warrant falls within the search warrant statute, MCL 780.652(d); MSA 28.1259(2)(d), nor that it can serve as a basis for arrest in order to recognize that, in the unique circumstances of this case, it satisfies the privacy concerns raised in *Payton*.[10] The clearest course under *Payton* and *Oliver* would have been for the police to have obtained an arrest warrant. However, we conclude that in this special setting, the magistrate's issuance of the search warrant, while not a basis for either a search for or a seizure of defendant under Michigan statutory law, "interpose[d] [a] magistrate's determination of probable cause"[11] to search and thereby removed

[9] In light of this conclusion, we do not reach the inevitable discovery issue raised by the parties.

[10] "The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers. Crime, even in the privacy of one's own quarters, is, of course, of grave concern to society, and the law allows such crime to be reached on proper showing. The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent." [*Id.*, 445 US 586, n 24 (quoting *Johnson v United States*, 333 US 10, 13-14; 68 S Ct 367; 92 L Ed 436 [1948]).]

[11] *Payton, supra*, 445 US 602.

any Fourth Amendment barrier to the arrest of defendant in his home, rather than in a public place, in light of the fact that there was probable cause to arrest, independent of the search warrant.[12]

IV

The remaining question concerns the propriety of the identification procedure employed. After arresting the defendant, the police did not take him to the station in order to accomplish a corporeal line-up. Instead, the police offered him a choice. He could either consent to appear at the sheriff's department for a corporeal line-up or he could allow the police to take his photograph for use in a later photographic line-up. As stated *ante,* p 686, defendant initially refused to do either. After being told that he could not refuse both procedures, he acquiesced in being photographed. At the preliminary examination, defense counsel argued that this procedure violated Michigan evidentiary rules concerning line-up identifications. These rules provide that where a suspect is in custody, even prior to the initiation of judicial proceedings against him, he must be given a corporeal rather than a photographic line-up unless certain exceptional circumstances exist,[13] and even then he

[12] By recognizing the import of the magistrate's determination for the limited purpose of protecting the privacy of defendant's home, we do not suggest that a magistrate's determination that there is probable cause to believe that a suspect can be located at his or a third party's home can be the basis for an appellate court to conclude that there was probable cause to arrest.

[13] The exceptions provided for in *People v Franklin Anderson,* 389 Mich 155, 186-187, n 22; 205 NW2d 461 (1973), are:

1. It is not possible to arrange a proper line-up.
2. There are insufficient numbers of persons available with defendant's physical characteristics.
3. The nature of the case requires *immediate* identification.

must be afforded "the right to counsel as much as he would for corporeal identification procedures." *People v Franklin Anderson,* 389 Mich 155, 187; 205 NW2d 461 (1973).[14]

The magistrate rejected this argument on the grounds that defendant was not in custody at the time of the line-up. In his appeal before the Court of Appeals, without squarely appealing the identification procedure, defendant nonetheless did argue that, in using a search warrant to place him under police control, the police avoided the protection afforded under Michigan evidentiary law regarding line-up procedures.[15]

In light of the Court of Appeals opinion and the imprecision in the order granting leave to appeal to this Court, the issue whether the identification procedure used in this case complied with *Anderson* and our other decisions in this area[16] has not been clearly considered below or briefed here, even though it was implicated throughout defendant's arguments. We therefore remand this case to the Court of Appeals for reconsideration of the issue whether the use of an uncounseled photographic line-up was consistent with *Anderson* under the circumstances of this case in which the defendant was photographed while under arrest, but was

4. The witnesses are at a place far distant from the location of the in-custody accused.

5. The subject refuses to participate in a line-up and by his actions would seek to destroy the value of the identification.

[14] As set forth in detail in *Anderson,* n 13 *supra,* p 187, the purpose of the rules is to ensure that the dangers of misidentification are minimized.

[15] Essentially, what the police did was arrest the Defendant, take his photo, release him and then held a photo line-up since he was not then in custody.

[16] See *People v Jackson,* 391 Mich 323; 217 NW2d 22 (1974); *People v James Anderson,* 391 Mich 419; 216 NW2d 780 (1974); *People v Lee,* 391 Mich 618; 218 NW2d 655 (1974); *People v Kachar,* 400 Mich 78; 252 NW2d 807 (1977).

released from custody prior to the time of the line-up.

If the Court of Appeals concludes that the identification procedure used was consistent with *Anderson,* no further issues need be addressed by that Court. Should the Court conclude that the procedure was not consistent with *Anderson,* it should then determine whether there was an independent basis for complainant's in-court identification and, if so, whether the improper admission of the results of the photographic line-up was harmless. *People v Kachar,* 400 Mich 78; 252 NW2d 807 (1977).

RILEY, C.J., and CAVANAGH, ARCHER, and GRIFFIN, JJ., concurred with BRICKLEY, J.

LEVIN, J. I concur in the result.

BOYLE, J. I concur on the basis that the warrant in question did not authorize the arrest of the defendant and that the statute does not authorize a seizure of an individual *as evidence.* I write separately to emphasize my view that the proper focus of the inquiry regarding the admissibility of this evidence is whether it was seized in compliance with the command of the Fourth Amendment.

The legislative history of the statute indicates that the Legislature intended to broaden the scope of permissible objects of a search warrant, as defined in *Warden v Hayden,* 387 US 294; 87 S Ct 1642; 18 L Ed 2d 782 (1967). In *Warden,* the Court rejected the distinction previously made between the seizure of items of evidential value only and the seizure of instrumentalities, or fruits of a crime or contraband.

Speaking for the Court, Justice Brennan noted the rejection of property premises as the basis for

application of the Fourth Amendment and observed that the principle object of the Fourth Amendment is the protection of privacy afforded by the evaluation of a neutral magistrate. The Court held that "[t]he requirements of the Fourth Amendment can secure the same protection of privacy whether the search is for 'mere evidence' or for fruits, instrumentalities or contraband," and that "in the case of 'mere evidence' probable cause must be examined in terms of cause to believe that the evidence sought will aid in a particular apprehension or conviction." *Id.* at 306-307.

The predecessor of the statute involved in this case, 1948 CL 776.1, 776.2; MSA 28.1259, 28.1260 authorized warrants only to search for and seize instrumentalities or fruits of crime or contraband.

It is evident that the Legislature broadened the scope of the current statute to permit a search for "[e]vidence of crime or criminal conduct on the part of any person." Thus, if the warrant in this case had authorized the seizure of already existing photographs of the defendant, the statute would authorize their seizure.

However, just as it is likely that the Legislature intended to expand the search warrant statute to permit the seizure of all evidence that could be obtained in compliance with the constitution, we cannot assume that the Legislature intended to permit a seizure of an individual by process that does not safeguard Fourth Amendment interests. Thus, because we proceed here on the basis that the defendant was arrested[1] prior to the photographs being taken, I agree that neither the

[1] We, therefore, do not reach the issue as to whether a brief detention of an individual on less than probable cause for the purpose of taking photos under the judicial supervision of a warrant establishing probable cause for a search comports with the Fourth Amendment. See dictum in *Hayes v Florida,* 470 US 811; 105 S Ct 1643; 84 L

search warrant statute nor the warrant authorized the seizure of the person *as evidence.*[2]

As Justice BRICKLEY concludes, whether the warrant in this case adequately safeguarded the interests protected by the Fourth Amendment depends on what the warrant authorized the police to do. The warrant embodied a judicial finding that there was probable cause to believe defendant would be found on the premises. However, although the affidavit set forth probable cause for arrest, the warrant did not in terms embody a judicial finding that there was probable cause to believe that the defendant had committed a felony. Thus, to paraphrase the language in *Steagald v United States,* 451 US 204; 101 S Ct 1642; 68 L Ed 2d 38 (1981), while the warrant in this case protected defendant's privacy interest in being free from an unreasonable search, the magistrate did not determine that an arrest of the defendant was reasonable.[3]

Recognizing that we do not decide today that the same instrument may not authorize both a search

Ed 2d 705 (1985). The Fourth Amendment may permit a seizure for the purpose of fingerprinting if there is reasonable suspicion that the suspect has committed a criminal act, "if there is a reasonable basis for believing that fingerprinting will establish or negate the suspect's connection with that crime, and if the procedure is carried out with dispatch." *Id.* at 817. "[T]he line is crossed when the police, without probable cause or a warrant, forcibly remove a person from his home . . . and transport him to the police station, where he is detained, although briefly, for investigative purposes. . . . [S]uch seizures, at least where not under judicial supervision, are sufficiently like arrests to invoke the traditional rule that arrests may constitutionally be made only on probable cause. *Id.* at 816.

[2] The Federal Rule of Criminal Procedure which previously authorized the seizure of instrumentalities, fruits, contraband, and property that "constitutes evidence of the commission of a criminal offense" has been amended to permit a search warrant to be issued for a "person for whose arrest there is probable cause . . . ." FR Crim P 41(b).

[3] I agree that there was probable cause justifying an arrest without a warrant.

and an arrest or that suppression of evidence so obtained is appropriate where evidence is seized in compliance with the constitution, although not specifically authorized by statute, I concur in today's decision.

MARROCCO v RANDLETT

Docket No. 79802. Argued November 3, 1987 (Calendar No. 1). Decided December 5, 1988.

W. Thomas Marrocco, Jr., brought an action in the Macomb Circuit Court against James Randlett, former mayor of the City of Warren, and Lillian Dannis, the city treasurer, and others, seeking damages for injuries resulting from the intentional infliction of emotional distress and interference with contractual relations. The plaintiff alleged that the defendants prevented him from performing his occupation which caused him public humiliation and embarrassment, and that defendant Dannis harassed him by raising the tax assessment on his home, forcing sale below market value, and that the assessment subsequently was reduced. The court, Kenneth N. Sanborn, J., granted summary judgment for Randlett and Dannis, on the ground that they were immune from tort liability as government officials. The Court of Appeals, GRIBBS, P.J., and WALSH and BEASLEY, JJ., affirmed in an opinion per curiam (Docket No. 87357). The plaintiff appeals.

In an opinion by Justice LEVIN, joined by Chief Justice RILEY, and Justices BRICKLEY, ARCHER, and GRIFFIN, the Supreme Court *held:*

The highest executive officials of local government are not immune from tort liability for acts outside their executive authority. Whether particular acts are within executive authority depends on factors including the nature of the specific acts alleged, the position of the official alleged to have performed the acts, the definition of the official's authority in the charter, ordinance, or other local law, and the structure and allocation of powers in the particular level of government.

1. The highest executive officials of all levels of government are absolutely immune from all tort liability when acting

REFERENCES

Am Jur 2d, Municipal, County, School, and State Tort Liability §§ 5, 206 *et seq.*

Am Jur 2d, Torts §§ 17, 53.

Comment Note.—Municipal immunity from liability for torts. 60 ALR2d 1198.

within their executive authority; however, the intentional use or misuse of a badge of governmental authority for a purpose unauthorized by law is not an exercise of a governmental function. In determining whether particular acts by executive officials are within executive authority, it is necessary to look to the powers of the offices of the executives as authorized by applicable ordinances or local law.

2. In this case, because the record is greatly limited, reversal and remand to the trial court are required for determination of the authority of the city officials and whether the particular acts alleged were within that authority.

Justice BOYLE, joined by Justice CAVANAGH, concurring, stated that the law of governmental authority should be developed in a systematic fashion on the bases of actual records in specific cases.

In this case, the order granting leave assumed the precedential value of the standard articulated in *Ross v Consumers Power Co (On Rehearing)*, 420 Mich 567 (1984), with regard to elected governmental officials, and limited the issue to the application of *Ross* to these facts. The majority appears to assume the precedential value of *Ross* and *Smith v Dep't of Public Health*, 428 Mich 540 (1987), in reasoning that the defendant officials' intentional tortious acts may carry them outside their authority and the scope of their immunity. However, because of the nature of the parties in *Ross* and *Smith*, the standards are dicta.

Given the scope of the order granting leave in this case, remand to the circuit court for further proceedings is proper because at least insofar as the mayor is alleged to have sought to have the plaintiff fired from the prosecutor's office, it is questionable whether there is immunity under the *Ross* standard.

Reversed and remanded.

GOVERNMENTAL IMMUNITY — MUNICIPAL OFFICIALS — EXECUTIVE AUTHORITY.

The highest executive officials of local government are not immune from tort liability for acts outside their executive authority; whether particular acts are within executive authority depends on factors including the nature of the specific acts alleged, the position of the official alleged to have performed the acts, the definition of the official's authority in the charter, ordinance, or other local law, and the structure and allocation of powers in the particular level of government.

*Weinstein, Gordon, Hoffman & Shulman, P.C.,*

and *Stewart, Nowak & Flinn, P.C.* (by *Eric G. Flinn),* for the plaintiff.

*Garan, Lucow, Miller, Seward, Cooper & Becker, P.C.* (by *Matthew A. Seward* and *Rosalind Rochkind*), for the defendants.

LEVIN, J. The question presented is whether the mayor and the treasurer of a home-rule city are absolutely immune from tort liability pursuant to *Ross v Consumers Power Co (On Rehearing),* 420 Mich 567; 363 NW2d 641 (1984). The trial court granted summary disposition[1] for defendant elected municipal officials on plaintiff's claims alleging tortious conduct. The Court of Appeals affirmed.[2] We reverse because the plaintiff alleged conduct that, if true, may not have been within defendants' executive authority.

I

Plaintiff W. Thomas Marrocco, Jr., was examined on deposition at considerable length. That was the only evidence presented to the trial court by either the plaintiff or the defendants before the court granted summary disposition. We therefore address the legal issues on the basis of the facts Marrocco alleges. The factual record is greatly limited because this case has not been tried. The statement of facts that follows synthesizes Marrocco's allegations in his pleadings and during his depositions.

Marrocco was an assistant city attorney of Warren from 1972 to 1975, when he was appointed city attorney by Mayor Ted Bates. Marrocco asserts

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

[2] *Marrocco v Randlett,* unpublished opinion per curiam of the Court of Appeals, decided October 30, 1986 (Docket No. 87357). We granted leave to appeal, 428 Mich 873; 402 NW2d 469 (1987).

that he applied for and was granted a leave of absence by the Civil Service Board from his civil service position as an assistant city attorney. Defendant Lillian Dannis was elected treasurer of Warren in 1979, and defendant James Randlett was elected mayor of Warren in 1981.

Antecedents of this controversy are described in *City of Warren v Dannis,* 136 Mich App 651, 654; 357 NW2d 731 (1984), where the Court of Appeals referred to a treasurer who preceded Dannis and "made some extremely questionable and completely inappropriate investments which ended in the city's losing large sums of money." These included certain arbitrage transactions. The Securities and Exchange Commission had been holding hearings regarding such transactions engaged in by the City of Ann Arbor and became interested in similar transactions by Warren. The Warren City Council followed Ann Arbor's lead in establishing an Investment Policy Commission (IPC) to set investment policy and oversee city investments. An advisory opinion of the Attorney General[3] agreed that the city council had not unlawfully delegated its authority in setting up the IPC. Marrocco was involved in the formation of the Warren IPC.

After her election as treasurer in 1979, Dannis refused to follow the investment policy. Marrocco's office brought an action for mandamus on behalf of the city to require compliance. Among the irregularities the city asserted in Dannis' behavior as treasurer was exceeding the limit on the amount of funds the city could deposit in one bank—in this instance the Bank of Warren—as a percentage of the bank's net worth. Subsequently, the court granted the city's motion to dismiss a show cause hearing—which had been scheduled for May, 1980

[3] Unpublished opinion of the Attorney General (Senator Art Miller, Jr.), April 20, 1980.

—and to allow it to amend the complaint to ask for a declaratory judgment. Marrocco said that Dannis altered her behavior so as to be in "substantial compliance" with the ordinance for two weeks, but then she again was out of compliance. The city did not seek a preliminary injunction. Two months after the city commenced the mandamus action, the city council adopted the investment policy as an ordinance, in an effort, according to Marrocco, to obtain Dannis' compliance without further litigation.

Marrocco alleges that Dannis and Randlett received consideration in the form of loans and high interest on personal accounts from the Warren Bank in return for the city's low interest deposits on which the bank earned high interest. Marrocco asserts that a bank officer funded one-third of Dannis' election campaign to influence her judgment as a public official.

On November 9, 1981, the Monday after Randlett was elected mayor, Randlett asked Marrocco to leave his position as city attorney. Randlett said that he realized that Marrocco, expecting to leave after the election, had already sought civil service reinstatement to his former position, but Randlett then stated that he did not recognize the reinstatement and that Marrocco's services would no longer be required in any capacity in the city attorney's office. Marrocco said that he desired to stay at least until the following June so that his pension would vest and that the mayor's actions would compel him to bring an action in circuit court. Thomas Barwin, the mayor's assistant, said that they would ruin his reputation or ruin him if he did. Marrocco gathered his things and left his office that day. Also, either that Monday or the prior Friday, Dannis told Marrocco: "I believe you're the most honest City Attorney this City

ever had, but I want you to pack your pencils and get out of town." From November 9, 1981, until Marrocco's ultimate reinstatement in 1983, he was deprived of the opportunity to work as an assistant city attorney in Warren.

Marrocco pursued administrative remedies in January and February, 1982, in an effort to be reinstated. The Civil Service Board had earlier reinstated him as an assistant city attorney. However, Randlett replaced at least two members of the board, and, after reconsidering the issue, it declined to take any action regarding Marrocco's reinstatement.

Marrocco then commenced a civil action, pursuing this course from February to April, 1982. In April, the circuit court ordered Marrocco reinstated as an assistant city attorney. On the first day he reported for work, however, city attorney David Griem, Marrocco's successor, told him that the mayor's office was pressuring Griem to fire him. Marrocco states that Griem told him he would note that Marrocco reported for work, but that he should leave because the mayor and Barwin were going to have him thrown out. Marrocco left and that month accepted a position in the Macomb County Prosecutor's office. He informed his supervisor at his new job that he would return to his Warren job when able to do so.

Within three weeks of Marrocco's April, 1982, start at the prosecutor's office, two supervisors, Paris and Lord, told Marrocco that both Randlett and Dannis were pressuring them to fire him. Griem also told Marrocco that he knew Randlett and Dannis had contacted Paris' office. After two months' work, Marrocco resigned his position handling paternity cases—which Marrocco says he was told was a "back shelf position where nobody

can get you"—primarily because he was aware of what his presence might be doing to Paris' career.

In the ensuing months, Griem's refusal to fire Marrocco for cause, his request that Randlett put in writing his instruction to do so, and his continuing to pursue the lawsuit that was the subject of *City of Warren v Dannis,* despite pressure from Randlett not to, led to Griem's resignation in September or October, 1982.

Marrocco experienced further harassment. He sought to enter Warren City Hall a number of times before and after his court-ordered reinstatement as an assistant city attorney. In May or June, 1983, Marrocco entered city hall on crutches after an accident. He perused campaign paraphernalia for Randlett's reelection on a table outside the mayor's office and made a tongue-in-cheek remark about the "mayor cleaning up corruption." Barwin told him to remove himself or be thrown out. Marrocco also states that persons in and out of city hall were afraid to talk to him. At one point he sought to aid assistant city attorney Servitto with a motion in a case and learned that Randlett threatened Servitto with dismissal if Servitto accepted Marrocco's aid. Servitto was later fired.

Marrocco also alleges that Dannis harassed him by raising the tax assessment on his house so he could not afford it and had to sell, and that subsequently the assessment was reduced.

II

In *Ross v Consumers Power Co (On Rehearing),* 420 Mich 567, 592; 363 NW2d 641 (1984), this Court stated:

> Judges, legislators, and the highest executive

officials of all levels of government are absolutely immune from all tort liability whenever they are acting within their respective judicial, legislative, and executive authority.[4]

The parties concede that Randlett and Dannis are among the highest elective officials of Warren government. The question presented is thus whether there is a genuine issue of material fact whether defendants acted "within their . . . executive authority."[5]

No decision of this Court defines "within their . . . executive authority." In *Smith v Dep't of Public Health,* 428 Mich 540, 544, 611; 410 NW2d 749 (1987), this Court said that there was no " 'intentional tort' exception to governmental immunity" and thus intentional torts are immune if committed within the scope of a governmental function. It was emphasized, however, that "the intentional use or misuse of a badge of governmen-

[4] The Court continued:

> Lower level officers, employees, and agents are immune from tort liability only when they are
>
> a) acting during the course of their employment and are acting, or reasonably believe they are acting, within the scope of their authority;
> b) acting in good faith; and
> c) performing discretionary-decisional, as opposed to ministerial-operational, acts.
>
> "Discretionary-decisional" acts are those which involve significant decision-making that entails personal deliberation, decision, and judgment. "Ministerial-operational" acts involve the execution or implementation of a decision and entail only minor decision-making. [*Id.*]

We need not examine whether the alleged acts are discretionary-decisional or ministerial-operational. "Within . . . executive authority" refers to all authorized acts—both discretionary-decisional and ministerial-operational—and an official is subject to liability for discretionary-decisional acts not "within [his] executive authority."

[5] *Id.* at 592.

tal authority for a purpose unauthorized by law is not the exercise of a governmental function."[6]

*Ross* establishes a framework for analysis in its methodology for answering the analogous question whether acts of lower level officials or governmental units are "governmental functions." The analysis is to look at the statutes (ordinances) to determine whether the act is in an area in which the governmental unit is authorized to function.[7] The analogous approach in the instant case would be to examine the powers of the offices of mayor and treasurer.[8]

Plaintiff refers to sections of the Code of Ordinances of the City of Warren defining the duties of

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[6] In *Harlow v Fitzgerald,* 457 US 800, 818-819; 102 S Ct 2727; 73 L Ed 2d 396 (1982), the United States Supreme Court held that federal "government officials performing discretionary functions" are not absolutely immune from personal liability, but they are generally shielded by a "qualified immunity" that protects them "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."

[7] This Court held:

> [A] governmental function is an activity which is expressly or impliedly mandated or authorized by constitution, statute, or other law. . . . Whenever a governmental agency engages in an activity which is not expressly or impliedly mandated or authorized by constitution, statute, or other law (i.e., an *ultra vires* activity), it is not engaging in the exercise or discharge of a governmental function. The agency is therefore liable for any injuries or damages incurred as a result of its tortious conduct. [*Id.* at 620.]

See also *Hyde v Univ of Michigan Bd of Regents,* 426 Mich 223, 243; 393 NW2d 847 (1986).

[8] This is the approach employed by the Washington Supreme Court:

> This court adheres to the rule that officers of municipalities have only such powers and duties as are conferred upon them expressly or by necessary implication in the applicable statutes. [*State v O'Connell,* 83 Wash 2d 797, 824; 523 P2d 872 (1974). Citation omitted.]

the mayor and treasurer.[9] The Warren Code outlines but does not specifically enumerate their responsibilities. Upon examination of other chapters, however, it is possible to say that some acts are not within their executive authority.

Marrocco alleges that he was granted a leave of absence from his civil service position of assistant city attorney by the Civil Service Board when he was appointed Warren city attorney and that upon leaving that position he was entitled to and did receive reinstatement as an assistant city attorney. He alleges that Randlett interfered with his reinstatement. If Marrocco had the right to reinstatement, the mayor most likely had no right to interfere with Marrocco's return to the position of assistant city attorney.

The Warren Code provides that the position of city attorney is exempt from the operation of the civil service system, and that the city attorney "shall serve at the will of the appointing authority."[10] The code provides:

> [I]f any city employee shall be appointed to any position exempted by this article [such as city attorney], *such employee shall,* upon written application therefor, *receive a leave of absence* for the period of time that such employee shall serve in such exempted position *and such city employees* who have been appointed *shall,* upon discontinuance of employment in such exempted position, *be reinstated* to the employment and duties classification held by such person at the time of acceptance of such exempted position.[11] [Emphasis added.]

It thus appears that Marrocco, as assistant city attorney, was entitled to obtain a leave of absence

[9] Sections 7.3 and 7.12 of the Charter of the City of Warren.

[10] Warren Code, § 25-23(a).

[11] Warren Code, § 25-23(b).

during his service as city attorney and to reinstatement as assistant city attorney upon completing his duties as city attorney. Assuming that the mayor had the authority to hire and fire the city attorney, he nevertheless had no authority to interfere with a city attorney's resumption of employment as an assistant city attorney, a civil service position not subject to the mayor's appointive power.

While the mayor may appoint and remove Civil Service Board members,[12] that does not authorize him to interfere with the leave of absence and reinstatement process described in the Warren Code.[13] Such interference would not be "within [his] executive authority," and Randlett would not be entitled to the defense of immunity.

The mayor allegedly sought to have Marrocco fired from the Macomb County Prosecutor's office. It is questionable whether such an act is within the mayor's executive authority.

Turning to Marrocco's allegation that Dannis improperly raised the tax assessment on Marrocco's home so that he was forced to sell it, and that thereafter Dannis reduced the assessment, it is questionable whether those acts were within her authority.

Because we address these issues without benefit of factual development, we limit ourselves to the three alleged acts discussed. This does not, however, preclude a finding that other acts of Randlett or Dannis were not within their executive authority.

III

We hold that the highest executive officials of

[12] Warren Code, §§ 25-37 and 25-41.

[13] Warren Code, § 25-23(b).

local government are not immune from tort liability for acts not within their executive authority. The determination whether particular acts are within their authority depends on a number of factors, including the nature of the specific acts alleged, the position held by the official alleged to have performed the acts, the charter, ordinances, or other local law defining the official's authority, and the structure and allocation of powers in the particular level of government. It is not our intention now to rule with specificity concerning the authority of officials under the Warren Code. The trial court is the proper forum for an initial determination.

The decision of the Court of Appeals is reversed, and the cause is remanded to the trial court for proceedings consistent with this opinion.

RILEY, C.J., and BRICKLEY, ARCHER, and GRIFFIN, JJ., concurred with LEVIN, J.

BOYLE, J. (*concurring*). In *Ross v Consumers Power Co (On Rehearing),* 420 Mich 567, 633; 363 NW2d 641 (1984), this Court apparently held that the highest elected officials of all levels of government are absolutely immune when they are acting within their authority. In fact, however, no high level elected official was a party in *Ross.*

Building upon *Ross, Smith v Dep't of Public Health,* 428 Mich 540, 611; 410 NW2d 749 (1987), apparently held that intentional torts are immune if committed within the scope of a governmental function, but that the intentional misuse of a badge of governmental authority for a purpose unauthorized by law is not the exercise of a governmental function and therefore not immune. However, in *Smith,* there were no individual defendants, elected or appointed.

Our order granting leave to appeal in this case assumed the precedential value of the *Ross* standard and therefore limited the issue to the application of *Ross* to these facts. Unfortunately, the majority opinion appears to assume the precedential value of *Ross* and *Smith* in reasoning that the tortious nature of these defendants' acts may carry them outside of the authority of these officials and thereby outside of the scope of their immunity.

Our continuing responsibility for policy formulation in the area of officer and employee immunity is set forth in 1986 PA 175, MCL 691.1407(3); MSA 3.996(107)(3), which provides that the new, statutory "gross negligence" standard shall not be construed as altering the law of intentional torts as it existed prior to the effective date of the amendment. See *McCann v Michigan,* 398 Mich 65; 247 NW2d 521 (1976); *Lockaby v Wayne Co,* 406 Mich 65; 276 NW2d 1 (1979).

I would prefer that common law in the area of governmental immunity be developed in a systematic case law fashion on the bases of actual records in specific cases. Instead, I perceive a process in which dictum is balanced upon dictum, and when the issue is actually presented, there is scarcely a record in which to explore the ramifications of the ruling. The law of governmental authority is too important to both plaintiffs and governmental defendants to be developed in this fashion.

Nevertheless, recognizing the limitations of our order granting leave to appeal in this case, I would concur in the result of the majority, remanding this matter to the circuit court. In my view, at least insofar as the mayor is alleged to have sought to have the plaintiff fired from the Macomb County Prosecutor's office, it is questionable whether there is immunity under the *Ross* stan-

dard. However, in so concluding, I do not wish to be understood as discouraging arguments as to whether we should delimit or affirm the dictum in *Ross* regarding absolute immunity or as to the wisdom or lack thereof of reintroducing concepts that define governmental function by reference to an actor's intent. I am assuming that the nature of our order granting leave in this matter renders the case sui generis.

CAVANAGH, J., concurred with BOYLE, J.

## ASKEW v ANN ARBOR PUBLIC SCHOOLS

Docket No. 78996. Argued October 8, 1987 (Calendar No. 7). Decided December 12, 1988.

Jessie Askew was awarded workers' compensation benefits by a hearing referee for injuries sustained in the course of her employment with the Ann Arbor Public Schools. The Workers' Compensation Appeal Board affirmed. In a subsequent separate proceeding, the board found that while the original claim was pending on appeal there had been a change in Askew's physical condition which occurred after the hearing before, and the award by, the referee, but before the hearing and decision by the board on appeal, and that Askew was entitled to continuing benefits. The Court of Appeals, MACKENZIE, P.J., and WALSH and SHEPHERD, JJ., reversed in an unpublished opinion per curiam, finding that the plaintiff should have sought to present, during the WCAB review of the first proceeding, the evidence that she was disabled and holding that the plaintiff was precluded by the doctrine of res judicata from obtaining continuing benefits (Docket No. 82704). The plaintiff appeals.

In an opinion by Justice LEVIN, joined by Justices BRICKLEY, ARCHER and GRIFFIN, the Supreme Court *held:*

A worker who has obtained an award of workers' compensation benefits is not required, while the award is pending on appeal before the Workers' Compensation Appeal Board, to seek to present to the board evidence of a change in physical condition, which occurred after the award and which the worker claims supports a further and separate claim of benefits arising from the same injury, in order to avoid the bar of res judicata and to preserve the right to a separate hearing on the claim.

1. An order of a workers' compensation hearing referee is dispositive unless an appeal is taken to the Workers' Compensation Appeal Board. The workers' compensation act provides

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REFERENCES

Am Jur 2d, Workmen's Compensation §§ 584 *et seq.*

Matters concluded, in action at law to recover for the same injury, by decision or finding made in workmen's compensation proceeding. 84 ALR2d 1036.

that if a claim for review of a referee's decision is filed with the WCAB, the board may hear the claim together with such additional evidence as it may allow. It is clear from the language of the statute ("as it in its discretion may allow") and well established that, had the plaintiff sought to introduce additional evidence, the board would not have been obligated to hear it.

2. Although a referee's decision is reviewable de novo by the board, it does not follow that the date of decision by the board is determinative for purposes of res judicata. The board reviews the record made before the referee, and its decision is conclusive of all matters adjudicable, including the condition of the injured worker at the time the record was made.

3. The doctrine of res judicata bars claims actually litigated as well as claims arising out of the same transaction that could have been brought. The question presented in this case is whether the worker, in order to prevent application of the doctrine of res judicata, must seek to expand the record to include evidence of a change in physical condition that occurred after the conclusion of the hearing before the referee. The board declared in this case that, for purposes of the application of the doctrine of res judicata, the date of the hearing before, and decision by, the referee and not the date of the hearing before, or decision by, the board was determinative. The administration of justice would not be advanced by the adoption of a rule requiring the employee to present such evidence, where the employee claims that the evidence supports a further and separate claim of benefits arising from the same injury, in order to avoid the bar of res judicata and to preserve the right to a hearing on the further and separate claim.

Justice BOYLE, joined by Justice CAVANAGH, concurring, stated that both the principles of res judicata and sound public policy require that the plaintiff not be precluded from litigating his change of condition.

The plaintiff's petitions present a substantial overlap of witnesses and proofs, and the petition based on a change of condition arose out of the same transaction or occurrence as the original petition. Under the general rule of res judicata, there is but one claim involved in both petitions.

It is the finality of an award that determines whether the doctrine of res judicata will attach. Although the doctrine applies in workers' compensation proceedings, it is subject to the exception of a change in physical condition. A compensation award is an adjudication as to the condition of the injured worker at the time it is entered. It is conclusive of all matters adjudicable at that time, but it is not an adjudication of the

claimant's future condition and does not preclude subsequent awards or modifications of the original award upon a showing that the employee's physical condition has changed.

In this case, the change of condition on which the plaintiff based his second petition occurred after the decision of the referee regarding his first petition. Given the nature of the statutory scheme, the plaintiff neither could nor should have raised the issue of change of condition during the appeal of the referee's decision.

Chief Justice RILEY, concurring, stated that a claimant of wage-loss benefits may relitigate a changed physical condition which occurred after a hearing referee's initial award, but before a decision of the Workers' Compensation Appeal Board. Because the doctrine of res judicata does not bar such relitigation, it is unnecessary to resort to public policy as a basis for resolution.

Reversed and remanded.

WORKERS' COMPENSATION — WORKERS' COMPENSATION APPEAL BOARD — CHANGE IN PHYSICAL CONDITION — RES JUDICATA.

A worker who has obtained an award of workers' compensation benefits is not required, while the award is pending on appeal before the Workers' Compensation Appeal Board, to seek to present to the board evidence of a change in physical condition, which occurred after the award and which the worker claims supports a further and separate claim of benefits arising from the same injury, in order to avoid the bar of res judicata and to preserve the right to a separate hearing on the claim (MCL 419.859; MSA 17.237[859]).

*Goodman, Eden, Millender & Bedrosian* (by *Morton A. Eden* and *Diane M. Kwitoski*) for the plaintiff.

*Conklin, Benham, Ducey, Ottaway, Listman & Chuhran, P.C.* (by *Martin L. Critchell*), for the defendant.

Amici Curiae:

*Glotta, Rawlings & Skutt, P.C.* (by *Richard M. Skutt*), and *Susan E. Lister* for Michigan Trial Lawyers Association and Michigan Injured Workers.

LEVIN, J. The question presented is whether a worker who has obtained an award of workers' compensation benefits that is pending on appeal to the Workers' Compensation Appeal Board must seek to present to the WCAB, during its review of the earlier award, evidence of a change in physical condition, which occurred after the award, that the worker claims supports a further and separate claim of benefits arising from the same injury in order to avoid the bar of res judicata and preserve his right to a hearing on the further and separate claim. We hold that he is not required to seek to present the evidence during the appeal.

The Workers' Compensation Appeal Board found, in October, 1974, that Jessie Askew was injured on February 19, 1971, and affirmed a referee's November, 1972, decision awarding her benefits for a closed period from February 20, 1971, to July 26, 1971.

Subsequently, in a separate proceeding, the WCAB found[1] that there had been a change in Askew's physical condition which occurred after the November, 1972, hearing and award, but before the hearing and decision by the WCAB on review of that award. The WCAB found in that second proceeding that Askew was entitled to continuing benefits from a date in 1973,[2] on the basis of testimony of medical experts who made a diagnosis in 1973 (i.e., before the WCAB's 1974

[1] On December 26, 1984. See n 2.

[2] March 23, 1976. This award was based on a petition for benefits filed March 23, 1977. The one-year back rule, MCL 418.833; MSA 17.237(833), was applied, and that explains why benefits were awarded from March 23, 1976, rather than from the 1973 date of disability.

The referee dismissed the petition, stating that the decision of November, 1972, was res judicata. The WCAB reversed in October, 1978, and remanded for a hearing on the merits. The WCAB said the prior decision was res judicata "as to plaintiff's physical condition *through the date of hearing.*" (Emphasis in original.) The Court of Appeals denied leave to appeal in December, 1978.

decision in the first proceeding) of problems arising from the 1971 injury that were not evident in 1972 when the hearing before the referee that resulted in the earlier award was held.[3]

An order of a referee can be and is dispositive[4] unless an appeal is taken to the WCAB. Here, Askew took an appeal in the first proceeding to the WCAB. It was her claim, rejected in 1974 by the WCAB in that proceeding, that the record made before the referee at the first hearing in November, 1972, supported an award of benefits beyond the five-month closed period for which they were awarded.

The WCAB found in the second proceeding that there was evidence of a change in physical condition commencing in 1973. That evidence, accordingly, could not have been made part of the record at the time of the first hearing in November, 1972. Askew's employer, the Ann Arbor Public Schools, contends that because the additional evidence was available in 1973—while the referee's 1972 decision was still pending on appeal to the WCAB—Askew should have sought to present the additional evidence during the WCAB review in the first proceeding before the 1974 WCAB decision in that proceeding was made.

The workers' compensation act provided that if a claim for review by the WCAB of a referee's decision is filed, the WCAB "may hear the parties,

On remand, the referee entered an order denying benefits, stating that there had been no worsening or change in Askew's condition. On appeal, the WCAB, by order dated December 26, 1984, disagreed with the referee and, in a two to one decision, awarded continuing benefits from March 23, 1976.

The Court of Appeals granted leave to appeal on March 28, 1985, and reversed on June 12, 1986. We granted leave to appeal, limited to the issue of the application of the doctrine of res judicata in this case. *Askew v Ann Arbor Public Schools,* 428 Mich 857; 399 NW2d 397 (1987).

[3] November, 1972.

[4] MCL 418.851, 418.863; MSA 17.237(851), 17.237(863).

together with such additional evidence as it in its discretion may allow them to submit . . . ."[5]

The Court of Appeals agreed with the Ann Arbor Public Schools that Askew should have sought to present the evidence that she was disabled from a date in 1973 to the WCAB during its review in the first proceeding and held that Askew was precluded by the doctrine of res judicata from obtaining continuing benefits. The Court of Appeals observed that this Court in *Gose v Monroe Auto Equip Co,* 409 Mich 147, 160-161; 294 NW2d 165 (1980), had said in effect "that the doctrine of res judicata bars a claim which a plaintiff in a worker's compensation case could have brought, but did not."[6]

Ann Arbor Public Schools argues that when an appeal is taken from a referee's decision to the WCAB, the decision of the WCAB and not the decision of the referee is the "award" within the meaning of this Court's repetition in *Gose* of its earlier statement in *Hlady v Wolverine Bolt Co,* 393 Mich 368, 375-376; 224 NW2d 856 (1975), " 'that a compensation award is an adjudication as to the condition of the injured workman at the time it is entered, and conclusive of all matters adjudicable at that time.' "

In neither *Gose* nor *Hlady,* however, did this Court focus on the question now presented, whether the "time" of the award for res judicata purposes is the date of the decision by the referee or the date of the decision by the WCAB where an intervening change in physical condition may, as recognized in the passage from *Hlady* quoted in

[5] MCL 418.859; MSA 17.237(859). The statute was amended by 1985 PA 103; the quoted phrase now reads: "may hear the parties, together with such additional evidence as it may allow . . . ."

[6] *Askew v Ann Arbor Public Schools,* unpublished opinion per curiam of the Court of Appeals, decided June 12, 1986 (Docket No. 82704).

*Gose,*[7] justify a further award of benefits or the stopping of payment on an award previously entered.

This Court's decisions in *Gose* and *Hlady* that the doctrine of res judicata bars claims actually litigated and also those arising out of the same transaction that could have been, but were not, brought does not address the question whether a worker who has obtained a referee's award that is pending on appeal to the WCAB must *seek* to present, during the WCAB's review of the earlier award, evidence in support of a further and separate claim for benefits on the basis of a change in physical condition that occurred after the referee's award arising from the same injury to avoid the bar of res judicata and preserve his right to a hearing on the further and separate claim.

Neither general res judicata doctrine[8] nor policy

[7] " 'The general rule with respect to the effect upon the application of the principles of res judicata to decisions under workmen's compensation acts, of a provision authorizing the modification of an award upon a showing of a change in the employee's condition, is that a compensation award is an adjudication as to the condition of the injured workman at the time it is entered, *and conclusive of all matters adjudicable at that time,* but it is not an adjudication as to the claimant's future condition and does not preclude subsequent awards or subsequent modifications of the original award upon a showing that the employee's physical condition has changed. . . .' " *Hlady v Wolverine Bolt Co,* 393 Mich 368, 375-376; 224 NW2d 856 (1975) (emphasis supplied in *Hlady*). [*Gose v Monroe Auto Equip,* 409 Mich 147, 160-161; 294 NW2d 165 (1980).]

[8] Dimensions of "Claim" for Purposes of Merger or Bar—General Rule Concerning "Splitting"

(1) When a valid and final judgment rendered in an action extinguishes the plaintiff's claim pursuant to the rules of merger or bar (see §§ 18, 19), the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose.

(2) What factual grouping constitutes a "transaction," and

requires one result in preference to the other. Requiring a worker claiming further benefits or an employer claiming that payment of benefits should be stopped to seek to present to the WCAB evidence of a change in physical condition that occurs during the pendency of an appeal thereto would not be unfair as long as sufficient time remained to do so before the WCAB ruled and the request to present the evidence would not unduly delay the ultimate decision. In the instant case, however, the WCAB indicated that the worker or employer is not required to seek to present such evidence on appeal.

The WCAB declared in the instant case that, for purposes of the application of the doctrine of res judicata, the date of the first hearing and decision before the referee, November, 1972—and not the date of the hearing before or the decision by the WCAB—was determinative. The WCAB said that the November, 1972, decision was res judicata "as to plaintiff's physical condition *through the date of hearing.*" (Emphasis in original.)[9] That declaration of the WCAB may reflect an assessment of the

> what groupings constitute a "series," are to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage. [1 Restatement Judgments, 2d, § 24, p 196.]

[9] We recognize that the view expressed in this WCAB opinion may not be shared by all members of the WCAB. There is, however, no decision of the WCAB to the contrary.

Ann Arbor Public Schools relies on the statement of a member of the WCAB who filed a concurring opinion in another case, stating the procedure to be followed when an employer, in that case, or an employee files a new petition on the basis of a change in physical condition after an initial decision and award or denial by a referee. In this case no such petition was filed.

We regard as noteworthy that the WCAB's decision in the instant case, on the question whether a petition to take additional evidence must be filed with the WCAB, during the pendency of the appeal before

frequency with which petitions to present additional evidence are granted by the WCAB, the likelihood of delay if such petitions are routinely granted, or the systemic or substantive problems that might develop if the determinative date is the date of decision by the WCAB (or the date of a hearing before the WCAB or a date preceding the hearing).

It is clear from the language of the statute ("as it in its discretion may allow")[10] and well established that had Askew sought to introduce the additional evidence, the WCAB would not have been obliged to hear it.[11] Adoption of the rule advocated by Ann Arbor Public Schools would not, unless the WCAB were to routinely grant petitions to submit additional evidence, result in the economies of a single adjudication visualized by the Ann Arbor Public Schools.

If we were to adopt the rule advocated by the Ann Arbor Public Schools, it would have operative effect only in cases where the WCAB chose to grant a petition to submit additional evidence and in cases where no such petition was filed. In those cases where a petition was filed and the WCAB declined to receive additional evidence, the worker would clearly be entitled to a hearing before a

it, to avoid the bar of res judicata where there has been a change in physical condition during the pendency of the appeal, was written by the chairman of the WCAB and signed by four other members without qualification.

[10] See text accompanying n 5.

[11] When the doctrine of res judicata has been invoked to bar a claim not presented, the party against whom it has been applied, generally if not invariably, has had an opportunity to present as of right the claim not presented, but failed to do so. In the instant case, Askew did not have a right to present a claim for continuing benefits during the course of her appeal to the WCAB from the 1972 referee decision. While we do not predicate decision on the basis that she did not have a right to so present her claim, we do not wish to be understood as intimating that the doctrine of res judicata may be invoked in respect to a claim not presented where the claim may not be presented as of right.

referee regarding a further and separate claim to benefits.

Adoption of a rule making the date of hearing or award by the WCAB determinative might produce a mountain of additional "protective" petitions that would be routinely denied by the WCAB and become a source of considerable litigation in those cases where a petition was not filed on the question whether a protective petition was required to be filed.

1985 PA 103 provides a new administrative procedure for adjudicating contested claims for workers' compensation. Applications for hearing filed after March 31, 1986, are to be heard by a workers' compensation magistrate rather than a referee. An appeal from the magistrate's decision is to be taken to the newly established workers' compensation appellate commission in lieu of the WCAB. Act 103 provides for the phasing out of the functions of the referee and the WCAB. The WCAB reviews a decision of a referee de novo.[12] The findings of fact of a magistrate are to be considered conclusive by the commission if supported by competent, material, and substantial evidence on the whole record.[13]

Under the new procedure established by Act 103, authorization for the taking of additional evidence on review to establish a change in physical condition has been eliminated. The appellate commission "may remand a matter to a worker's compensation magistrate for purposes of supplying a complete record if it is determined that the record is insufficient for purposes of review."[14] The

[12] See MCL 418.859; MSA 17.237(859); *Kostamo v Marquette Iron Mining Co,* 405 Mich 105, 135; 274 NW2d 411 (1979).

[13] MCL 418.861a; MSA 17.237(861a). See *Civil Service Comm v Dep't of Labor,* 424 Mich 571; 384 NW2d 728 (1986).

[14] MCL 418.861a(12); MSA 17.237(861a)(12).

determinative date for res judicata purposes under the new procedure will be the hearing before the magistrate. The Legislature has thus enacted an administrative system for adjudicating contested claims for workers' compensation that clearly does not contemplate the taking of additional evidence on appeal where there has been a change in physical condition. If we were to adopt the new rule advocated by the Ann Arbor Public Schools and reverse the decision of the WCAB in the instant case, it would affect only those cases where a hearing was sought before April 1, 1986.

Although a referee's decision is reviewable de novo by the WCAB,[15] it does not follow that the date of decision by the WCAB is determinative for res judicata purposes. The WCAB reviews the record made before the referee. The WCAB decision is " 'conclusive of all matters adjudicable, [including the condition of the injured worker] at [the] time' "[16] that record was made. The question here presented is whether the worker must, to prevent application of the doctrine of res judicata, seek to expand that record to include evidence of a change in physical condition that occurred after the referee's hearing was concluded.

Adoption of a rule making the date of hearing or award by the WCAB determinative could work against employers in other cases. If there has been a change in the physical condition of a worker receiving benefits pursuant to an order of a referee or the WCAB, an employer may seek a stop-payment order. If we were to hold that an injured worker is required to seek to present evidence of a change in physical condition occurring between the referee's award and the hearing before the WCAB, then an employer might also be required to

[15] See n 12.

[16] *Hlady, supra,* 376.

seek to present evidence of a change in condition justifying a stop-payment order[17] where the employer was aware (or possibly should have been aware) of the change in condition between the referee hearing and the WCAB hearing.

Having in mind the difficulty confronting the WCAB in disposing of the backlog of cases still subject to its jurisdiction, we decline to adopt a new rule that might further add to its burden and exacerbate the problem with which it is confronted by requiring injured workers and employers to file petitions seeking to present evidence of a change in physical condition, which occurs between the referee and the WCAB hearings, to the WCAB during its review to avoid a possible res judicata determination. Were we to adopt such a rule, the WCAB could deny all such petitions. Then a decision of this Court adopting such a rule would have added more paperwork (in cases where a petition was filed and denied), created a trap for the unwary (in cases where a petition was not filed), and become a source of litigation for the magistrates, the appellate commission, and the WCAB as well, who would be called upon in cases where a petition was not filed to assess whether, in particular cases, a petition to present such evidence should have been filed with the WCAB.

We are not persuaded that the administration of justice would be advanced by adoption of a rule requiring the employee to present evidence of a change in physical condition, which occurred after the award, that the worker claims supports a further and separate claim of benefits, arising from the same injury in order to avoid the bar of res judicata and preserve his right to a hearing on the further and separate claim.

[17] Payment of seventy percent of weekly benefits awarded by a referee is required during the pendency of an appeal to the WCAB. MCL 418.862; MSA 17.237(862).

We emphasize that although both of Askew's claims arose out of the same injury, Askew's claim in the second proceeding was based on a change in physical condition that occurred after the hearing before the referee in the first proceeding had concluded which gave rise to a claim separate and distinct from her claim in the first proceeding.

We reverse the decision of the Court of Appeals and remand the cause to the WCAB.

BRICKLEY, ARCHER, and GRIFFIN, JJ., concurred with LEVIN, J.

BOYLE, J. (*concurring*). In *Pike v City of Wyoming,* 431 Mich 589; 433 NW2d 768 (1988), a majority of this Court held that despite a prior, final award of benefits by the bureau, the doctrine of res judicata did not preclude the defendants from relitigating the issue of the plaintiff's wife's dependency. It was my expressed view in *Pike* that the majority of this Court had based its decision, not upon the law of res judicata, but upon an ad hoc notion of public policy. In my dissent in *Pike,* I explained:

> There may be matters of public policy so extraordinary as to justify a departure from res judicata principles. However, a court's vague notion of "fairness"—though motivated by benevolence in a particular case—does not justify the substantial injustice that results when finally decided cases are reopened. Such a view negates the expectations of the bar on which client advice is predicated and corrupts the decision-making process of a court. [*Pike, supra,* pp 630-631 (BOYLE, J., dissenting).]

Today, a majority of this Court takes one step beyond *Pike,* abandoning both law *and* public policy as a basis for its decision. The majority prefaces its holding as follows:

> Neither general res judicata doctrine nor policy requires one result in preference to the other. [*Ante,* pp 720-721.]

I agree with the majority that the doctrine of res judicata does not preclude[1] the plaintiff from litigating his 1973 change of condition. However, contrary to the majority, I believe that both the principles of res judicata and sound public policy require this result.

I

Recent deviations from the rule of res judicata notwithstanding,[2] Michigan does follow the broad rule of res judicata with regard to workers' compensation claims. *Gose v Monroe Auto Equip Co,* 409 Mich 147; 294 NW2d 165 (1980). Under this rule:

> When a valid and final judgment rendered in an action extinguishes the plaintiff's claim pursuant to the rules of merger or bar . . ., the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose. [1 Restatement Judgments, 2d, § 24(1), p 196.]

[1] I am inclined to believe that it is the doctrine of merger which is at issue, since the order of the bureau was in favor of the plaintiff on the issue of continuing disability. See 1 Restatement Judgments, 2d, § 18, p 151; cf. § 19, p 161.

[2] As a basis for his decision in *Pike, supra,* p 602, Justice GRIFFIN has cited either a change in the law as a general exception to res judicata or the possibility that any collateral attack on the *amount* of benefits, as opposed to the *entitlement* to benefits, presents an exception to res judicata. Similarly, Justice BRICKLEY has based his decision in *Pike, supra,* p 607, on the suggestion that there was an unspecified "changed circumstance" that in context must be the conclusion that the statute is unconstitutional. Despite these differences, it appears that all would agree that the broad rule of res judicata is applicable to these proceedings.

Thus, the Restatement formulation of the rule of res judicata focuses upon the transaction out of which the action arose and designates the date of a "final judgment" as that upon which res judicata attaches to the claim.

The initial error of the majority is the assumption that a rule of res judicata may simply be grafted onto the decision of choice. The majority reasons:

> In neither *Gose* nor *Hlady* [*v Wolverine Bolt Co,* 393 Mich 368; 224 NW2d 856 (1975)], however, did this Court focus on the question now presented, whether the "time" of the award for res judicata purposes is the date of the decision by the referee or the date of the decision by the WCAB where an intervening change in physical condition may, as recognized in the passage from *Hlady* quoted in *Gose,* justify a further award of benefits or the stopping of payment on an award previously entered. [*Ante,* pp 719-720.]

While it is literally true that neither of these decisions sets forth the "time" at which res judicata attaches, the reason is that it is not the time, but the state of finality which determines whether res judicata is applicable. Thus, the *Hlady* majority explained:

> "Where issues of fact or law have been *finally* decided by a court of competent jurisdiction in one legal action which are essential to the maintenance of another legal action, it is universally held that the second action must fail." [*Hlady, supra,* p 376 (emphasis added), quoting with approval *Jones v Chambers,* 353 Mich 674; 91 NW2d 889 (1958). See also *Cohen v Home Life Ins,* 273 Mich 469, 473; 263 NW 857 (1935); 1 Restatement Judgments, 2d, § 13, p 132.]

The Workers' Disability Compensation Act specifies that a claim of appeal may be taken from

either the decision of the hearing referee[3] or the appeal board.[4] At the expiration of an appeal period, the decision is final, *Abbott v Saginaw Ice & Coal Co,* 284 Mich 462, 475; 280 NW 21 (1938), and may be enforced in circuit court. MCL 418.863; MSA 17.237(863).

Here, the hearing referee's decision awarded a closed period of wage-loss compensation to the plaintiff on December 6, 1972. The plaintiff filed a timely claim of appeal with the appeal board. On October 28, 1974, the appeal board affirmed the decision of the hearing referee. No appeal was taken from the appeal board's decision. Instead, on March 23, 1977, more than two years later, the plaintiff filed a new claim for wage-loss compensation with the bureau. Her new petition alleged a change of condition which preceded the appeal board's decision by nearly two years.[5]

The only final decision in this matter is that of the appeal board dated October 28, 1974. I agree generally with the Court of Appeals conclusion that "the doctrine of res judicata bars a claim

[3] MCL 418.851; MSA 17.237(851) provided:

> The hearing referee assigned to any hearing in accordance with the provisions of section 847 shall make such inquiries and investigations as he shall deem necessary. The hearing shall be held at the locality where the injury occurred and the order of the hearing referee shall be filed with the bureau. Unless a claim for review is filed by a party within 15 days, the order shall stand as the order of the bureau.

[4] MCL 418.861; MSA 17.237(861) provided:

> The court of appeals and the supreme court shall have power to review questions of law involved in any final order of the [appeal] board, if application is made by the aggrieved party within 30 days after such order by any method permissible under the rules of the courts of the laws of this state.

[5] In fact, it appears that the date alleged for the change of plaintiff's condition, and that ultimately found by the appeal board, was the date of the hearing referee's initial decision, December 6, 1972.

which a plaintiff in a workers' compensation case could have brought, but did not."[6] To be more precise, however, there is but one "claim" which arises from a single transaction or occurrence, although it may be based upon a number of different theories.[7] Thus, if in reality there is but one claim involved in this appeal, that alleged in the plaintiff's second petition is merged with her first and precluded under the general rule of res judicata.

In essence, there are two aspects to the question presented by Jessie Askew's delayed petition for further wage-loss compensation on the basis of a change of condition. The first question is whether the delayed petition is based upon the same claim as that underlying the plaintiff's first petition and

[6] *Askew v Ann Arbor Public Schools,* unpublished opinion per curiam of the Court of Appeals, decided June 12, 1986 (Docket No. 82704).

[7] As explained in 1 Restatement Judgments, 2d, § 24, comment a, pp 196-197:

> "Claim," in the context of res judicata, has never been broader than the transaction to which it related. But in the days when civil procedure still bore the imprint of the forms of action and the division between law and equity, the courts were prone to associate claim with a single theory of recovery, so that, with respect to one transaction, a plaintiff might have as many claims as there were theories of the substantive law upon which he could seek relief against the defendant. Thus, defeated in an action based on one theory, the plaintiff might be able to maintain another action based on a different theory, even though both actions were grounded upon the defendant's identical act or connected acts forming a single life-situation. . . .
>
> The present trend is to see claim in factual terms and to make it coterminous with the transaction regardless of the number of substantive theories, or variant forms of relief flowing from those theories, that may be available to the plaintiff; regardless of the number of primary rights that may have been invaded; and regardless of the variations in the evidence needed to support the theories or rights. The transaction is the basis of the litigative unit or entity which may not be split.

thereby extinguished under the doctrine of merger. See 1 Restatement Judgments, 2d, §§ 18(1), 24, pp 151-152, 196. The second question is whether, assuming that there is but one claim, any exception to the rule of res judicata is applicable. See, generally, 1 Restatement Judgments, 2d, § 26, pp 233-234. In neither question is the "time" of the final decision determinative. In both, orthodox principles of res judicata may be applied to reach a just and practical resolution of this dispute.

II

That resolution of this matter should turn initially upon what constitutes a "claim" in workers' compensation proceedings is not surprising. It was essentially this issue which divided the majority from the concurring opinion of Justice LEVIN in *Hlady* and the majority from Justice LEVIN's dissent in *Gose.* It is unfortunate that the question was not forthrightly addressed in *Hlady* and *Gose,* since the resulting confusion has generated the pluralities of *Pike, supra,* and *Riley v Northland Geriatric Center,* 431 Mich 632; 433 NW2d 787 (1988). Nevertheless, this question is not particularly difficult to resolve once it has been recognized.

Under the modern rule of res judicata, what constitutes a "claim" is determined by reference to the transaction or occurrence out of which the injury arose.[8] As explained in 1 Restatement Judgments, 2d, § 24(2), p 196:

> What factual grouping constitutes a "transaction," and what groupings constitute a "series," are to be determined pragmatically, giving weight

[8] See n 7.

> to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage.

The plaintiff's claim in this instance is for disability, or wage-loss compensation.[9] Thus, if the "transaction" out of which plaintiff's claim arose is his disability, it would follow that plaintiff's second claim arises out of a distinct transaction or occurrence. However, upon further reflection I do not believe that there are two "transactions" or claims in this instance.

As explained further in 1 Restatement Judgments, 2d, § 24, comment b, p 199:

> In general, the expression connotes a natural grouping or common nucleus of operative facts. Among the factors relevant to a determination whether the facts are so woven together as to constitute a single claim are their relatedness in time, space, origin, or motivation, and whether, taken together, they form a convenient unit for trial purposes. Though no single factor is determinative, the relevance of trial convenience makes it appropriate to ask how far the witnesses or proofs in the second action would tend to overlap the witnesses or proofs relevant to the first. If there is a substantial overlap, the second action should ordinarily be held precluded. But the opposite does not hold true; even when there is not a substantial overlap, the second action may be precluded if it stems from the same transaction or series.

Here, there is a substantial overlap of witnesses

[9] It should be noted that not all claims under the Workers' Disability Compensation Act are for wage-loss benefits. Medical and rehabilitation benefits, MCL 418.319; MSA 17.237(319), death benefits, MCL 418.321; MSA 17.237(321), and specific-loss benefits, MCL 418.361(2); MSA 17.237(361)(2), are also provided for under the act.

and other proofs. Indeed, it is in the nature of a petition for compensation based upon a change of condition that the most probative testimony will be that of experts who have examined the claimant both prior to and after the petition for a change of condition. This follows from the long-established rule that, although wage-loss compensation is paid for a limitation of "wage earning capacity,"[10] the only issue in a petition based upon a change of condition is the physical condition of the injured worker. See *Hood v Wyandotte Oil & Fat Co,* 272 Mich 190; 261 NW 295 (1935); *White v Michigan Consolidated Gas Co,* 352 Mich 201, 210; 89 NW2d 439 (1958) (*White II*). See also 3 Larson, Workmen's Compensation, § 81.00, p 15-528 (on a reopening for change of condition, no other issues may be relitigated, and the claimant's evidence must bear directly upon the comparison between his former and present disability).

There also can be little dispute that, if the initial appeal board had been allowed access to the testimony upon which plaintiff's second petition was based, the sum total would have been a more convenient package for resolution of the factual questions presented by both petitions.[11] The common factual issues underlying both petitions are predominant. The appeal board must, for instance, have an understanding of the nature of the injury, as well as the medical testimony presented at the initial hearing.

Naturally, there will not be a complete identity of factual issues underlying both petitions. The

[10] See, generally, comment, *Disability under the Michigan worker's compensation act,* 62 U Det L R 433 (1985).

[11] This is not to say that, in effect, requiring the appeal board to grant a petition for additional testimony on the basis of an alleged change of physical condition is the more efficient procedural method of addressing these questions. See part III.

underlying factual issues of entitlement[12] need not be revisited.[13] Similarly, when the issue is simply wage-loss compensation, factual issues surrounding medical, rehabilitation, and specific-loss benefits may be irrelevant.[14] However, it seems to me an inescapable conclusion that these petitions present a substantial overlap of witnesses and proofs and further that a petition based upon a change of condition arises out of the same transaction or occurrence as the original petition. I would therefore conclude that, under the general rule of res judicata, there is but one claim involved in both petitions. Thus, to my mind, the dispositive question involved in the appeal is whether Jessie Askew's second petition for compensation falls under any recognized exception to the doctrine of merger under the general rule of res judicata.

III

Among the recognized exceptions to the doctrine of merger are circumstances in which "it is the sense of the [statutory] scheme that the plaintiff should be permitted to split his claim . . . ." 1

[12] The Act requires an injured worker to establish four elements before an employer will be held liable for the worker's injuries. First, there must be a personal injury. Second, the injury must arise out of and in the course of employment. Third, the employer must have notice of the injury. Last, the employee must make a formal claim for compensation within the statutory period. [Comment, n 10 *supra,* p 436. Citations deleted.]

[13] While a plurality of the Court in *Pike* and *Riley* has abandoned the rule of res judicata in workers' compensation proceedings, the rule of collateral estoppel has not yet been abandoned. See, generally, 1 Restatement Judgments, 2d, § 27, p 250. Cf. *Storey v Meijer, Inc,* 431 Mich 368; 429 NW2d 169 (1988) (doctrine of collateral estoppel does not preclude relitigation of factual issues in circuit court when previously litigated in MESC hearings).

[14] See n 9.

Restatement Judgments, 2d, § 26(d), p 234. It is in this context that I would place the Michigan rule of res judicata regarding workers' compensation claims:

> "[A] compensation award is an adjudication as to the condition of the injured workman at the time it is entered, *and conclusive of all matters adjudicable at that time,* but it is not an adjudication as to the claimant's future condition and does not preclude subsequent awards or subsequent modifications of the original award upon a showing that the employee's physical condition has changed." [*Gose,* supra, pp 160-161. Citing with approval *Hlady v Wolverine Bolt Co, supra,* pp 375-376. Emphasis supplied in *Hlady.*]

I would emphasize that, under the practical analyses of *Hlady* and *Gose,* as well as the theoretical analysis of the Restatement of Judgments, 2d, the doctrine of res judicata *does* apply to workers' compensation proceedings, although it is subject to the long-established exception for a change of physical condition.

In my view, we must be constantly aware of and faithful to the legislative purpose in creating the workers' compensation remedy. In the context of a much earlier res judicata challenge to a change of condition, this Court explained:

> Obviously, plaintiff had no cause of action against his employer in the sense of the common law, or any amendment thereto, to split. Proceedings under the workmen's compensation act have nothing to do with common-law actions for damages for negligence on the part of the employer. Its enactment marked the crystallization into a legislative enactment of the economic fact that the ultimate consumer pays for the compensation of injured employees in the increased cost of the

> product. It aims at compensation, not damages. It is wholly substitutional in character and displaces the common-law liability for negligence. It should be administered substantially as insurance of a social character. Claimant had no action in law or in equity against his employer. Proceedings under the workmen's compensation act are purely statutory,—administrative, not judicial,—inquisitorial, not contentious,—disposed of, not by litigation and ultimate judgment, but summarily. Most of the difficulties now encountered in the administration of the workmen's compensation act arise from injudicious attempts, sometimes acquiesced in, to engraft upon the workmen's compensation act common-law theories at variance with its spirit and intent. [*Hebert v Ford Motor Co,* 285 Mich 607, 609-610; 281 NW 374 (1938).]

While we must be faithful to legislative purpose and attentive to the statutory scheme underlying workers' compensation, we must also be aware that the Legislature does not work in a vacuum. The Legislature is presumed to be aware of the existing decisions of the Court, *People v Cash,* 419 Mich 230, 241; 351 NW2d 822 (1984), *Michigan Gas Storage Co v Gregory,* 341 Mich 34, 37; 67 NW2d 219 (1954), and matters of procedure fall uniquely within the traditional power and expertise of the judicial branch. See, e.g., *St John v Nichols,* 331 Mich 148, 158; 49 NW2d 113 (1951). Thus, in fleshing out the skeletal procedures set forth in chapter 8 of the Workers' Disability Compensation Act, MCL 418.801 *et seq.;* MSA 17.237(801) *et seq.,* we must also give careful consideration to the long-established, slowly cured, procedural doctrines of the common law. In the language of the *Hebert* Court, it is "injudicious attempts . . . to engraft upon the workmen's compensation act common-law theories at variance with its spirit and intent" which we must avoid—

not all attempts to rely upon common-law procedural rules.

Here we are asked to decide whether the plaintiff's petition based on a change of physical condition resulting in a continuing disability is precluded even though the change of condition occurred after the decision of the referee. It is argued by the defendant that the doctrine of merger precludes this petition, even though the issues it raised could not have been raised before the hearing referee because the plaintiff might have raised these issues during her subsequent administrative appeal. If the plaintiff could have presented this claim, I might agree that plaintiff's claim would be barred under the rule of res judicata as set forth in *Hlady* and *Gose.* Upon examination of the statute, however, I am entirely unconvinced that plaintiff either could have or should have raised these issues before the appeal board.

As discussed in the majority opinion, the appeal board formerly had statutory authority to allow the taking of "such additional evidence as it in its discretion may allow . . . ." MCL 418.859; MSA 17.237(859). This controlling statutory language has been modified by 1985 PA 103, which provides that "[t]he board may hear the parties, together with such additional evidence as it may allow . . . ." MCL 418.859; MSA 17.237(859). The majority opinion focuses only upon the language of MCL 418.861a(12); MSA 17.237(861a)(12), which applies not to the appeal board, but to its successor, the appellate commission. Under the circumstances, I find it neither necessary nor instructive to speculate as to the scope of the appellate commission's authority in taking additional testimony. I believe that it is sufficient to note that the Legislature itself has considered the discretionary nature of the appeal board's authority. Naturally,

I would assume that the Legislature was aware when enacting 1985 PA 103, as well as when enacting the language at issue, what meaning this Court has attached to the word "discretion." *Cash, Michigan Gas Storage Co, supra.* See also *Spalding v Spalding,* 355 Mich 382; 94 NW2d 810 (1959).

I agree with the majority that the discretionary nature of the appeal board's authority over petitions for additional testimony practically limits the ability of any party to present new issues during an appeal. We should consider the exceedingly narrow scope of review of the denial of a petition for additional testimony when deciding whether parties can and therefore *must* present these issues before the appeal board.

In deciding whether the plaintiff's claim should be precluded by the doctrine of merger, we must also consider the present controversy in our Court of Appeals over the scope of review accorded the appeal board. Cf. *Kingery v Ford Motor Co,* 116 Mich App 606, 614; 323 NW2d 318 (1982) (review de novo does not permit the raising of a new issue which was not presented earlier), with *Roberts v Marquette General Hosp,* 127 Mich App 301, 304; 338 NW2d 393 (1983) (it is within the appeal board's de novo review authority to consider issues not previously raised). Moreover, we must consider the powerful disincentive to delaying these claims presented in the one-year back rule of § 833, MCL 418.833(1); MSA 17.237(833)(1).[15] We must consider the general but well-recognized thesis that work-

[15] Section 833(1) provides:

> If payment of compensation is made, other than medical expenses, and an application for further compensation is later filed with the bureau, no compensation shall be ordered for any period which is more than 1 year prior to the date of filing of such application.

ers' compensation proceedings are intended to be summary administrative proceedings rather than contentious litigation. *Hebert, supra.*

Finally, in deciding whether the doctrine of merger precludes plaintiff's second petition, we must consider our own prior decisions in this area. In fact, the identical issue presented in this case was previously considered and resolved in *White v Michigan Consolidated Gas Co, supra,* (*White II*).

In *White v Michigan Consolidated Gas Co,* 342 Mich 160; 69 NW2d 160 (1955) (*White I*), a unanimous Court held that the plaintiff was entitled to a closed period of compensation from May 21, 1951, until November 7, 1952. The case was remanded for entry of an order consistent with the Supreme Court's opinion. On June 9, 1955, three months after this Court's decision, the same plaintiff filed a new petition alleging a change of condition dated November 7, 1952. As in the instant case, the date of the change of condition alleged by White coincided with the expiration of the closed period previously adjudicated. As in the instant case, the change of condition alleged actually preceded the date of the appellate commission's initial decision.[16]

The appellate commission nonetheless ordered continuing compensation from the date of the change of condition. This Court affirmed in *White II,* explaining:

> We deal in this case with an instance of temporary total disability. In such a situation, the device employed by the appeal board in ordering payment of compensation until further order of the board, we have many times approved. *Hovey v General Construction Co,* 233 Mich 531 [207 NW 852

[16] The appellate commission was the statutory predecessor of the current Workers' Compensation Appeal Board.

(1926)]; *Warner v Michigan Electric Railway Co,* 248 Mich 60 [226 NW 887 (1929)]; *Pretzer v State Psychopathic Hospital,* 286 Mich 454 [282 NW 213 (1938)]; *Lynch v Briggs Mfg Co,* 329 Mich 168 [45 NW2d 20 (1950)].

Such an order does not finally determine rights to compensation. A petition to stop, to decrease or to increase compensation is always permissible in order to show circumstances concerning a claimant's physical condition which have changed from the last date of hearing. *Hood v Wyandotte Oil & Fat Co, supra; Catino v Morgan & Wright Co,* 272 Mich 154 [261 NW 281 (1935)]; *Goines v Kelsey Hayes Wheel Co,* 294 Mich 156 [292 NW 686 (1940)]. Indeed, in view of plaintiff's age and the nature of the injury, it is to be hoped that time or further medical treatment will occasion still further consideration of this case.

We believe that what has been said serves to answer appellant's contention that the previous order of this Court in *White v Michigan Consolidated Gas Co, supra,* was res judicata as to compensation claimed between the dates of November 7, 1952 (the previous referee's hearing date) and June 4, 1954 (the previous appeal board order date). [*White II,* 352 Mich 210-211.]

Indistinguishable facts were also presented in *Morgan v Freedman Artcraft,* 401 Mich 54; 257 NW2d 85 (1977), in which a unanimous Court, following *White II,* held that res judicata did not preclude a subsequent petition.

The subsequent treatment of *White II,* casts some doubt upon other aspects of the opinion, although in my view its specific ruling on res judicata remains intact. See, e.g., *Sanford v Ryerson & Haynes, Inc,* 396 Mich 630, 637; 242 NW2d 393 (1976) (rejecting *White II*'s use of a "competent" evidence standard of review over administrative fact finding). Perhaps the most problematic treatment of *White II* was in *Gose,* where the majority explained:

> "While the doctrine of res judicata does apply to workmen's compensation cases (*Willis v Michigan Standard Alloy Casting,* 367 Mich 140 [116 NW2d 222 (1962)]), in Michigan it has been limited to issues that were actually litigated as a matter of fact. *Hebert v Ford Motor Co,* 285 Mich 607 [281 NW 374 (1938)]; *White v Michigan Consolidated Gas Co,* 352 Mich 201 [89 NW2d 439 (1958)]."
>
> A close reading of both *Hebert* and *White* shows that neither opinion delineated a rule unique to workers' compensation proceedings; they merely recited a narrow application of the rule, as opposed to a broad version, discussed *infra.* Moreover, in each case, res judicata was inapplicable: two separate injuries involving two separate transactions were at issue in *Hebert,* and in *White* a final determination on the merits had not been made in the first proceeding. [*Gose, supra,* p 159, n 1. Quoting with approval *Stokes v Lakey Foundry Corp,* 20 Mich App 217, 219; 173 NW2d 832 (1969).]

In fact, as can be seen in a close reading of *White I* and *White II,* there was a "final" decision, although the matter was remanded by this Court for entry of the order of the appellate commission. Thus, *White II,* actually involved a new petition, a collateral attack on the prior adjudication.

Furthermore, although the *Gose* majority adopted a broad rule of res judicata, the narrow rule set forth in *White II* was merely an alternative basis for its holding. Thus, in *White II,* it was further explained:

> Obviously, in the period between the referee's hearing and appeal board decision, the crucial facts pertaining to disability could change to the advantage of either party without any adjudication upon such change. This was recognized in the order of the appeal board, ending "until the further order of the workmen's compensation department." [*Id.,* p 211.]

Indeed, in my view, it is this reasoning, and not a narrow rule of res judicata, which explains the *White II* holding, since the question of plaintiff's continuing disability was *actually* litigated in the prior proceeding.

The reasoning of this Court in *White II* is fully consistent with the exception to the doctrine of merger set forth in 1 Restatement Judgments, 2d, § 26(d). Moreover, I believe that *White II* is indistinguishable from the instant case. Given the nature of this statutory scheme, it is simply unreasonable to suggest either that plaintiff could have or should have presented her petition on the basis of a change of condition to the appeal board in the first appeal under penalty of forfeiture. Indeed, as the majority has pointed out, there is little sense in burdening the appeal board at this late date with an avalanche of protective petitions. The irony of doing so in furtherance of a rule of judicial economy is inescapable.[17]

It is for these reasons, lying within general res judicata doctrine and sound public policy, that I concur in the holding of the majority. The decision of the Court of Appeals should be reversed and the award of the appeal board should be reinstated.

CAVANAGH, J., concurred with BOYLE, J.

[17] As explained by one commentator, the finality of res judicata is intended to promote judicial economy:

> A good place to start critical analysis of the whole matter is with the question: why should not a party be *compelled* to join all the claims which it *may* join? Surely something is to be gained from wiping a slate clean, and it has been urged that the law should require this result when parties invoke its processes to settle some of their disputes. Wherever there will be a large overlap of issues or evidence if two trials are held, it is wasteful to society and harassing to the adversary to have more than one, and there should be no more than one unless there is some very good reason. [James & Hazard, Civil Procedure (3d ed), § 11.8, pp 599-600. Emphasis in the original.]

RILEY, C.J. (*concurring*). I agree with the majority that res judicata does not preclude Jessie Askew from relitigating her changed physical condition. The majority correctly holds that Jessie Askew's second petition for wage-loss benefits, which arose out of a changed physical condition, constituted a separate claim. However, I write separately because, although I agree with the majority's policy considerations supporting the conclusion that res judicata does not bar relitigation of a change to a claimant's physical condition,[1] I disagree with the majority's holding that "[n]either general res judicata doctrine nor policy requires one result in preference to the other." *Ante,* pp 720-721. In my opinion, reliance upon res judicata alone would not preclude Jessie Askew from relitigating her changed physical condition. Thus, unlike the majority, I find it unnecessary to resort to public policy as a basis for resolving this case.

Therefore, I agree with the majority that a claimant may relitigate a changed physical condition which occurred after the hearing referee's initial award, but before the decision of the Workers' Compensation Appeal Board. Accordingly, I would reverse the decision of the Court of Appeals and reinstate the decision of the WCAB.

[1] However, I find it unnecessary and speculative to discuss the scope of review and authority the Legislature has given to the newly created appellate board under MCL 418.859; MSA 17.237(859).

PEOPLE v MITCHELL

Docket No. 82140. Decided December 20, 1988. On application by the defendant for leave to appeal, the Supreme Court, in lieu of granting leave to appeal, reversed in part the judgment of the Court of Appeals and remanded the case to the trial court.

Donald Mitchell pled guilty in the Detroit Recorder's Court, Joseph A. Gillis, J., of breaking and entering an occupied dwelling with intent to commit larceny and of possession of a firearm during the commission of a felony. The Court of Appeals, MAHER, P.J., and WAHLS and SULLIVAN, JJ., affirmed in an unpublished opinion per curiam, holding that the defendant's plea of guilty of the felony-firearm charge waived the right to contest whether there was a factual basis for the charge and that, in any event, the factual basis was adequate (Docket No. 95207). The defendant seeks leave to appeal.

In a unanimous opinion per curiam, the Supreme Court *held:*

The defendant should not have been precluded from challenging the adequacy of the factual basis of his felony-firearm conviction. The factual basis stated by the defendant at the plea proceeding did not provide grounds for concluding that the defendant possessed a firearm during the commission of the breaking and entering. In order to waive the right to contest the factual basis of a guilty plea, there must be a valid plea, taken in accordance with appropriate procedures such as those of MCR 6.101(F), including the establishment of a factual basis.

Reversed and remanded.

*Frank J. Kelley,* Attorney General, *Louis J. Caruso,* Solicitor General, *John D. O'Hair,* Prosecuting Attorney, *Timothy A. Baughman,* Chief, Criminal Division, Research, Training and Appeals, and *Susan Randolph,* Assistant Prosecuting Attorney, for the people.

*George Stone* for the defendant.

PER CURIAM. The defendant pled guilty of breaking and entering an occupied dwelling with intent

to commit larceny[1] and possession of a firearm during the commission of a felony.[2] On appeal, he challenged the felony-firearm conviction on the ground that the factual basis at the plea proceeding was inadequate. However, the Court of Appeals affirmed the decision of the trial court, holding that the plea waived the right to contest whether there was a factual basis for the charge and that, in any event, the factual basis was adequate. We disagree with both conclusions, and reverse the decision of the Court of Appeals.

I

The information charged defendant with breaking and entering an occupied dwelling with intent to commit larceny and with possession of a firearm during the commission of a felony.[3] The only record of the facts regarding the offenses is the transcript of the defendant's guilty-plea proceeding.[4] For the purpose of this appeal, the critical statement came in the first exchange between the court and defendant about the factual basis:

> *The Court:* All right, tell the Court what happened on March the 9th of 1986, at 13303 Pembroke, involving you and this house and the gun.
>
> *The Defendant:* I was walking down Pembroke and I walked in to see if anybody—normally in the winter-time people don't just leave their door open, the door was wide open and I walked in to see if somebody was hurt or something, okay, and I didn't see nobody [sic] in the house. *The gun was laying [sic] on the table and I picked the gun up—*
>
> *The Court:* Was the door wide open, you didn't even have to open it?

[1] MCL 750.110; MSA 28.305.

[2] MCL 750.227b; MSA 28.424(2).

[3] The breaking and entering was listed as the underlying felony.

[4] Defendant waived examination.

*The Defendant:* Yes, Sir.

*The Court:* You got through without touching a thing?

*The Defendant:* Yes, Sir.

*The Court:* Well there's no breaking and entering. [Emphasis added.]

After further discussions between the defendant and the court, defendant admitted that he had forced the door open. There was no further mention of the gun.

The plea was accepted, and the trial court ultimately sentenced the defendant pursuant to the sentence bargain to three to fifteen years in prison for the breaking and entering, consecutive to the mandatory two-year term for felony-firearm.

Defendant moved to withdraw his plea, raising the factual-basis issue, but the trial court denied the motion.

II

On appeal, the defendant claimed that the factual basis was inadequate because it showed that defendant did not obtain the firearm until after completion of the breaking and entering. Thus, he did not have possession of the firearm "during the commission of" the breaking and entering. In an unpublished opinion per curiam, the Court of Appeals rejected this reasoning on two grounds. First, it found the issue to have been waived by the guilty plea:

> By pleading guilty, defendant has waived the right to contest the factual basis of the charge. *People v New,* 427 Mich 482, 491; 398 NW2d 358 (1986).

Second, the Court said that even if there was no waiver, the factual basis was adequate:

> The fact that defendant did not possess the firearm until he was inside the dwelling does not negate the crime. See *People v White,* 143 Mich App 229, 230-231; 371 NW2d 919 (1985); *People v Mahone,* 97 Mich App 192, 194; 293 NW2d 618 (1980).

The defendant seeks leave to appeal in this Court.

III

The Court of Appeals relied on *People v New, supra,* for its waiver analysis. *New* involved two cases. In one, the defendant pled guilty and then sought to raise on appeal the claim that the trial court erred in denying his motion to suppress incriminating statements he had made. In the other case, the defendant pled nolo contendere and then sought to raise in the Court of Appeals an issue regarding an alleged illegal seizure of evidence from his hotel room.

We held that the pleas waived the right to raise those issues on appeal:

> Today, we hold that a defendant, after pleading guilty, may raise on appeal only those defenses and rights which would preclude the state from obtaining a valid conviction against the defendant. Such rights and defenses "reach beyond the factual determination of defendant's guilt and implicate the very *authority* of the state to bring a defendant to trial . . . ." [*People v*] *White,* 411 Mich [366] 398 [308 NW2d 128 (1981)] (MOODY, J., concurring in part and dissenting in part). In such cases, the state has no legitimate interest in securing a conviction. On the other hand, *where the defense or right asserted by defendant relates solely to the capacity of the state to prove defen-*

*dant's factual guilt, it is subsumed by defendant's guilty plea.* [427 Mich 491. Emphasis added.][5]

We think the Court of Appeals has misinterpreted *People v New.* Implicit in that decision is the understanding that in order to waive such issues there must be a valid plea taken in accordance with appropriate procedures such as those in MCR 6.101(F), including the establishment of a factual basis for the plea.[6]

Where the statements by a defendant at the plea procedure do not establish grounds for a finding that the defendant committed the crime charged, the factual basis for the plea-based conviction is lacking.

Thus, we conclude that defendant is not precluded from challenging the compliance with MCR 6.101(F)(3)(a). To hold otherwise would amount to a complete abrogation of the factual-basis requirement—the same analysis as used by the Court of Appeals in this case would apply to any case in which the factual basis was not established.

[5] In addition, *New* continued to recognize the "conditional" plea procedure under which the right to raise such issues can be preserved despite a guilty plea. See *People v Reid,* 420 Mich 326; 362 NW2d 655 (1984).

[6] MCR 6.101(F)(3):

(3) An Accurate Plea.

(a) If the defendant pleads guilty, the court, by questioning him or her, shall establish support for a finding that he or she is guilty of the offense charged or the offense to which he or she is pleading.

(b) If the defendant pleads nolo contendere, the court shall not question him or her about his or her participation in the crime. The court shall:

(i) state why a plea of nolo contendere is appropriate; and

(ii) conduct a hearing, unless there has been one, that establishes support for a finding that the defendant is guilty of the offense charged or the offense to which the defendant is pleading.

IV

The alternative basis for the Court of Appeals decision was its conclusion that the defendant's admissions at the plea proceeding provided an adequate basis for finding that he had committed the felony-firearm offense. The Court relied on two cases.

In *People v Mahone, supra,* the defendant chased the victim while armed only with a rake. The victim drew a gun, and the defendant wrestled it away. The defendant then fatally shot the victim. The Court held that these facts established the felony-firearm offense.

*People v White, supra,* 143 Mich App 229, presented facts very similar to those in the instant case. The defendant pled guilty of breaking and entering a store and stealing firearms. The Court found the theft of the guns adequate to establish a factual basis for possession of a firearm during the commission of the breaking and entering.

Obviously, *People v Mahone* is distinguishable from the instant situation since at the time the defendant committed the homicide he had possession of a firearm and used it to kill the victim. *People v White,* on the other hand, is indistinguishable. However, we disagree with the reasoning of the Court of Appeals in *White* and in the instant case. We do not view a conviction on these facts as consonant with the legislative purpose underlying the felony-firearm statute.

Accordingly, pursuant to MCR 7.302(F)(1), in lieu of granting leave to appeal, we reverse in part the judgment of the Court of Appeals because the guilty plea did not waive the right to contest the factual basis and because the factual basis stated at the plea proceeding did not provide grounds for concluding that defendant possessed a firearm in

the commission of the breaking and entering. The case is remanded to the Recorder's Court of the City of Detroit. On remand the prosecutor shall be given an opportunity to establish that the defendant was in possession of a firearm during the commission of the breaking and entering.[7] If the prosecutor is able to do so and there is no contrary evidence both convictions shall stand. If the prosecutor is unable to establish that the offense was committed, the trial court shall set aside both convictions. If contrary evidence is produced, the matter shall be treated as a motion to withdraw the guilty pleas, and the court shall decide the matter in the exercise of its discretion. MCR 6.101(F)(6). If the motion is granted, the court shall set aside both convictions. In all other respects, leave to appeal is denied. We do not retain jurisdiction.

RILEY, C.J., and LEVIN, BRICKLEY, CAVANAGH, BOYLE, ARCHER, and GRIFFIN, JJ., concurred.

[7] See *Guilty Plea Cases*, 395 Mich 96, 129; 235 NW2d 132 (1975).

# ACTIONS ON APPLICATIONS FOR LEAVE TO APPEAL FROM THE COURT OF APPEALS

*Summary Dispositions July 6, 1988:*

COHEN v COHEN, No. 82343. In lieu of granting leave to appeal, the judgment of the Court of Appeals is reversed and the final judgment of the Kalamazoo Circuit Court is reinstated. MCR 7.302(F)(1). The trial court's award of alimony did not constitute an abuse of discretion. Jurisdiction is not retained. Court of Appeals No. 85114.

MANOR ELECTRIC COMPANY, INC v PATILLO, No. 82535. In lieu of granting leave to appeal, the judgments of the Court of Appeals and the Wayne Circuit Court are reversed, and the case is remanded to the circuit court for further proceedings. MCR 7.302(F)(1). The complaint alleged the existence of an agency relationship with sufficient specificity reasonably to inform the defendant of the claims she was called on to defend. MCR 2.111(B)(1). Jurisdiction is not retained. Court of Appeals No. 88203.

PEOPLE v ANDREE, No. 82688. In lieu of granting leave to appeal, the judgment of the Court of Appeals dated January 27, 1988, is vacated, and the matter is remanded to the Kent Circuit Court for resentencing before the original sentencing judge. If the original sentencing judge is not available, the Kent Circuit Court clerk is to inform the Michigan Supreme Court clerk. MCR 7.302(F)(1). Jurisdiction is not retained. Court of Appeals No. 101647.

PEOPLE v WADE, No. 82713. In lieu of granting leave to appeal, the judgment of the Court of Appeals is vacated, and the case is remanded to that Court for reconsideration in light of *People v Allen*, 429 Mich 558 (1988). MCR 7.302(F)(1). Court of Appeals No. 89180.

MCCORMICK v MCCORMICK, No. 82826. In lieu of granting leave to appeal, the order of the Wayne Circuit Court denying the plaintiff's motion to enforce the alimony provision of the divorce judgment unless the Wayne Circuit Court decides to grant a motion of the defendant for a stay of proceedings pending appeal is reversed. MCR 7.302(F)(1). If a motion for stay is filed by the defendant, the Wayne Circuit Court is to determine whether an appeal bond should be filed by the defendant in order to protect the interests of the plaintiff. MCR 7.209. The motion to waive fees is granted. Jurisdiction is not retained. Court of Appeals No. 105895.

*Leave to Appeal Denied July 6, 1988:*

BERGMAN v THE CLEVELAND CLIFFS IRON COMPANY, No. 82307; Court of Appeals No. 100205.

BOYLE, J., states as follows:

I concur in denial because nothing in the record suggests that this ownership-management structure was devised to avoid third-party

liability or liability under the Workers' Disability Compensation Act. MCL 418.101 *et seq.;* MSA 17.237(101) *et seq.,* and because the appellant does not challenge the procedure followed in the trial court, but, rather, concedes on appeal that the question is one of law. See 1 Restatement Agency, 2d, § 220, comment on subsection (1).

ARCHER, J., would grant leave to appeal.

PEOPLE v PRESLER, No. 82607; Court of Appeals No. 100322. ARCHER, J., would grant leave to appeal.

PEOPLE v NICHOLS #1, No. 82619; Court of Appeals No. 90419. CAVANAGH, J., would grant leave to appeal on the sentencing issue.

PEOPLE v MELZER, No. 82632; Court of Appeals No. 95454.

DIFRONZO v VILLAGE OF PORT SANILAC, No. 82672; reported below: 166 Mich App 148. BRICKLEY and CAVANAGH, JJ., would grant leave to appeal.

HOLME v JASON'S LOUNGE, No. 82702; reported below: 168 Mich App 132. LEVIN, J., would grant leave to appeal.

PEOPLE v MURPHY, No. 82735; Court of Appeals No. 95934.

MCQUEEN v GENERAL MOTORS CORPORATION, No. 82761; reported below: 166 Mich App 418.

PEOPLE v WERSHE, No. 82763; reported below: 166 Mich App 602.

PEOPLE v HAIRSTON, No. 82978. The certification by the Court of Appeals pursuant to Administrative Order No. 1984-2 that its decision in this case conflicts with its decision in *People v Ross,* 84 Mich App 218 (1978), is considered, and the Court declines to order further consideration of the question presented. Leave to appeal as cross-appellant is also denied. Court of Appeals No. 90952.

BOYLE, J., would grant leave to appeal.

PEOPLE v ROSSER, No. 83348; Court of Appeals No. 107665. LEVIN, J., would grant bond on appeal.

*Interlocutory Appeals*

*Leave to Appeal Denied July 6, 1988:*

SAYLES v BAUGHMAN, No. 81673; reported below: 163 Mich App 58. RILEY, C.J., and BRICKLEY and GRIFFIN, JJ., would grant leave to appeal.

HOUSTON v SOUTHWEST DETROIT HOSPITAL, No. 82703; reported below: 166 Mich App 623. RILEY, C.J., and BOYLE, J., would grant leave to appeal.

OSTERGREN v OSTERGREN, No. 83420; Court of Appeals No. 108379. BOYLE and ARCHER, JJ., would remand to the Court of Appeals for consideration as on leave granted.

Reconsideration denied September 7, 1988. BOYLE and ARCHER, JJ., would grant reconsideration and would remand the case to the Court of Appeals as on leave granted.

*Leave to Appeal Granted July 11, 1988:*

PEOPLE v TRIPLETT, No. 81825. Limited to the issues whether the trial court adequately explained the sentence and, if not, what the proper remedy is. Reported below: 163 Mich App 339.

*Summary Dispositions July 11, 1988:*

HAEFELE v MEIJER, INC, No. 82429. In lieu of granting leave to appeal, the case is remanded to the Court of Appeals as on rehearing granted to consider the following issues: (1) whether the defendants waived their defense that plaintiff's claims are preempted by § 514 of the Employment Retirement Income Security Act (ERISA), 29 USC 1144. If the Court of Appeals determines that the ERISA defense was not waived, then the Court of Appeals should also consider (2) whether plaintiff's claims are preempted by ERISA, and (3) assuming plaintiff's claims are preempted by ERISA, should the plaintiff's claims be treated as one to recover benefits under ERISA's civil enforcement provision, § 502(a)(1)(B), 29 USC 1132(a)(1)(B), and, if so, under what standard of review should the plan fiduciary's denial of benefits be reviewed by the Court. See *Bruch v Firestone Tire & Rubber Co,* 828 F2d 134 (CA 3, 1987), cert gtd 108 S Ct 1288 (1988). MCR 7.302(F)(1). Jurisdiction is not retained. Reported below: 165 Mich App 485.

MCKENZIE v CRAWFORD, No. 82536. In lieu of granting leave to appeal, the judgments of the Saginaw Circuit Court and the Court of Appeals are vacated, and the case is remanded to the Court of Appeals which, while retaining jurisdiction, is to remand the case to the Saginaw Circuit Court to allow the plaintiff to file a motion to amend his pleadings to allege facts to conform with representations made by his counsel on the record and in his application for leave to appeal to this Court that his life is in danger if the insurance policy is allowed to continue against his will. If the Saginaw Circuit Court allows such an amendment of the pleadings, the Court of Appeals will thereafter determine whether an exception to *Secor v Pioneering Foundry, Inc,* 20 Mich App 30; 173 NW2d 780 (1969), should be adopted when an insured reasonably fears that his life is in danger if an insurance policy is allowed to continue to be maintained against his will, and whether the standing rule of *Hicks v Cary,* 332 Mich 606; 52 NW2d 351 (1952), applies to the facts of this case. MCR 7.302(F)(1). Jurisdiction is not retained. Court of Appeals No. 100830.

PEOPLE v THOMPSON, No. 83300. In lieu of granting a stay, the judgment of the Court of Appeals is vacated, and the case is remanded to that Court which, while retaining jurisdiction, is to remand the case to the Muskegon Circuit Court for a hearing on the

defendant's claim based on *Batson v Kentucky,* 476 US 79; 106 S Ct 1712; 90 L Ed 2d 69 (1986), and *Griffith v Kentucky,* 479 US 314; 107 S Ct 708; 93 L Ed 2d 649 (1987). MCR 7.316(A)(7). Defendant's application for leave to appeal is moot and is denied without prejudice. Jurisdiction is not retained. Court of Appeals No. 87895.

*Leave to Appeal Denied July 11, 1988:*

LEAGUE GENERAL INSURANCE COMPANY v MICHIGAN CATASTROPHIC CLAIMS ASSOCIATION, No. 82417. Leave to appeal as cross-appellant is also denied. Reported below: 165 Mich App 278.

Reconsideration granted *post,* 871.

LADEMAN v CITIZENS INSURANCE COMPANY OF AMERICA, No. 82482; Court of Appeals No. 95241.

SMITH v EVANS, Nos. 82501, 82502; Court of Appeals No. 94970. RILEY, C.J., and GRIFFIN, J., would remand to the Court of Appeals for further consideration of whether the Saginaw Circuit Court abused its discretion in light of the totality of all the circumstances leading up to the circuit court's entry of the order precluding the plaintiffs from calling the expert witness as opposed to merely considering whether the plaintiffs had to produce a copy of the expert's report at the hearing conducted on January 27, 1986.

*In re* GREENE ESTATE (GREENE v GREENE ESTATE), No. 82556; Court of Appeals No. 91681.

PEOPLE v LAWRENCE JOHNSON, No. 82584; Court of Appeals No. 101053. LEVIN and ARCHER, JJ., would grant leave to appeal to consider the retroactivity of *Sandstrom v Montana,* 442 US 510; 99 S Ct 2450; 61 L Ed 2d 39 (1979). In the Sixth Circuit, see, e.g., *Conway v Anderson,* 698 F2d 282, 284 (CA 6, 1983); *Williams v Engle,* 683 F2d 152 (CA 6, 1982); *Krzeminski v Perini,* 614 F2d 121 (CA 6, 1980), cert den 449 US 866 (1980); *Burton v Bergman,* 649 F2d 428, 431, n 3 (CA 6, 1981), vacated and remanded on other grounds 456 US 953 (1982). Similarly, see *Guthrie v Warden, Maryland Penitentiary,* 683 F2d 820, 823, n 3 (CA 4, 1982); *Bonnett v Solem,* 640 F2d 125 (CA 8, 1981); *Dietz v Solem,* 640 F2d 126, 130 (CA 8, 1981).

CRIMBOLI LANDSCAPE CONTRACTORS, INC v FIOTT, No. 82588; Court of Appeals No. 101659.

PEOPLE v BROOKS, No. 82599; Court of Appeals No. 103641. ARCHER, J., would remand this case to the Court of Appeals for plenary consideration.

PEOPLE v KELTO, No. 82609; Court of Appeals No. 99058. LEVIN, J., would grant leave to appeal.

Reconsideration denied October 31, 1988. LEVIN, J., would grant reconsideration and leave to appeal.

PEOPLE v APRILL, No. 82617; Court of Appeals No. 89391. BRICKLEY and BOYLE, JJ., would grant leave to appeal.

PEOPLE v ROBEY, No. 83373; Court of Appeals No. 90718.

*Interlocutory Appeals*

*Leave to Appeal Denied July 11, 1988:*

TROUTMAN v OLLIS (TROUTMAN v SCHAFTENAAR), No. 82336; reported below: 164 Mich App 727. LEVIN and GRIFFIN, JJ., would grant leave to appeal.

Reconsideration denied October 4, 1988. LEVIN, J., would grant reconsideration and would grant leave to appeal.

KENNEDY v MELOY, No. 82895. The Court of Appeals is to expedite its consideration of this case. Court of Appeals No. 100015.

RILEY, C.J., and CAVANAGH and BOYLE, JJ., would grant leave to appeal.

PEOPLE v KEMP, No. 83021; Court of Appeals No. 100103.

AUTEN v COCKRUM, No. 83400; Court of Appeals No. 108238.

*Interlocutory Appeal*

*Leave to Appeal Denied July 22, 1988:*

DAVIS v HILTON HOTELS CORPORATION, No. 83723; Court of Appeals No. 110067.

*Reconsideration Granted July 25, 1988:*

GILROY v GENERAL MOTORS CORPORATION, No. 82260. The Court's order of April 25, 1988, 430 Mich 872, is vacated, and the case is remanded to the Court of Appeals for consideration as on rehearing granted. The Court of Appeals, while retaining jurisdiction, is to remand this case to the Bureau of Workers' Compensation so that the parties can make a supplemental record as to the contractual relationship between the defendant and the insurance carrier, which relation resulted in the carrier's foregoing its right of reimbursement in this case. After receipt of the record of the proceedings before the bureau, the Court of Appeals is to consider its decision again. Leave to file a brief amicus curiae is also granted. Jurisdiction is not retained. Reported below: 166 Mich App 609.

*Summary Dispositions July 25, 1988:*

PEOPLE v GARLAND, No. 78910. In lieu of granting leave to appeal, the case is remanded to the Court of Appeals for reconsideration in

light of *People v Straight,* 430 Mich 418 (1988). MCR 7.302(F)(1). Reported below: 152 Mich App 301.

ARMSTEAD v LANSING SCHOOL DISTRICT, No. 82747. In lieu of granting leave to appeal, the judgment of the Court of Appeals is modified so as to remand the case to the Workers' Compensation Appeal Board to decide the issues concerning notice and forfeiture of benefits from noncooperation, which were raised in defendant's pleadings. MCR 7.302(F)(1). Jurisdiction is not retained. Court of Appeals No. 103769.

BOLTON v JONES, Nos. 80081, 80477. In lieu of granting leave to appeal, the judgment of the Court of Appeals is vacated and the case is remanded to that Court for reconsideration in light of *Canon v Thumudo, Davis v Lhim,* and *Hall v Han,* 430 Mich 326 (1988). MCR 7.302(F)(1). Reported below: 156 Mich App 642.

*Leave to Appeal Denied July 25, 1988:*

BURTON v EVANS MECHANICAL CONTRACTORS, No. 81923; Court of Appeals No. 98406.

PEOPLE v CORTEZ, No. 82431; Court of Appeals No. 81326.

ATTORNEY GENERAL v PUBLIC SERVICE COMMISSION, No. 82526; reported below: 170 Mich App 319.

CENTRAL STATE SAVINGS & LOAN ASSOCIATION v HILLIS, No. 82546; Court of Appeals No. 92740.

SARACINO v BELLE RIVER JOINT VENTURE, No. 82552; Court of Appeals No. 83825.

PEOPLE v MEIER, No. 82565; Court of Appeals No. 100777.

PEOPLE v EDWARD ALLEN, No. 82575; Court of Appeals No. 101004.

PEOPLE v TOMMY MARTIN, No. 82620; Court of Appeals No. 100592.

AMERICAN EMPLOYERS' INSURANCE COMPANY v MEDICAL PROTECTIVE COMPANY (AMERICAN EMPLOYERS' INSURANCE COMPANY v PATTERSON & PATTERSON, WHITFIELD, MANIKOFF, TERNAN & WHITE), No. 82649; reported below: 165 Mich App 657.

PEOPLE v CRESS, No. 82683; Court of Appeals No. 86748.

LEICHTMAN v GOLDSTEIN, MEKLIR, SCHREIER, FREIDMAN & NOLISH, No. 82721; Court of Appeals No. 103850.

PELCHAT v ARCTIC ENTERPRISES, INC, No. 82731; Court of Appeals No. 90287.

PEOPLE v DINGMAN, No. 82764; Court of Appeals No. 102866.

SAFRAN v LAPEER COUNTY BOARD OF COMMISSIONERS, No. 82774; Court of Appeals No. 95723. Reconsideration denied October 4, 1988.

GOODWIN v GOODWIN, No. 82780; Court of Appeals No. 95626.

LEBAR v GUYER, No. 82797; Court of Appeals No. 95572. Reconsideration denied October 4, 1988.

PEOPLE v HARMON, No. 82805; Court of Appeals No. 97278.

*In re* MERRILL ESTATE (SECOND NATIONAL BANK OF SAGINAW v MERRILL), No. 82825; Court of Appeals No. 96580.

*In re* O'NEILL ESTATE (VAN BUREN v SCHAFER), No. 82831; reported below: 168 Mich App 540.

PEOPLE v CURTIS SMITH, No. 82842; Court of Appeals No. 101571.

CHANDLER v CITY OF GRAND RAPIDS, No. 82845; Court of Appeals No. 92376.

PEOPLE v HURST, No. 82849; Court of Appeals No. 101894.

PEOPLE v KINARD, No. 82850; Court of Appeals No. 89730.

CONTINENTAL HOLDING COMPANY v FOSTER, No. 82858; Court of Appeals No. 92006.

MCMANN v BASF WYANDOTTE CORPORATION, No. 82864; Court of Appeals No. 103430.

BUTLER v CITY OF PONTIAC, No. 82876; Court of Appeals No. 97569.

PEOPLE v RILEY SCOTT, No. 82911; Court of Appeals No. 91686.

PEOPLE v BENSON, No. 82922; Court of Appeals No. 95410.

GYONGYOSI v HADFIELD, No. 82947; Court of Appeals No. 95206.

ALLSTATE INSURANCE COMPANY v PETERSON, No. 82948; Court of Appeals No. 99376.

PEOPLE v DONALD ROBINSON, No. 82953; Court of Appeals No. 90181.

ROSENTHAL v ROSENTHAL, No. 82966; Court of Appeals No. 96311.

PEOPLE v GORDON, No. 83023; Court of Appeals No. 91331.

PEOPLE v TERRANCE EVANS, No. 83034; Court of Appeals No. 102989.

PEOPLE v MARTINEZ, No. 83195; Court of Appeals No. 98750. BOYLE, J., would grant leave to appeal.

PEOPLE v MCCULLOUGH, No. 83282; Court of Appeals No. 92972.

PEOPLE v SEAVER, No. 83372; Court of Appeals No. 100489.

ALLEN v ST FRANCIS HOME FOR BOYS, No. 83465; Court of Appeals No. 108586.

*Interlocutory Appeals*

*Leave to Appeal Denied July 25, 1988:*

PERRETT v GENERAL SAFETY CORPORATION, No. 82795; Court of Appeals No. 93063.

SVOKE v AHONEN LUMBER COMPANY, No. 82993; Court of Appeals No. 103029.

*Summary Disposition July 26, 1988:*

*In re* MORRIS (DEPARTMENT OF SOCIAL SERVICES v MORRIS), No. 82811. In lieu of granting leave to appeal, the case is remanded to the probate court to make additional findings with respect to the questions whether there was a no contest plea tendered and accepted and, if so, whether that plea was induced by a promise to return the children to the mother. If it is determined that a no contest plea was made, the probate court is to make a finding as to whether the plea should be set aside. MCR 7.302(F)(1). Jurisdiction is retained. Court of Appeals No. 98587.

*Leave to Appeal Denied July 26, 1988:*

SIZELAND v CITY OF ROYAL OAK, No. 82366; Court of Appeals No. 91998.

ROSE v HARRY FOX, INC, No. 82615; Court of Appeals No. 103011.

PEOPLE v RICHARDSON, No. 82749; Court of Appeals No. 100672. ARCHER, J., would grant leave to appeal on the issue whether the defendant should have the right to allocute after the judge's statement of the reasons for the sentence, but before the imposition of sentence.

PEOPLE v BICKNELL, No. 82840; Court of Appeals No. 102846.

PEOPLE v YOUNGBLOOD, No. 82863; reported below: 165 Mich App 381. BOYLE, J., would grant leave to appeal.

LEIDER v FITZGERALD EDUCATION ASSOCIATION, No. 82927; reported below: 167 Mich App 210.

*Interlocutory Appeal*

*Leave to Appeal Denied July 26, 1988:*

MOORE v FORD MOTOR CREDIT COMPANY, No. 82650; reported below: 166 Mich App 100. CAVANAGH, J., would grant leave to appeal.

*Leave to Appeal Denied August 1, 1988:*

PEOPLE v WARRICK, No. 78786, 4/March 1988. The cause having been briefed and orally argued, the order of October 6, 1987, 429 Mich

857, granting leave to appeal, is vacated and leave to appeal is denied because the Court is no longer persuaded that it should review the question presented. Court of Appeals No. 83541.

*Appeal Dismissed August 17, 1988:*

PROVIDENT LIFE & ACCIDENT INSURANCE COMPANY v KING, No. 80643. Appeal dismissed upon stipulation of the parties with prejudice and without costs. Leave to appeal was granted December 22, 1987, 429 Mich 885. Court of Appeals No. 89478.

*Reconsideration Granted August 24, 1988:*

PEOPLE v COVINGTON, No. 77496. The case is remanded to the Eaton Circuit Court for resentencing on the basis indicated by the trial court at the hearing conducted on May 12, 1986. Leave to appeal was denied October 22, 1986, 426 Mich 866. Reported below: 144 Mich App 652.

BOYLE, J., would not order resentencing.

*Summary Disposition August 24, 1988:*

PEOPLE v PERKINS, No. 83424. In lieu of granting leave to appeal, the judgment of the Court of Appeals is vacated and the denial of credit for time served of the trial court is affirmed. The defendant was not incarcerated because of an inability to post bond or denial of bond. MCR 7.302(F)(1). Court of Appeals No. 100404.

*Leave to Appeal Denied August 24, 1988:*

SWANSON v VILLAGE OF NEWBERRY (AFTER REMAND), Nos. 81150, 81201. See 429 Mich 863 (1987). Court of Appeals No. 91838.

*In re* MCNERNEY ESTATE (NOBLE v MCNERNEY), No. 82566. Leave to appeal as cross-appellant is also denied. Reported below: 165 Mich App 586.

BOYLE and ARCHER, JJ., would grant leave to appeal.

*In re* PEOPLE v PRENTIS WILSON (WAYNE COUNTY PROSECUTOR v RECORDER'S COURT JUDGE #1), No. 82935; reported below: (*On Remand*) 167 Mich App 282. LEVIN, CAVANAGH, and ARCHER, JJ., would grant leave to appeal.

PEOPLE v CIRAULO, No. 83230; Court of Appeals No. 98199. RILEY, C.J., and BRICKLEY and BOYLE, JJ., would grant leave to appeal.

Reconsideration denied October 31, 1988.

PEOPLE v COLLIER, No. 83445; reported below: 168 Mich App 687. RILEY, C.J., and BOYLE, J., would grant leave to appeal.

PEOPLE v HARVEY, No. 83447; Court of Appeals No. 96420. RILEY, C.J., and BRICKLEY and BOYLE, JJ., would grant leave to appeal.

PEOPLE v MILDRED GIDDINGS and PEOPLE v EDWARD GIDDINGS, Nos. 83603, 83604. Leave to appeal as cross-appellant is also denied. Reported below: 169 Mich App 631.

*Leave to Appeal Denied September 1, 1988:*

PEOPLE v PHILLIPS, No. 83767; Court of Appeals No. 101427.

*Interlocutory Appeal*

*Leave to Appeal Denied September 1, 1988:*

JOHNSON v ROY O'BRIEN, INC, No. 83974; Court of Appeals No. 105839.

*Clarification Granted in Part September 7, 1988:*

KELLEPOUREY v BURKHART, No. 82238. The summary disposition of June 7, 1988, 430 Mich 889, should have indicated that this Court does not retain jurisdiction. In all other respects the motion for clarification is denied. Reported below: 163 Mich App 251.

*Reconsideration Denied September 7, 1988:*

KAPLAN v UPLAND HILLS FARM SCHOOLS, No. 81311. Leave to appeal was denied June 1, 1988, 430 Mich 888. Court of Appeals No. 76888.

LEVIN, BOYLE, and ARCHER, JJ., would grant reconsideration and leave to appeal.

DAUGHERTY v STATE OF MICHIGAN, No. 81965. Leave to appeal was denied April 19, 1988, 430 Mich 870. Reported below: (*After Second Remand*) 163 Mich App 697.

LEVIN and ARCHER, JJ., would grant reconsideration and leave to appeal.

HARRISON TOWNSHIP v STATE BOUNDARY COMMISSION, No. 82224. Leave to appeal was denied April 25, 1988, 430 Mich 872. Court of Appeals No. 69340.

PEOPLE v ERVIN, No. 82493. Leave to appeal was denied June 1, 1988, 430 Mich 888. Court of Appeals No. 95822.

THOMAS v STAFF BUILDERS HEALTH CARE, No. 82596. Leave to appeal was denied May 31, 1988, 430 Mich 886. Reported below: 168 Mich App 127.

PEOPLE v CRAYTON, No. 82604. Leave to appeal was denied May 31, 1988, 430 Mich 886. Court of Appeals No. 100018.

PEOPLE v RICHMOND, No. 82817. Leave to appeal was denied June 28, 1988, 430 Mich 897. Court of Appeals No. 92843.

PENA v OAKLAND CIRCUIT JUDGE, No. 82956. Leave to appeal was denied June 28, 1988, 430 Mich 897. Court of Appeals No. 106185.

*Summary Dispositions September 7, 1988:*

PEOPLE v SMOTHERS, No. 82624. In lieu of granting leave to appeal, the judgment of the Court of Appeals is vacated, and the case is remanded to that Court for reconsideration in light of *People v Allen*, 429 Mich 558 (1988). MCR 7.302(F)(1). Court of Appeals No. 96515.

VENNE v MICHIGAN MUTUAL INSURANCE COMPANY, No. 83042. In lieu of granting leave to appeal, the judgment of the Court of Appeals is modified by deleting the direction that the Manistee Circuit Court enter judgment for the defendant. The circuit court, in entering judgment for the plaintiff, expressly declined to rule on the merits of the plaintiff's alternate grounds in support of his motion for summary disposition. On remand, the Manistee Circuit Court is to consider such alternate grounds and conduct further proceedings consistent with this order and the Court of Appeals judgment as modified by this order. MCR 7.302(F)(1). Jurisdiction is not retained. Reported below: 168 Mich App 513.

ROSSMAN v ROSSMAN #1, No. 83825. In lieu of granting leave to appeal, the order of the Court of Appeals dismissing this appeal is vacated, and the case is remanded to that Court for plenary consideration. On remand, the Court of Appeals is to grant the plaintiff's motion to waive fees. MCR 7.302(F)(1). Court of Appeals No. 104878.

Reconsideration denied November 30, 1988.

*Leave to Appeal Denied September 7, 1988:*

DONAJKOWSKI v THE BESSER COMPANY, No. 82262; Court of Appeals No. 102566. Reconsideration denied November 30, 1988.

CITY OF TRENTON v TRENTON FIRE FIGHTERS UNION, LOCAL 2701, INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, No. 82680; reported below: 166 Mich App 285.

PEOPLE v STEVENS, No. 82334; Court of Appeals No. 89223.

PEOPLE v MIZELL, No. 82727; Court of Appeals No. 102182. Reconsideration denied November 30, 1988.

WARDEN, RIVERSIDE CORRECTIONAL FACILITY v REESE, No. 82745; Court of Appeals No. 102541.

EICHHORN v LAMPHERE SCHOOL DISTRICT and EICHHORN v HOLLOWAY, Nos. 82776-82778; reported below: 166 Mich App 527.

PEOPLE v JERRY WHITE, No. 82786; Court of Appeals No. 97214.

GENTILE v MCALISTER MOTORS, INC, No. 82796; Court of Appeals No. 100788.

PEOPLE v TWIGG, No. 82804; Court of Appeals No. 81980.

PEOPLE v NASH, No. 82806; Court of Appeals No. 101326.

PEOPLE v JACOBS, No. 82829; Court of Appeals No. 100208.

*In re* RYBKOWSKI, No. 82852; Court of Appeals No. 101548.

CURLEY v CURLEY, No. 82859; Court of Appeals No. 92115.

PEOPLE v MCLAUGHLIN, No. 82875; Court of Appeals No. 92717.

PEOPLE v PHILLIP BOYD, No. 82871; Court of Appeals No. 99333.

VANDERWALL v MIDKIFF (GELDERLOOS ESTATE v MIDKIFF ESTATE), Nos. 82887, 82903, 82984; reported below: 166 Mich App 668.

PEOPLE v TOMMY LLOYD MARTIN, No. 82890; Court of Appeals No. 102198.

PEOPLE v MORTON, No. 82897; Court of Appeals No. 101437.

GOODEN v TRANSAMERICA INSURANCE CORPORATION OF AMERICA, No. 82902; reported below: 166 Mich App 793.

PEOPLE v CONVILLE, No. 82905; Court of Appeals No. 92338.

PEOPLE v HICKS, No. 82912; Court of Appeals No. 95524.

MINOR v WILLIAM BEAUMONT HOSPITAL, No. 82943; Court of Appeals No. 97722.

SHIELDS v MELLING DROP FORGE, No. 82954; Court of Appeals No. 103560.

PEOPLE v BULLOCK, No. 82961; Court of Appeals No. 91279.

BROOKS v AMALGAMATED TRANSIT UNION DIVISION 26 AFL-CIO, No. 82969; Court of Appeals No. 97786.

THE MILBRAND COMPANY v BAUER, No. 82970; Court of Appeals No. 91571.

PEOPLE OF THE CITY OF INKSTER v WORKMAN, No. 82986; Court of Appeals No. 103129.

PEOPLE v TIMKO, No. 82988; Court of Appeals No. 104167.

PEOPLE v STODDARD, No. 83003; Court of Appeals No. 102201.

GROMALA v NORDIN, No. 83005; Court of Appeals No. 98060.

TALLENT v ROSENBERG, No. 83015; Court of Appeals No. 96808.

PEOPLE v KINCHELOW, No. 83022; Court of Appeals No. 101054.

PEOPLE v HARDIN, No. 83025; Court of Appeals No. 102634.

PEOPLE v MICHAEL SMITH, No. 83028; Court of Appeals No. 103245.

DEVOE v C A HULL, INC and DEVOE v DEPARTMENT OF TRANSPORTATION (FISCHER ESTATE v C A HULL, INC and FISCHER ESTATE v DEPARTMENT OF TRANSPORTATION), Nos. 83029, 83030; reported below: 169 Mich App 569.

BROEMER v KAURALA, No. 83036; Court of Appeals No. 106284.

HOWES v NEW YORK CARPET WORLD, No. 83043; Court of Appeals No. 104267.

PEOPLE v ESTEY, No. 83045; Court of Appeals No. 97073.

SUMPTER TOWNSHIP v STEEG, No. 83046; Court of Appeals No. 96204.

PEOPLE v LEWIS, No. 83055; Court of Appeals No. 103561.

KERBY v JUDGES' RETIREMENT BOARD OF MICHIGAN, No. 83056; reported below: 166 Mich App 302.

PEOPLE v RICHARD SIMPSON, No. 83073; Court of Appeals No. 100002.

SILVA v RAIMI, No. 83075; Court of Appeals No. 102716.

BENZIE COUNTY GENERAL SCHOOLS v EDINGER, No. 83081; Court of Appeals No. 88708.

COPCO STEEL & ENGINEERING v CITY OF DETROIT, No. 83085; Court of Appeals No. 90418. Reconsideration denied December 29, 1988.

WHEELING v MICHIGAN NATIONAL BANK—OAKLAND, No. 83096; Court of Appeals No. 85302.

KINZIE v AMF LAWN AND GARDEN, DIVISION OF AMF, INC, No. 83114; reported below: 167 Mich App 528.

BARAGAR v LEON CHEMICAL AND PLASTICS, No. 83118; Court of Appeals No. 104067.

PEOPLE v PEARL BROWN, No. 83122; Court of Appeals No. 94965.

PACE v AUTO CLUB GROUP INSURANCE COMPANY, No. 83143; Court of Appeals No. 92275.

FREEDMAN v CITY OF OAK PARK, No. 83147; reported below: 170 Mich App 349.

JERRY L SUMPTER, PC v CITIZENS INSURANCE COMPANY OF AMERICA, No. 83153; Court of Appeals No. 87890.

CASTIGLIONE v FORD MOTOR COMPANY, No. 83156; Court of Appeals No. 90423.

AUTO-OWNERS INSURANCE COMPANY v AMERICAN COMMUNITY MUTUAL INSURANCE COMPANY, No. 83165; Court of Appeals No. 95881.

PEOPLE v BUBEN, No. 83185; Court of Appeals No. 98376.

COLLINS v GENERAL MOTORS CORPORATION, No. 83188; Court of Appeals No. 104323. RILEY, C.J., would grant leave to appeal.

Reconsideration denied December 29, 1988.

LYLE v MARQUETTE CIRCUIT JUDGE, No. 83189; Court of Appeals No. 102745.

PEOPLE v WILLIAM GRIFFIN, No. 83199; Court of Appeals No. 102453.

PEOPLE v ROWELL, No. 83213; Court of Appeals No. 101789.

WINNER v GENERAL MOTORS CORPORATION, No. 83231; Court of Appeals No. 104291.

MICRO-TIME MANAGEMENT SYSTEMS v COMERICA BANK—SOUTHFIELD, Nos. 83241-83243; Court of Appeals Nos. 104638, 104694, 105082.

BEANE v NELSON, No. 83251; Court of Appeals No. 84107.

CASSIDY v DEPARTMENT OF CORRECTIONS, No. 83258; Court of Appeals No. 102166.

PEOPLE v RONALD, No. 83311; Court of Appeals No. 97080.

PARKS v CITY OF OWOSSO, No. 83367; Court of Appeals No. 94436.

PEOPLE v WILLIAM FINLEY, No. 83384; Court of Appeals No. 91573.

*In re* LEVIN (DEPARTMENT OF SOCIAL SERVICES v DAVIS), No. 83514. Motion to waive fees is granted. Court of Appeals No. 103037.

MCKINNON v CITY OF DETROIT, No. 83581; Court of Appeals No. 83282.

*In re* GILSOUL (DEPARTMENT OF SOCIAL SERVICES v FORSELL), No. 83649. Motion to waive fees is granted. Court of Appeals No. 100659.

*Interlocutory Appeals*

*Leave to Appeal Denied September 7, 1988:*

HUDSON v FORD MOTOR COMPANY, No. 82686; Court of Appeals No. 94247.

EISLEY v SPANGLER, No. 83026; Court of Appeals No. 93977.

FROLING v ARBOR DRUGS, INC, Nos. 83048, 83064; Court of Appeals No. 90693.

ANDERSEN v WINCKLER, No. 83121; Court of Appeals No. 104328.

PEOPLE v CHARLES ROBINSON, No. 83175; Court of Appeals No. 98216.

PEOPLE v LAMONT WILLIAMS, No. 83277; Court of Appeals No. 101444.

BENJAMIN W SIMON PROPERTIES v FASHION DESIGNS INCORPORATED, No. 83494; Court of Appeals No. 108074.

MCPECK v E W BLISS COMPANY, INC, No. 83652; Court of Appeals No. 108134.

JALEEL v CITY OF DETROIT, No. 83730; Court of Appeals No. 109608.

*Summary Dispositions September 8, 1988:*

PEOPLE v KING, No. 82595. In lieu of granting leave to appeal, the case is remanded to the Court of Appeals for reconsideration in light of *People v Allen,* 429 Mich 558; 420 NW2d 499 (1988). MCR 7.302(F)(1). Court of Appeals No. 88044.

BRYANT v BRANNEN, No. 82784. In lieu of granting leave to appeal, the judgment of the Court of Appeals is vacated, and the case is remanded to that Court for reconsideration in light of *Williams v Cunningham Drug Stores, Inc,* 429 Mich 495 (1988). MCR 7.302(F)(1). This order should not be understood as precluding reconsideration of the issue involving the doctrine of respondeat superior should the Court of Appeals desire to do so. Jurisdiction is not retained. Court of Appeals No. 93843.

*Leave to Appeal Denied September 8, 1988:*

COEN v OAKLAND COUNTY, No. 79041; reported below: 155 Mich App 662. LEVIN, BOYLE, and ARCHER, JJ., would remand to the Court of Appeals for reconsideration in light of *Canon v Thumudo, Davis v Lhim,* and *Hall v Han,* 430 Mich 326 (1988).

PEOPLE v JERRY MATTHEWS, No. 81776; reported below: 163 Mich App 244. LEVIN, CAVANAGH, and ARCHER, JJ., would grant leave to appeal on the question whether the failure to give an alibi instruction was harmless error.

POTTER v CITY OF DETROIT, No. 82638; Court of Appeals No. 93709. LEVIN, CAVANAGH, and BOYLE, JJ., would grant leave to appeal.

VICTOR v KANGAS, No. 82729; Court of Appeals No. 96512.

SCHANZ v NEW HAMPSHIRE INSURANCE COMPANY, No. 82810; reported below: 165 Mich App 395. Reconsideration denied December 29, 1988.

PEOPLE v SERRANO, No. 83493; Court of Appeals No. 101433.

*Interlocutory Appeals*

*Leave to Appeal Denied September 8, 1988:*

HALL v PEOPLES COMMUNITY HOSPITAL AUTHORITY, No. 82518; Court of Appeals No. 101612.

LEVIN, J., would grant leave to appeal and states:

There is a substantial question whether the Legislature can, consistent with the Equal Protection Clause, immunize a governmental hospital, or indeed a physician employed by the government, from liability for conduct for which a private hospital or doctor is subject to tort liability under state law, statutory law, or common law.

ARCHER, J., would grant leave to appeal.

KULP v VERNDALE PRODUCTS, INC, No. 82983; Court of Appeals No. 90464. GRIFFIN, J., would grant leave to appeal.

*Summary Dispositions September 13, 1988:*

PEOPLE v SAMUEL BROWN, No. 82679. In lieu of granting leave to appeal, the order of the Court of Appeals certified February 3, 1988, granting the motion to affirm is vacated, and the case is remanded to that Court for plenary consideration. On remand, the Court of Appeals is to consider the merits of defendant's motion to remand filed in propria persona. MCR 7.302(F)(1). Jurisdiction is not retained. Court of Appeals No. 100483.

AUTO CLUB INSURANCE ASSOCIATION v HAWKINS, No. 82815. In lieu of granting leave to appeal, the case is remanded to the Court of Appeals for further consideration of whether the absence of Elbur Hawkins' name from the Mustang endorsement affects either the policy's coverage or the cancellation notice requirements. MCR 7.302(F)(1). Jurisdiction is not retained. Court of Appeals No. 97197.

PEOPLE v ZAK, No. 83625. In lieu of granting leave to appeal, the case is remanded to Recorder's Court for hearing on defendant's previously filed motion for reduction of bond. MCR 7.302(F)(1). Jurisdiction is not retained. Court of Appeals No. 107243.

*Reconsideration Denied September 13, 1988:*

JONES v MID-AMERICA EXPOSITIONS, INC, No. 82170. Leave to appeal was denied April 26, 1988, 430 Mich 875. Court of Appeals No. 99182.

LEVIN, J., would remand to the Court of Appeals for plenary consideration.

*Leave to Appeal Denied September 13, 1988:*

OLKOWSKI v CITY OF DETROIT, No. 82541; Court of Appeals No. 101216.

PEOPLE v LUCE, No. 82570; Court of Appeals No. 97952.

WRIGHT v GENERAL MOTORS CORPORATION, No. 82577; Court of Appeals No. 103565. RILEY, C.J., and BRICKLEY and GRIFFIN, JJ., would grant leave to appeal.

MEAD v MAUL MANUFACTURING COMPANY, No. 82751; Court of Appeals No. 103470. RILEY, C.J., and BRICKLEY and GRIFFIN, JJ., would grant leave to appeal.

PEOPLE v WITHERS, No. 82824; Court of Appeals No. 93749.

PEOPLE v HANNAFORD, No. 82910; reported below: 167 Mich App 147.

PEOPLE v CANNON, No. 83024; Court of Appeals No. 97815.

*In re* KING, Nos. 83233, 83234; Court of Appeals No. 100708.

PEOPLE v DEWEY THOMAS, No. 83392; Court of Appeals No. 87300. BOYLE, J., would grant leave to appeal to consider the question whether *People v Sullivan,* 407 Mich 303 (1979), requires reversal of defendant's conviction on double jeopardy grounds where defense counsel's request for adjournment caused separate trials.

PEOPLE v WOLLER, No. 83491; Court of Appeals No. 101790.

PEOPLE v LEIGH, No. 83641; Court of Appeals No. 99662. BRICKLEY and BOYLE, JJ., would grant leave to appeal.

*Interlocutory Appeal*

*Leave to Appeal Denied September 13, 1988:*

JENKINS v FRISON BUILDING MAINTENANCE COMPANY, No. 82906; reported below: 166 Mich App 716.

*Summary Disposition September 14, 1988:*

PEOPLE v CARSON, No. 82637. In lieu of granting leave to appeal, the judgment of the Court of Appeals is reversed in part, and the defendant's conviction for possession of a firearm during the commission of a felony is reinstated. In light of the defense theory, defense counsel's argument, and the lack of objection, the trial court did not commit error requiring reversal when it instructed the jury that a .22-caliber rifle is a firearm. MCR 7.302(F)(1). Court of Appeals No. 92969.

ARCHER, J., would grant leave to appeal.

*Summary Disposition September 15, 1988:*

*In re* MORRIS (DEPARTMENT OF SOCIAL SERVICES v MORRIS), No. 82811. In lieu of granting leave to appeal, the case is remanded to the Court of Appeals for reconsideration in light of the finding by the probate judge that a plea of no contest had been tendered and accepted on October 18, 1985, "pursuant to an agreement that an Order would enter on that date, returning the children to the mother within fourteen days." MCR 7.302(F)(1). See *ante,* p 858. Jurisdiction is not retained. Court of Appeals No. 98587.

*Leave to Appeal Denied September 15, 1988:*

PEOPLE v DRAPER, No. 78953; reported below: 150 Mich App 481. Reconsideration granted January 5, 1989, 432 Mich 851.

PEOPLE v MICOL, No. 82798; Court of Appeals No. 100875. LEVIN and ARCHER, JJ., would remand to the Court of Appeals for consideration as on leave granted.

KOTLARCZYK v KOTLARCZYK, No. 82865; Court of Appeals No. 89570. LEVIN, J., would grant leave to appeal.

PEOPLE v MOSES, No. 83784; Court of Appeals No. 109598.

LEVIN, J., would grant leave to appeal to consider whether the Court of Appeals has the authority to waive for an indigent the five-copy requirement, and, if not, to consider whether the rule should be changed to allow or require the Court of Appeals to do so for an indigent.

ARCHER, J., would remand to the Court of Appeals for consideration as on leave granted.

LAFAYETTE APARTMENTS COMPANY v CITY OF PETOSKEY, No. 82639; Court of Appeals No. 90198. BRICKLEY, BOYLE, and ARCHER, JJ., would grant leave to appeal.

Reconsideration denied February 3, 1989. BOYLE, J., would grant reconsideration and would grant leave to appeal.

PEOPLE v TERRY, No. 82949; Court of Appeals No. 104232. BOYLE, J., would grant leave to appeal.

*Summary Disposition September 19, 1988:*

HAMMOND v JOBBERS WAREHOUSE SERVICE, INC, No. 81715. In lieu of granting leave to appeal, the judgment of the Court of Appeals is vacated, and the case is remanded to that Court for consideration of the other issues raised on appeal. MCR 7.302(F)(1). The Court of Appeals erred in holding that the "short test" for determining whether a person is employed in a "bona fide administrative capacity" and, thus, excepted from the overtime provisions of the Fair

Labor Standards Act, 29 USC 201 *et seq.*, is limited to academic administrative personnel. The test applies to all employees "compensated on a salary or fee basis at a rate of not less than $250 per week." 29 CFR 541.2. See, e.g., *Donovan v Tama Meat Packing Corp,* 817 F2d 54 (CA 8, 1987); *Clark v J M Benson Co, Inc,* 789 F2d 282 (CA 4, 1986); *Donovan v United Video, Inc,* 725 F2d 577 (CA 10, 1984). Court of Appeals No. 93733.

*Leave to Appeal Denied September 19, 1988:*

JACKSON v NEW CENTER COMMUNITY MENTAL HEALTH SERVICES, No. 80443. Leave to appeal as cross-appellant is also denied. Reported below: 158 Mich App 25.

LEVIN and ARCHER, JJ., would remand to the Court of Appeals for reconsideration in light of *Canon v Thumudo, Davis v Lhim,* and *Hall v Han,* 430 Mich 326 (1988).

GLASS v THE HARVEST LIFE INSURANCE COMPANY, No. 82695; reported below: 168 Mich App 667. Reconsideration denied December 29, 1988.

JACOBS v ST CLAIR COUNTY, No. 82788; reported below: 163 Mich App 230. ARCHER, J., would grant leave to appeal.

PAULSEN v BUREAU OF STATE LOTTERY, No. 83152; reported below: 167 Mich App 328.

*Leave to Appeal Denied September 22, 1988:*

LEWIS v LEWIS, No. 84149; Court of Appeals No. 111440.

*Summary Dispositions September 23, 1988:*

MURDOCK ESTATE v HUTZEL HOSPITAL, Nos. 83248, 83249. In lieu of granting leave to appeal, the case is remanded to the Court of Appeals for consideration as on leave granted. MCR 7.302(F)(1). Court of Appeals Nos. 101001, 101114.

BRINTLEY v HUTZEL HOSPITAL, No. 83279. In lieu of granting leave to appeal, the case is remanded to the Court of Appeals for consideration as on leave granted. MCR 7.302(F)(1). Court of Appeals No. 104318.

*Leave to Appeal Denied September 23, 1988:*

KNOLLENBERG v CROPP, No. 83027; Court of Appeals No. 101370. ARCHER, J., would grant leave to appeal to examine the question whether there was sufficient testimony adduced during the direct and cross-examination of plaintiffs' expert witness to enable the jury to find that there was a breach of the applicable standard of care.

PEOPLE v KECK, No. 83052; Court of Appeals No. 101562. LEVIN, J., would grant leave to appeal.

PEOPLE v SEKOIAN, No. 83146; reported below: 169 Mich App 609.

FULKERSON v OAKLAND COUNTY BOARD OF ELECTION COMMISSIONERS, No. 84185; Court of Appeals No. 111117. RILEY, C.J., and GRIFFIN, J., would grant leave to appeal.

*Interlocutory Appeals*

*Leave to Appeal Denied September 23, 1988:*

NORTHWESTERN SAVINGS AND LOAN ASSOCIATION v CADILLAC WILDWOOD DEVELOPMENT CORPORATION, No. 83140; Court of Appeals No. 92649. Reconsideration denied November 30, 1988.

BRUCE v BRUCE, No. 84214; Court of Appeals No. 110259.

*Leave to Appeal Granted September 28, 1988:*

BENDER v HELEN NEWBERRY JOY HOSPITAL BOARD OF TRUSTEES, No. 82008. Limited to the issues (1) whether the revocation proceedings violated the plaintiff's due process rights, and (2) whether the defendant-appellant has qualified immunity against the plaintiff's claim for damages. Court of Appeals No. 93851.

BUFALINO v DETROIT MAGAZINE, INC, Nos. 82179, 82180. Limited to the issue whether the lead plaintiff is a public figure. Court of Appeals Nos. 81253, 80533.

PEOPLE v ADKINS, Nos. 82294, 82333. Limited to the issue whether defendant should have been granted sentence credit for time served in an Ohio jail and a federal prison, on an unrelated conviction, from the time that Michigan authorities could have placed a hold on him. Leave to appeal as cross-appellant is denied because the Court is not persuaded that it should review the questions presented. Court of Appeals No. 88132.

VIVIAN v ROSCOMMON COUNTY BOARD OF ROAD COMMISSIONERS, No. 82555. Limited to the issue whether MCL 560.255b; MSA 26.430(255b) was applicable in this case. The Public Corporation Law and Real Property Law sections of the State Bar of Michigan are invited to file briefs amici curiae on the subject of the application of that statute in this case. Reported below: 164 Mich App 234.

UNIVERSITY OF MICHIGAN REGENTS v STATE OF MICHIGAN, No. 82674. Limited to the issue whether the Civil Rights Act, MCL 37.2402(f); MSA 3.548(402)(f) is unconstitutional as violative of Const 1963, art 8, § 5. The joint motion to file briefs amici curiae is also granted. Reported below: 166 Mich App 314.

POET v TRAVERSE CITY OSTEOPATHIC HOSPITAL, No. 82941. Limited to the issue whether the Court of Appeals correctly determined that

plaintiffs were entitled to a new trial as a consequence of the trial judge's denial of plaintiffs' challenge of juror Primo for cause, where she was subsequently dismissed peremptorily. Court of Appeals No. 92453.

PEOPLE v PEARL EVANS, No. 83297; reported below: 168 Mich App 654.

PEOPLE v HEGEDUS, No. 83601. Limited to the issue whether the Occupational Safety and Health Act, 29 USC 651 *et seq.,* preempts prosecution for manslaughter where an employee dies from carbon monoxide poisoning while at work. Leave to file a brief amicus curiae is also granted. Reported below: 169 Mich App 62.

*Reconsideration Granted September 28, 1988:*

LEAGUE GENERAL INSURANCE COMPANY v MICHIGAN CATASTROPHIC CLAIMS ASSOCIATION, No. 82417. Order of July 11, 1988, *ante,* 854, is vacated. On reconsideration, leave to appeal is granted, limited to the following questions: (1) Did the Legislature intend that 1988 PA 277 operate to validate the past assessments by defendant-appellant against insurance companies? (2) If so, is the statute constitutional? The case is to be argued and submitted with *In re Certified Question from the United States Court of Appeals for the Sixth Circuit, Preferred Risk Mutual Ins Co v Michigan Catastrophic Claims Ass'n,* No. 82968. Reported below: 165 Mich App 278.

*Summary Dispositions September 28, 1988:*

DAVIS v ROPER CORPORATION (DAVIS v SEARS, ROEBUCK & COMPANY) (AFTER REMAND), No. 81125. In lieu of granting leave to appeal, the Court of Appeals judgment of June 2, 1987, is vacated, and, for the reasons set forth by that Court in its opinion of April 18, 1988, the Genesee Circuit Court's grant of summary disposition to defendant Roper Corporation is affirmed. MCR 7.302(F)(1). Previously reported: 160 Mich App 595 and 429 Mich 886.

ARCHER, J., would grant leave to appeal.

PALLONI v SMITH, No. 83002. In lieu of granting leave to appeal, the judgment of the Court of Appeals is reversed and the order of the Wayne Circuit Court which granted a new trial to the plaintiff is reinstated. MCR 7.302(F)(1). The Supreme Court perceives no abuse of discretion on the part of the trial judge in determining that the verdict in this case was contrary to the great weight of the evidence. Reported below: 167 Mich App 393.

GRIFFIN, J., would grant leave to appeal.

Reconsideration denied February 2, 1989. LEVIN, BRICKLEY, and GRIFFIN, JJ., would grant reconsideration and would grant leave to appeal.

*Leave to Appeal Denied September 28, 1988:*

SHEPARD v REDFORD COMMUNITY HOSPITAL, No. 78645; reported below: 151 Mich App 242. RILEY, C.J., and BRICKLEY and GRIFFIN, JJ., would grant leave to appeal.

LUBIC v JOBA CONSTRUCTION COMPANY, No. 80586; Court of Appeals No. 91837. CAVANAGH, BOYLE, and ARCHER, JJ., would grant leave to appeal.

MARCEAU v BROAD CRANE ENGINEERING COMPANY, No. 80829; Court of Appeals No. 98024. CAVANAGH, BOYLE, and ARCHER, JJ., would grant leave to appeal.

Reconsideration granted 432 Mich 858.

GAMBINO v CARDAMONE, No. 81079; reported below: 163 Mich App 574. Reconsideration denied December 29, 1988.

BOUFORD v JODAR, No. 81437; Court of Appeals No. 94363. ARCHER, J., would grant leave to appeal.

PEOPLE v MORRELL, No. 82012; Court of Appeals No. 94721. LEVIN and ARCHER, JJ., would grant leave to appeal.

PECK v GENERAL MOTORS CORPORATION and PANKOW v GENERAL MOTORS CORPORATION, Nos. 82304, 82305; reported below: 164 Mich App 580. CAVANAGH, BOYLE, and ARCHER, JJ., would grant leave to appeal.

Reconsideration granted in *Pankow,* No. 82305, 432 Mich 892.

JONES v WAYNE COUNTY PROSECUTOR'S OFFICE, No. 82468; reported below: 165 Mich App 62. CAVANAGH, J., would grant leave to appeal.

FRICK v PATRICK, No. 82576; reported below: 165 Mich App 689. CAVANAGH and ARCHER, JJ., would grant leave to appeal.

PEOPLE v PARIS, No. 82661. Leave to file briefs amici curiae is granted. The motion to strike by defendant- appellee is granted except as to appendix v, which is part of the record on appeal. Reported below: 166 Mich App 276.

RILEY, C.J., and BOYLE and GRIFFIN, JJ., would grant leave to appeal.

PEOPLE v NICHOLS #2, No. 82699; Court of Appeals No. 89068.

PARDEE v SCHALL, No. 82758; Court of Appeals No. 86371. ARCHER, J., would grant leave to appeal.

MAYES v CADILLAC INSURANCE COMPANY, No. 82836; Court of Appeals No. 98812. BOYLE, J., would grant leave to appeal.

CUFFE v GENERAL MOTORS CORPORATION, No. 82908; reported below: 166 Mich App 766. ARCHER, J., would grant leave to appeal.

Reconsideration granted 432 Mich 885.

PEOPLE v COMBS, No. 82932; Court of Appeals No. 99636. RILEY, C.J., and BOYLE and GRIFFIN, JJ., would grant leave to appeal.

METRO v FORD MOTOR COMPANY and GRIFFIN v FORD MOTOR COMPANY, Nos. 82937, 82938; reported below: 169 Mich App 549. ARCHER, J., would grant leave to appeal.

Reconsideration granted 432 Mich 886.

PEOPLE v READY, No. 83066; Court of Appeals No. 93004. BOYLE, J., would grant leave to appeal.

PEOPLE v OLK, No. 83133; Court of Appeals No. 90937.

PEOPLE v BUFKIN, No. 83435; reported below: 168 Mich App 615. BOYLE, J., would grant leave to appeal.

PEOPLE v ROBERT WILSON, No. 83590; Court of Appeals No. 94977. BOYLE, J., would grant leave to appeal.

PEOPLE v FERGUSON, No. 83796. Leave to appeal as cross-appellant is also denied. Court of Appeals No. 96990. BOYLE, J., would grant leave to appeal.

*Summary Dispositions October 4, 1988:*

SPALO v A & G ENTERPRISES, No. 83196. In lieu of granting leave to appeal, the case is remanded to the Court of Appeals for consideration as on leave granted. MCR 7.302(F)(1). Court of Appeals No. 104321.

WALDECK v SMALL, No. 83336. In lieu of granting leave to appeal, the judgment of the Court of Appeals is vacated, and the case is remanded to that Court which, while retaining jurisdiction, is to remand the case to the Oakland Circuit Court which is to direct the parties to promptly explain to that court whether, and if so how, the claims in the instant case differ from those in *Waldeck v Small,* Oakland Circuit Court No. 82-245053-CZ. The circuit court may, at its option, schedule a further hearing on the plaintiff's motion to set aside default and for relief from judgment. Regardless of whether the circuit court decides to hold such a further hearing, it is to explain its decision on the plaintiff's motion so as to facilitate meaningful appellate review. MCR 7.302(F)(1). Court of Appeals No. 85532.

ANDERSON v BAIT, No. 83416. In lieu of granting leave to appeal, the case is remanded to the Court of Appeals for consideration as on leave granted. MCR 7.302(F)(1). Court of Appeals No. 104414.

*Leave to Appeal Denied October 4, 1988:*

CICINELLI v MOSSNER, No. 83159; Court of Appeals No. 98194. Reconsideration denied February 1, 1989.

PEOPLE v JONES, No. 83197; reported below: 168 Mich App 191.

HEWITT v BIONDI KELLERING SERVICE, No. 83198; Court of Appeals No. 104093. Reconsideration denied December 29, 1988.

PEOPLE v YOUNG, No. 83200; Court of Appeals No. 95688.

PEOPLE v ROBERSON, No. 83204; reported below: 167 Mich App 501.

GARB-KO, INC v LANSING-LEWIS SERVICES, INC, No. 83212; reported below: 167 Mich App 779.

PEOPLE v SHAYA, No. 83220; Court of Appeals No. 94027.

PEOPLE v CAMPBELL #1, No. 83222; Court of Appeals No. 100943.

GAMBOA v KIRBY, No. 83246; Court of Appeals No. 104981.

JIMENEZ v GENERAL MOTORS CORPORATION, No. 83250; Court of Appeals No. 103966.

BALKO v GENERAL MOTORS CORPORATION, No. 83252; Court of Appeals No. 104270.

CERASOLI v KICKLAND, No. 83256; Court of Appeals No. 96490.

MUDGET v VILJEAN, No. 83260; Court of Appeals No. 88276.

TUNK v BUCK, No. 83261; Court of Appeals No. 96137.

PEOPLE v SWEEZER, No. 83262; Court of Appeals No. 100585.

AHRENS v SAGINAW VALLEY TRUCKING BROKERAGE, No. 83263; Court of Appeals No. 103896.

PEOPLE v WELLS, No. 83280; Court of Appeals No. 103454.

PEOPLE v KRON, Nos. 83283, 83284; Court of Appeals Nos. 86971, 91661.

PEOPLE v LUMSDEN, No. 83301; reported below: 168 Mich App 286.

PEOPLE v DEMSON, No. 83303; Court of Appeals No. 102152.

PEOPLE v DILLA, No. 83304; Court of Appeals No. 102544.

BARBE v MAYO CLINIC, No. 83313; Court of Appeals No. 91485.

MERIDIAN MUTUAL INSURANCE COMPANY v HUNT, No. 83321; reported below: 168 Mich App 672.

DELLA PELLA v WAYNE COUNTY, No. 83323; reported below: 168 Mich App 362. Reconsideration denied December 29, 1988.

PEOPLE v SWILLING, No. 83326; Court of Appeals No. 103113.

SCOTT v SPEAS COMPANY, No. 83338; Court of Appeals No. 104809.

PEOPLE v ETHERIDGE, No. 83340; Court of Appeals No. 82380.

LYLE v INGHAM CIRCUIT JUDGE, No. 83341; Court of Appeals No. 100473.

AULGUR v AULGUR, No. 83342; Court of Appeals No. 89351.

LYLE v SAGINAW COUNTY, No. 83344; Court of Appeals No. 101546. Reconsideration denied November 30, 1988.

PEOPLE v DERRY JACKSON, No. 83346; Court of Appeals No. 101842.

PEOPLE v HAYES, No. 83347; Court of Appeals No. 102659.

PEOPLE v DARWIN WILLIAMS, No. 83353; Court of Appeals No. 96862.

PEOPLE v MORIN, No. 83364; Court of Appeals No. 84960.

CLANTON v MICHIGAN STATE UNIVERSITY, No. 83365; Court of Appeals No. 103837. Reconsideration denied November 30, 1988.

NUCULAJ v CHRYSLER CORPORATION, No. 83366; Court of Appeals No. 101262.

LOWERY v UNITED PARCEL SERVICE, No. 83371; Court of Appeals No. 104599.

KOEPP v T & G HEAVY TRUCK & TRAILER REPAIR, No. 83378; Court of Appeals No. 102295.

PEOPLE v GOODMAN, No. 83381; Court of Appeals No. 91852.

KENNY v COMMUNITY FEDERAL CREDIT UNION, No. 83388; Court of Appeals No. 95788.

YAUCH v GENERAL MOTORS CORPORATION, No. 83390; Court of Appeals No. 104454.

FIRE INSURANCE EXCHANGE v FOX, No. 83391; reported below: 167 Mich App 710.

PEOPLE OF THE CITY OF RIVER ROUGE v BYRD, No. 83415; Court of Appeals No. 104339.

PEOPLE v HOWARD, No. 83433; Court of Appeals No. 94750.

BILLUPS v HOWELL PUBLIC SCHOOLS, No. 83440; reported below: 167 Mich App 407.

PEOPLE v AKRAWI and PEOPLE v MATTI, Nos. 83457, 83741; Court of Appeals Nos. 89867, 93150.

PEOPLE v NELSON, No. 83458; Court of Appeals No. 105028.

ANDERSON v WESTIN MANUFACTURING COMPANY, No. 83479; Court of Appeals No. 92137.

SAMMONS v GENERAL MOTORS CORPORATION, No. 83485; Court of Appeals No. 104586. Reconsideration denied November 30, 1988.

MARASCO v WALSH, No. 83492; Court of Appeals No. 98095.

JORGENSEN v EAGLE OTTAWA LEATHER COMPANY, Nos. 81656, 83753; Court of Appeals Nos. 98815, 98979.

MITCHELL v MICHIGAN STATE UNIVERSITY, Nos. 80270, 80271. Leave to appeal as cross-appellant is also denied. Court of Appeals No. 96688, 96809.

PEOPLE v CUNNINGHAM, No. 82722; Court of Appeals No. 100048. Reconsideration denied December 29, 1988.

GLENWOOD SHOPPING CENTER LIMITED PARTNERSHIP v K MART CORPORATION, No. 82934; Court of Appeals No. 94527.

PEOPLE v TAISIR NASSAR, No. 82939; Court of Appeals No. 89368.

PEOPLE v ROY THOMAS, No. 82962; Court of Appeals No. 93065.

SEVAKIS v ARCHBOLD LADDER COMPANY, No. 82985; Court of Appeals No. 91440.

PEOPLE v FRY, No. 82998; Court of Appeals No. 95435.

PEOPLE v LORENZO MATTHEWS, No. 83031; Court of Appeals No. 95278.

OSTROWSKI v GENTILE, No. 83037; Court of Appeals No. 95437.

PEOPLE v ROSS, No. 83049; Court of Appeals No. 102976.

EAGAN v MARTINEZ, No. 83063; Court of Appeals No. 89342.

PEOPLE v POWELL, No. 83067; Court of Appeals No. 103028.

PEOPLE v BEIDOUN, No. 83068; Court of Appeals No. 88191.

PEOPLE v RIAD NASSAR, No. 83079; Court of Appeals No. 90241.

HEITSCH v HAMPTON, No. 83094; reported below: 167 Mich App 629.

MCNAMARA v GENERAL MOTORS CORPORATION, No. 83115; Court of Appeals No. 97967.

PEOPLE v HENAGAN, No. 83117; Court of Appeals No. 102376.

COLOSKY v ROYAL INSURANCE COMPANY OF AMERICA, No. 83131; Court of Appeals No. 93512.

VERPLOEGH v DEIGERT, No. 83134; Court of Appeals No. 93401.

PEOPLE v CALABRO, No. 83144; reported below: 166 Mich App 389.

PEOPLE v MAYS, No. 83154; Court of Appeals No. 103798.

PEOPLE v WATKINS, No. 83155; Court of Appeals No. 88485. Reconsideration denied December 29, 1988.

*Interlocutory Appeals*

*Leave to Appeal Denied October 4, 1988:*

MALIK v WILLIAM BEAUMONT HOSPITAL, No. 83221; reported below: 168 Mich App 159.

VILLARREAL v BRADA MILLER FREIGHT SYSTEMS, No. 83318; Court of Appeals No. 103754.

PEOPLE v SANDERS, No. 83667; Court of Appeals No. 92369.

PEOPLE v CAMPBELL #2, No. 83739; Court of Appeals No. 97808.

STARK v STARK, Nos. 83832, 83833; Court of Appeals No. 103663, 105196.

METROPOLITAN LIFE INSURANCE COMPANY v REIST, No. 82913; Court of Appeals No. 93320.

WOODY v ESSAD, No. 83070; Court of Appeals No. 102892.

MILLER v STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, No. 83113; reported below: 168 Mich App 238.

*Reconsideration Denied October 4, 1988:*

DURBIN v STATE OF MICHIGAN, No. 81516. Leave to appeal was denied June 1, 1988, 430 Mich 887. Court of Appeals No. 97575.

ARCHER, J., would grant reconsideration and would grant leave to appeal.

REGALADO v LENAWEE COUNTY ROAD COMMISSIONERS, No. 82286. Leave to appeal was denied June 1, 1988, 430 Mich 887. Court of Appeals No. 95574.

CAVANAGH and ARCHER, JJ., would grant reconsideration and would grant leave to appeal.

PEETE v CHRYSLER CORPORATION, No. 81793. Leave to appeal was denied June 28, 1988, 430 Mich 895. Court of Appeals No. 101447.

BURNS CLINIC MEDICAL CENTER, PC v VORENKAMP, No. 81838. Leave to appeal was denied June 28, 1988, 430 Mich 895. Reported below: 165 Mich App 224.

LEVIN and BOYLE, JJ., would grant reconsideration and would grant leave to appeal.

PEOPLE v STANEK, No. 82685. Leave to appeal was denied June 28, 1988, 430 Mich 896. Court of Appeals No. 101113.

*Summary Disposition October 5, 1988:*

HAYDEN v GREEN, No. 82762. In lieu of granting leave to appeal, the judgment of the Court of Appeals is reversed for the reasons stated by Judge HOOD in his dissent. MCR 7.302(F)(1). The final order of the Wayne Circuit Court dismissing the defendant law firm is affirmed. Leave to file a brief amicus curiae is granted. Reported below: 166 Mich App 352.

LEVIN, J., would grant leave to appeal.

Reconsideration denied December 29, 1988. LEVIN, J., would grant reconsideration and leave to appeal.

*Leave to Appeal Denied October 6, 1988:*

PEOPLE v THOMAS WILLIAMS, No. 77388; reported below: 143 Mich App 574.

BOYLE, J., states:

I would grant leave to fully consider the question addressed by Judge SHEPHERD in concurrence: Whether the peremptory order of this Court in *People v Boles,* 420 Mich 851; 358 NW2d 894 (1984), rev'g 127 Mich App 759; 339 NW2d 249 (1983), is to be understood to mandate jury instructions authorizing conviction of assaultive offenses where the defendant is charged with murder and there is no dispute that the victim died as a result of the assault.

As Judge SHEPHERD observed, such an interpretation pushes the obligation of trial judges to instruct on cognate offenses "to the outer extremes." If this Court really intends to impose this obligation on judges and offer this option to jurors, it should do so by opinion explaining how and why, where a defendant admits acting with felonious intent and does not dispute death as a result, a jury must be permitted to find nonculpability for such death.

Reconsideration denied December 29, 1988.

*Leave to Appeal Denied October 14, 1988:*

ORION CHARTER TOWNSHIP v BURNAC CORPORATION, Nos. 84160, 84161; reported below: 171 Mich App 450.

*Reconsideration Granted October 19, 1988:*

FOUMIA v WAYNE COUNTY BOARD OF COMMISSIONERS, No. 81409. The Supreme Court's order of March 22, 1988, 430 Mich 860, denying leave to appeal, is vacated, and on reconsideration, leave to appeal is granted, limited to the first two questions stated in the brief in support of the application for leave to appeal. Court of Appeals No. 93214.

*Summary Dispositions October 19, 1988:*

GREGORY v SCHAFER BAKERIES, INC, Nos. 82573, 82963. In lieu of granting leave to appeal, the March 14, 1988 order of the Court of Appeals is vacated. MCR 7.302(F)(1). The plaintiff's appeal of right was not vexatious. When the plaintiff filed his claim of appeal, a motion for rehearing was pending in *Carr v General Motors Corp,* 425 Mich 313; 389 NW2d 686 (1986). Further, while the plaintiff's deposition, when taken as a whole, was supportive of the defendant's position on appeal, it did contain testimony upon which the plaintiff could construct a legitimate good-faith argument. Leave to appeal the January 19, 1988 order of the Court of Appeals is denied because the Court is not persuaded that the questions presented should be reviewed. Court of Appeals No. 95393.

ALLISON v PEPSI-COLA BOTTLING COMPANY, No. 83295. In lieu of granting leave to appeal, the case is remanded to the Court of Appeals for consideration as on leave granted. MCR 7.302(F)(1). Court of Appeals No. 104429.

STATE TREASURER v TURNPAUGH, No. 84024. In lieu of granting leave to appeal, the Court of Appeals order of August 16, 1988, is vacated, and the case is remanded to that Court for reconsideration of the defendant's motion. MCR 7.302(F)(1). On reconsideration, the Court of Appeals is to either permit oral argument by both parties or limit both parties to written presentations only. Compare the present case with *Lawrence v Dep't of Corrections,* 81 Mich App 234 (1978), and *Jansson v Dep't of Corrections,* 146 Mich App 172 (1985). The motion to waive fees is granted. Jurisdiction is not retained. Court of Appeals No. 108679.

*Reconsideration Denied October 19, 1988:*

TSITSIS v CITY OF EAST DETROIT, No. 82422. Reconsideration of the Supreme Court's order of April 25, 1988, 430 Mich 874, is denied. Court of Appeals No. 90692.

*Leave to Appeal Denied October 19, 1988:*

DOWAGIAC LIMITED DIVIDEND HOUSING ASSOCIATION v CITY OF DOWAGIAC (VINEYARD PLACE v CITY OF DOWAGIAC), No. 82602; reported below: 166 Mich App 232.

DIAZ ESTATE v WARREN OBSTETRICAL AND GYNECOLOGICAL CLINIC, PC, No. 82623; Court of Appeals No. 95926.

DOCKWEILER v WENTZELL (DOCKWEILER v ALLEGAN COUNTY MENTAL HEALTH SERVICES, INC), No. 82717; reported below: 169 Mich App 368. BOYLE and ARCHER, JJ., would grant leave to appeal.

COX v COLOMA TOWNSHIP, No. 82740; Court of Appeals No. 93039.

PEOPLE v MCKINLEY, No. 82757; reported below: 168 Mich App 496.

HADDRILL v CINQUEMANI, No. 82844; Court of Appeals No. 95640.

CITY OF DETROIT v PARK AVENUE, LTD, No. 82848; Court of Appeals No. 97141.

ADKINS v MONG, No. 82869; reported below: 168 Mich App 726.

DERRICK v CITY OF DETROIT, No. 82891; reported below: 168 Mich App 560.

MILLS v WHITE CASTLE SYSTEM, INC, No. 82928; reported below: 167 Mich App 202. Reconsideration denied February 1, 1989.

HAWKINS v TOTAL HEALTH CARE, INC, No. 82973; Court of Appeals No. 100084. LEVIN, BOYLE, and ARCHER, JJ., would remand the case to the Court of Appeals for consideration as on leave granted.

MORRIS v CITY OF DETROIT, No. 82982; Court of Appeals No. 103665.

*In re* ALICE FISHER ESTATE, No. 83129; Court of Appeals No. 97719.

*In re* WILLIAMS (PEOPLE v JAMES WILLIAMS), No. 83141; Court of Appeals No. 89153. CAVANAGH, J., would grant leave to appeal.

MARR v YOUSIF, No. 83217; reported below: 167 Mich App 358.

PEOPLE v DEVINE, No. 83578; reported below: 168 Mich App 56.

PEOPLE v CUPER, No. 83837; Court of Appeals No. 95429. BOYLE, J., would grant leave to appeal.

PEOPLE v ESTEPP, No. 83840; Court of Appeals No. 91231.

MATLOCK v TOTAL PETROLEUM, INC, No. 83863; Court of Appeals No. 107760.

PEOPLE v GREENBERG, No. 84064; Court of Appeals No. 107752. LEVIN, J., would grant bond pending appeal.

*Interlocutory Appeals*

*Leave to Appeal Denied October 19, 1988:*

BEWERSDORFF v RAY WEEKS & SONS CO, No. 83182. Leave to appeal as cross-appellants is also denied. Court of Appeals No. 90553.

PEOPLE v TYLER, No. 83959. The Court of Appeals is to give expedited consideration to the defendant's appeal. Court of Appeals No. 110270. LEVIN, J., would grant bond pending appeal.

*Summary Disposition October 21, 1988:*

GELMAN SCIENCES, INC v FIREMAN'S FUND INSURANCE COMPANIES, No. 84260. In lieu of granting leave to appeal, the case is remanded to

the Court of Appeals for consideration as on leave granted. MCR 7.302(F)(1). The Court of Appeals is to grant a stay if the defendant posts an appeal bond in a reasonable amount with sufficient sureties and is to determine the amount and conditions of the bond. The stay entered by the Supreme Court on September 30, 1988, is vacated, effective October 31, 1988. Court of Appeals No. 111459.

*Leave to Appeal Denied October 21, 1988:*

*In re* ACQUISITION OF LAND FOR THE CENTRAL INDUSTRIAL PARK PROJECT (CITY OF DETROIT v MURRAY), Nos. 78449, 78450. The cause having been briefed and orally argued, the order of October 22, 1986, 426 Mich 864, granting leave to appeal is vacated, and leave to appeal is denied because the Court is no longer persuaded that the questions presented should be reviewed. Court of Appeals No. 73234.

LEVIN, J., is of the opinion that the Court should decide by written opinion the questions presented in the briefs filed by the appellants, the appellee, and the amicus curiae.

*Summary Disposition October 26, 1988:*

PEOPLE v PERDUE, Nos. 82643, 82746. In lieu of granting leave to appeal, the judgment of the Court of Appeals is vacated. MCR 7.302(F)(1). The Court of Appeals erred in determining that the defendant was unfairly prejudiced by the admission of a photograph, and that the trial court abused its discretion in denying the defendant's request to impanel a new jury for the trial on the habitual offender charge. The case is remanded to the Court of Appeals for consideration of the issues: (1) whether there was an adequate independent basis for the identification testimony, and (2) if so, whether any error in the conduct of the photographic show-up or in the introduction of evidence concerning it was harmless. If the Court of Appeals determines these issues in the prosecutor's favor, the Court should then address the issues previously raised by the defendant but not addressed in its opinion of January 28, 1988. Jurisdiction is not retained. Court of Appeals No. 89931.

*Leave to Appeal Denied October 26, 1988:*

PEOPLE v WILLIE GRIFFIN, No. 83685. The certification by the Court of Appeals pursuant to Administrative Order No. 1984-2 that its decision in this case conflicts with its decision in *People v Dalessandro,* 165 Mich App 569 (1988), is considered, and the Court declines to order further consideration of the questions presented. The Court of Appeals concluded that regardless of whether the standard of review to be applied to the defendant's claim of ineffective assistance of counsel is that articulated in *People v Garcia,* 398 Mich 250 (1976), or in *Strickland v Washington,* 466 US 668 (1984), defendant was not denied the effective assistance of counsel. Court of Appeals No. 91330.

*Leave to Appeal Denied October 28, 1988:*

THE DETROIT NEWS, INC v CITY OF DETROIT and *In re* CONTEMPT OF CORPORATION COUNSEL FOR THE CITY OF DETROIT, Nos. 84485, 84500; Court of Appeals Nos. 112385, 112481.

CAVANAGH and BOYLE, JJ., state:

Because there is no dispute that the documents as to which the contempt order was entered are records of the sale at public auction of publicly owned property, we join in the denial of leave to appeal.

ARCHER, J., dissents and states as follows:

I would remand these cases to the Court of Appeals for plenary consideration with expedited briefing and oral arguments. As to case No. 84500, I would direct the Court of Appeals to consider whether the trial court abused its discretion when it ordered the corporation counsel to be incarcerated for violating its order. The city had offered to provide the disputed records to the trial court to hold in its sole possession or to provide the records to the Detroit News if they would stipulate not to publish the contents until the appellate courts ruled.

I would, in the interim, grant an immediate stay of the contempt order and order the release of corporation counsel from the Wayne County Jail until the Court of Appeals has issued its opinion.

*Summary Dispositions October 31, 1988:*

O'NEAL v ANNAPOLIS HOSPITAL, Nos. 82925, 82926. In lieu of granting leave to appeal, the case is remanded to the Court of Appeals for consideration as on leave granted with respect to the plaintiffs' tort claims in light of the Court's decision in *Canon v Thumudo,* 430 Mich 326 (1988). MCR 7.302(F)(1). In all other respects the plaintiffs' application for leave to appeal is denied. Jurisdiction is not retained. Court of Appeals Nos. 101611, 104670.

DINGER v DEPARTMENT OF NATURAL RESOURCES, No. 83439. In lieu of granting leave to appeal, the case is remanded to the Court of Appeals for reconsideration in light of *Hadfield v Oakland Co Drain Comm'r,* 430 Mich 139 (1988). MCR 7.302(F)(1). Court of Appeals No. 70877.

*Leave to Appeal Denied October 31, 1988:*

PEOPLE v KIME, Nos. 83533-83535. Court of Appeals Nos. 97806, 98105.

In No. 83533, in lieu of granting leave to appeal, the judgment of the Court of Appeals additionally is vacated, and the case is remanded to that Court for consideration whether the trial court's refusal to suppress the defendant's prior convictions for criminal sexual conduct was harmless error. MCR 7.302(F)(1). Jurisdiction is not retained.

PEOPLE v CALVIN HOFFMAN, No. 82562; Court of Appeals No. 100073.

PEOPLE v GILES-EL, No. 82656; Court of Appeals No. 99199.

PEOPLE v ALDALALY, No. 82770; Court of Appeals No. 74837.

VALLANCE v BREWBAKER, No. 82870; Court of Appeals No. 93856. Reconsideration denied February 1, 1989.

HAVILAND v WHITE, No. 82888; Court of Appeals No. 88632.

PEOPLE v DUNLAP, Nos. 82917, 82918; Court of Appeals Nos. 99089, 99212.

PELLERITO v STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Nos. 83053, 83054. Leave to appeal as cross-appellant is also denied. Court of Appeals Nos. 92413, 93707.

ZARKOWSKI v GRAND TRUNK WESTERN RAILROAD COMPANY, No. 83161; Court of Appeals No. 94974.

*In re* PEOPLE v BUTLER (WAYNE COUNTY PROSECUTOR v RECORDER'S COURT JUDGE #2), No. 83194; Court of Appeals No. 106279.

EMMERT v ALL ERECTION AND CRANE RENTAL CORPORATION, No. 83216; 104280.

PEOPLE v STOREY, No. 83227; Court of Appeals No. 95793.

PEOPLE v HAWKINS, No. 83229; Court of Appeals No. 104302.

LEPKOWSKI v BLUE CROSS-BLUE SHIELD OF MICHIGAN, No. 83232; Court of Appeals No. 103912.

PEOPLE v WALKER, No. 83272; reported below: 167 Mich App 377.

PEOPLE v MOODY, No. 83294; Court of Appeals No. 97767.

PEOPLE v KOSS, No. 83355; Court of Appeals No. 101965.

PEOPLE v WILCOXSON, No. 83370; Court of Appeals No. 102695.

*In re* FRANKLIN ESTATE (FRANKLIN v LONG), No. 83380; Court of Appeals No. 98672.

PEOPLE v JOHN SIMPSON, No. 83383; Court of Appeals No. 103242.

PEOPLE v ALLGAIER, No. 83405; Court of Appeals No. 93739.

THE HARTFORD INSURANCE GROUP v KAYNAK, No. 83407; Court of Appeals No. 99917.

SINKLER v RUSSELL FOREST PRODUCTS, No. 83423; Court of Appeals No. 104853.

WILLIAMS v GENERAL MOTORS CORPORATION, No. 83428; Court of Appeals No. 100882.

CITY OF MANISTEE v EMPLOYMENT RELATIONS COMMISSION, No. 83432; reported below: 168 Mich App 422.

PEOPLE v DAVID JOHNSON, No. 83436; Court of Appeals No. 103710.

TURNER v GENERAL MOTORS CORPORATION, No. 83438; Court of Appeals No. 104433.

PEOPLE v WILKINS, No. 83448; Court of Appeals No. 95382. Reconsideration denied December 29, 1988.

PEOPLE v STUDINGER, No. 83449; Court of Appeals No. 96773.

CITY OF ROCHESTER HILLS v SIX STAR, LTD, INC, No. 83451; reported below: 167 Mich App 703. Reconsideration denied February 28, 1989.

KLINE v KIRSCH & COMPANY, No. 83453; Court of Appeals No. 104335.

PEOPLE v MALLORY, No. 83455; reported below: 168 Mich App 255.

PEOPLE v EARL JACKSON (also known as AKRAM ABDULLAH MADYUN), No. 83461; Court of Appeals No. 84853.

ERIKSEN v FISHER, Nos. 83466, 83467; reported below: 166 Mich App 439.

SUTTER v GERBER PRODUCTS COMPANY, No. 83468; Court of Appeals No. 96462.

PEOPLE v CROSS, No. 83473; Court of Appeals No. 103925.

WILLIAMS v ARROW OVERALL SUPPLY COMPANY, No. 83475; Court of Appeals No. 104726.

SECOND NATIONAL BANK OF BAY CITY v DORE, No. 83478; Court of Appeals No. 99122.

PEOPLE v FISHER, No. 83486; Court of Appeals No. 102246.

AKERS v HERRICK MEMORIAL HOSPITAL, No. 83487; Court of Appeals No. 102317.

PEOPLE v TILLEY, No. 83489; Court of Appeals No. 102994.

MORSE v FARM BUREAU MUTUAL INSURANCE COMPANY, No. 83490; Court of Appeals No. 96971. Reconsideration denied February 1, 1989.

LOPUS v L & L SHOP-RITE, INC, No. 83495; reported below: 171 Mich App 486.

PEOPLE v GOLIDY, No. 83516; Court of Appeals No. 104752. Reconsideration granted 432 Mich 898.

PEOPLE v ACOSTA, No. 83519; Court of Appeals No. 107169.

PEOPLE v FITZGERALD, No. 83520; Court of Appeals No. 94185.

MOORE v ACOSTA, No. 83524; Court of Appeals No. 88668.

PEOPLE v ROBERTSON, No. 83526; Court of Appeals No. 94152.

BRICK v WYANDOTTE PAINT PRODUCTS COMPANY, INC, No. 83537; Court of Appeals No. 99643.

PEOPLE v BABCOCK, No. 83540; Court of Appeals No. 96863.

CROWLEY v GOVERNOR OF MICHIGAN, No. 83545; reported below: 167 Mich App 539.

MORIN v INGHAM CIRCUIT JUDGE, No. 83546; Court of Appeals No. 104077.

PEOPLE v LEONARD PORTER, No. 83547; reported below: 169 Mich App 190.

PEOPLE v BOWMAN, No. 83551; Court of Appeals No. 90550.

WIRTANEN v PENKIVECH, No. 83552; Court of Appeals No. 102310. Reconsideration denied January 25, 1989.

HARDESTY v MANISTEE FORGE CORPORATION, No. 83559; Court of Appeals No. 104997.

GROWNEY v GROWNEY, No. 83566; Court of Appeals No. 89236. Reconsideration denied February 1, 1989.

ALPENA POWER COMPANY v ALPENA TOWNSHIP, No. 83570; Court of Appeals No. 92518.

PEOPLE v PEETE, No. 83575; Court of Appeals No. 93290.

PEOPLE v BRUNSON, No. 83580; Court of Appeals No. 104214. Reconsideration denied February 1, 1989.

PEOPLE v RITCHIE, No. 83584; Court of Appeals No. 97738.

BROOKS v THE UPJOHN COMPANY, No. 83585; Court of Appeals No. 98372. Reconsideration denied February 1, 1989.

DIETRICH & SHRAUGER v SHRAUGER, No. 83596; Court of Appeals No. 99428.

PEOPLE v JAMES SCOTT, No. 83602; Court of Appeals No. 77559.

SUPERIOR STATE BUILDING v MENOMINEE COUNTY LLOYD HOSPITAL, No. 83605; Court of Appeals No. 104555.

STEFANI v CAPITAL TIRE, INC, No. 83608; reported below: 169 Mich App 32.

DUNLAP v CLINTON VALLEY CENTER, No. 83615; reported below: 169 Mich App 354.

*In re* DAVIS (TROTTER v CITY OF LINCOLN PARK), No. 83619; Court of Appeals No. 94636.

PEOPLE v SPENCER, No. 83640; Court of Appeals No. 95694.

PEOPLE v TORREZ, No. 83642; Court of Appeals No. 87589.

WYOMING PROMOTIONS, INC v HOLLYWOOD FIREWORKS MANUFACTURING, INC, No. 83647; Court of Appeals No. 97656.

PEOPLE v JOSLIN, No. 83653; Court of Appeals No. 97605.

HAWK v MONTGOMERY WARD LONG TERM DISABILITY TRUST FUND, No. 83663; Court of Appeals No. 91715.

PEOPLE v KENNETH JOHNSON, No. 83665; Court of Appeals No. 92451.

MONCURE v DIRECTOR, SPSM LIBRARY SERVICES, No. 83666; Court of Appeals No. 104767.

YEAGER v BOOBY TRAP LOUNGE, No. 83668; reported below: 171 Mich App 185.

PEOPLE OF THE CITY OF ALLEN PARK v BERNIER, No. 83694; Court of Appeals No. 104964.

*In re* BURDIN (PEOPLE v BURDIN), No. 83818; reported below: 171 Mich App 520.

*In re* SHAFFER, No. 83829; Court of Appeals No. 103262.

BOSWELL v VAN REKEN, No. 83952; Court of Appeals No. 92427.

PEOPLE v RODRIGUEZ, No. 83960; Court of Appeals No. 103830.

*In re* BOWEN (DEPARTMENT OF SOCIAL SERVICES v ALBERT BOWEN) and *In re* STALHOOD (DEPARTMENT OF SOCIAL SERVICES v JOANNE BOWEN), Nos. 83963, 83964; Court of Appeals Nos. 102099, 102102.

BURNAU v ST JOSEPH CIRCUIT JUDGE, No. 84057; Court of Appeals No. 105158.

*Interlocutory Appeals*

*Leave to Appeal Denied October 31, 1988:*

BURNS v BURNS, No. 83350; Court of Appeals No. 99039.

PEOPLE v JOHN KELLY, No. 83544; Court of Appeals No. 90640.

PEOPLE v LILLIE, No. 83908; Court of Appeals No. 102880.

PEOPLE v HARPER, No. 83967; Court of Appeals No. 109117.

PEOPLE v CROWELL, No. 84001; Court of Appeals No. 108981.

TIPTON v BRANDES, No. 84093; Court of Appeals No. 106400.

PEOPLE v MOORE, No. 84050; Court of Appeals No. 104099.

MONOLIDIS v PACKING MATERIAL COMPANY, INC, No. 84238; Court of Appeals No. 110411.

VIADUCT CORPORATION v CITY OF DETROIT, No. 84261; Court of Appeals No. 98418.

WAGGONER v WAGGONER, No. 84353; Court of Appeals No. 111471.

*Summary Dispositions November 2, 1988:*

PEOPLE v NOEL, No. 79220. In lieu of granting leave to appeal, the case is remanded to the Court of Appeals for reconsideration in light of *People v Adams* and *People v Stitt,* 430 Mich 679 (1988). MCR 7.302(F)(1). Court of Appeals No. 83803.

PEOPLE v WRIGHT, No. 82987. In lieu of granting leave to appeal, the judgment of the Court of Appeals is vacated, and the case is remanded to that Court, which is to remand the matter, while retaining jurisdiction, to the Recorder's Court for a hearing, consistent with the views expressed by Judge KELLY in dissent, for the trial judge to more adequately explain his reasons for denying defendant's motion for a new trial. MCR 7.302(F)(1). Court of Appeals No. 55618.

PEOPLE v CLAY, No. 83933. In lieu of granting leave to appeal, the case is remanded to the Court of Appeals for consideration as on leave granted. MCR 7.302(F)(1). Court of Appeals No. 104516.

*Leave to Appeal Denied November 2, 1988:*

PEOPLE v BOHN, No. 83080; Court of Appeals No. 94917.

TOWLES v MICHIGAN BASIC PROPERTY INSURANCE ASSOCIATION, No. 83011; Court of Appeals No. 93299. BOYLE and GRIFFIN, JJ., would grant leave to appeal.

PEOPLE v FRED WILLIAMS, No. 83208; Court of Appeals No. 94423. LEVIN, CAVANAGH, and ARCHER, JJ., would grant leave to appeal.

Reconsideration denied March 29, 1989. LEVIN, J., would grant reconsideration and leave to appeal.

PEOPLE v HUNT, No. 83296; Court of Appeals No. 103022.

ODETTE v LIQUOR CONTROL COMMISSION, No. 83505; reported below: 171 Mich App 137.

*Interlocutory Appeals*

*Leave to Appeal Denied November 2, 1988:*

PEOPLE v PESCI #1, No. 83183; Court of Appeals No. 93478.

PEOPLE v HEYDENBERK, No. 83496; reported below: 171 Mich App 494. LEVIN, CAVANAGH, and ARCHER, JJ., would grant leave to appeal.

PEOPLE v DUVALL, No. 84083; reported below: 170 Mich App 701. ARCHER, J., would grant leave to appeal on the issues (1) whether the trial court was correct in concluding that the defendant had demonstrated a reasonable expectation of privacy, and (2) whether the search was reasonable.

*Summary Dispositions November 3, 1988:*

PEOPLE v GUILMETTE, No. 83395. In lieu of granting leave to appeal, the judgments of the Court of Appeals and the Macomb Circuit Court are vacated, and the case is remanded to the Macomb Circuit Court. MCR 7.302(F)(1). The factual bases for the defendant's pleas were inadequate because there was no showing that he caused the victims to suffer personal injury as defined by statute. MCL 750.520a(j), 750.520b(1)(f); MSA 28.788(1)(j), 28.788(2)(1)(f). *Guilty Plea Cases,* 395 Mich 96, 128-132; 235 NW2d 132 (1975). On remand the prosecutor must be given an opportunity to establish the missing element. If the prosecutor is able to do so and there is no contrary evidence, the trial court is to reinstate the judgments of conviction. If the prosecutor is unable to establish the missing element, the judgments of conviction are to remain vacated. If contrary evidence is produced, the matter is to be treated as a motion to withdraw the guilty pleas and the court is to decide the matter in the exercise of its discretion. MCR 6.101(F)(6). Jurisdiction is not retained. Court of Appeals No. 102506.

*Summary Disposition November 4, 1988:*

MORSE v CITY OF MOUNT PLEASANT (MORSE v SAGEMAN), No. 81209, 8/April 1988. The cause having been briefed and orally argued, the judgment of the Court of Appeals is reversed, and the judgment of the Isabella Circuit Court is reinstated for the reasons stated in dissent in the Court of Appeals by Judge SAWYER. 160 Mich App 741, 748-749. Leave to appeal was granted December 22, 1987, 429 Mich 886.

LEVIN and ARCHER, JJ., state:

The question presented is whether the Legislature intended that an action may be maintained under the provisions of the Substance Abuse Assistance Act[1] against police officers who fail to take into protective custody an individual who appears to be incapacitated in a public place. We would, in agreement with the Court of Appeals, hold that such an action can be maintained and would remand for trial.

The circuit judge granted the defendant police officers' motion for summary judgment on the ground that they were immune from liability because their decision not to take plaintiff's decedent into protective custody was "discretionary, as opposed to ministerial" within the meaning of this Court's decision in *Ross v Consumers Power Co (On Rehearing)*, 420 Mich 567, 634; 363 NW2d 641 (1984), where this Court held that lower level officials, employees, and agents

[1] 1974 PA 339, MCL 325.751; MSA 18.1031(51).

are immune from tort liability when they act in good faith within the scope of their authority performing "discretionary, as opposed to ministerial acts."

The Court of Appeals reversed and remanded for trial, stating that the provisions of the Substance Abuse Assistance Act—now incorporated in the Public Health Code[2]—provide that a law enforcement officer "shall" take an incapacitated person into protective custody, that as originally enacted in 1974 the act provided that an officer "may" do so, and that the change from "may" to "shall" signified the Legislature's intent to provide for civil liability where law enforcement officers fail to take incapacitated persons into protective custody when encountered in a public place. 160 Mich App 741; 408 NW2d 541 (1987).

The Court of Appeals said:

> We believe that this statute unambiguously requires law enforcement officers to take incapacitated persons into protective custody when encountered in a public place. No discretion is left to the officer upon encountering an incapacitated person in a public place. Thus, no immunity is provided under *Ross.* [*Id.* at 745.]

The Court of Appeals declined to follow a decision of an Illinois intermediate appellate court, *Marshall v Ellison,* 132 Ill App 3d 732; 477 NE2d 830 (1985), construing language in an Illinois statute similar to the Michigan statute "to merely permit officers to effectuate protective custody. Michigan law clearly requires that the word 'shall' be interpreted in its mandatory sense. Moreover, *Marshall* is factually distinguishable in that it is unclear whether the law enforcement officers involved therein were aware that the individual involved was incapacitated." *Morse v Mt Pleasant, supra* at 747.

One member of the panel adopted the view of the circuit judge stating that the determination of what type of action to take, whether to intervene at all, was a discretionary decision, quoting the analysis in this Court's opinion in *Ross, supra* at 659-660, concerning one of the cases (*Zavala v Zinser*) consolidated with *Ross. Morse, supra* at 748-749.

I

The defendants' motion for summary judgment was not based on affidavits and does not appear to have been based on any depositions that may have been taken. The plaintiff provided the following statement of facts in respect to mediation:

> On October 8, 1982, the plaintiff's decedent, Kenneth James Morse, age 18, and three friends began drinking at about 7:30 P.M. They needed a "buyer" and found one outside a Mt.

[2] 1978 PA 368, MCL 333.1101; MSA 14.15(1101).

Pleasant grocery store. After obtaining a fifth and a pint of whiskey and come [sic] Coke the young men went to Island Park and drank the whiskey and Coke.

Mark Sheldon, one of the three boys, drove the plaintiff's decedent, Gary Shawn Martin, Jr., and Jeff Avery to within one-half block of Martin's home. The three youths then went into an alley. The plaintiff's decedent was too drunk to walk and was being helped by the other two youths.

A neighbor reported a possible prowler in the alley and the police were called. Detective Police Officers Howard Sageman and Wayne VanDyke, responded to the report.

When Martin and Avery saw the police vehicle enter the alley they ran. They assumed that the plaintiff's decedent was with them. When they looked back they saw the plaintiff's decedent laying [sic] in the middle of the alley. They then decided to return.

The police officers had two spotlights shining on the plaintiff's decedent and Officer VanDyke was using his police badge as a reflector to reflect light in the plaintiff decedent's eyes. Plaintiff's decedent smiled but did not open his eyes.

The officers asked Martin and Avery how much they had had to drink. The officers then told Martin and Avery that if the young men didn't take the plaintiff's decedent home, the officers would take him to jail.

At that time the plaintiff's decedent had minor bleeding under his nose as a result of falling in the alley.

The police officers then instructed the young men to each put one of the plaintiff's decedent's arms around each of their shoulders, then hold the plaintiff's decedent by the belt and carry him. The young men did as instructed and the police watched them walk or carry the plaintiff's decedent to the back of Martin's home.

The two boys propped the plaintiff's decedent up against a garage behind Martin's home and returned to the alley to retrieve a partially empty bottle of whiskey. They then returned to the plaintiff's decedent and tried to awaken him. The plaintiff's decedent was snoring but unwakeable. The boys propped him against the garage, put a coat over him and left him. Avery went home and Martin went into his house. He planned to bring the plaintiff's decedent into the house after his father was asleep but he, too, was intoxicated and fell asleep.

Kenneth Morse was found dead the next morning.

Dr. Werner U. Spitz, M.D. did an autopsy. His written opinion is as follows:

"Kenneth Morris [sic], 18 year old, while [sic, white?] male died of asphyxiation as a result of obstruction of the nose and mouth caused by pressure of the face against the ground.

Abrasions of the nose and left eyebrow resulted from the terminal fall. The decease [sic] collapsed as a result of far advanced alcohol intoxication, his blood alcohol level at the time of death was 0.41% and is believed to have been higher at the time of the collapse. The deceased layed [sic] in this face down position, unconscious for some time, as indicated by the considerable fullness of the urinary bladder. There were no other injuries and no pathologic changes suggestive of disease determinable at the post mortum [sic] examination of the body."

The plaintiff's decedent left him surviving [sic] his mother, Violet M. Morse; his father, Robert W. Morse; a brother, Michael Dean Morse, and a brother, Dean Edward Morse.

II

The statute provides:

(1) An individual who appears to be incapacitated in a public place *shall* be taken into protective custody by a law enforcement officer and *taken to an approved* service program, or to an emergency medical service, or to a transfer facility pursuant to subsection (4) for subsequent transportation to an approved service program or emergency medical service. When requested by a law enforcement officer, an emergency service unit or staff shall provide transportation for the individual to an approved service program or an emergency medical service. This subsection shall not apply to an individual who the law enforcement officer reasonably believes will attempt escape or will be unreasonably difficult for staff to control. [MCL 333.6501; MSA 14.15(6501). Emphasis supplied.]

As originally enacted in 1974 the statute provided:

(1) A person who appears to be incapacitated *may* be taken by a law enforcement officer or an emergency service unit *to the person's home,* to an approved service program, *or* to an emergency medical service. In taking the person, a law enforcement officer or an emergency service unit may take reasonable steps to protect themselves. The taking of a person to the person's home, to an approved service program, or emergency medical service under this subsection is not an arrest. An entry or other record shall not be made to indicate that the person was arrested or charged with a crime. [MCL 325.753; MSA 18.1031(53). Emphasis supplied.]

The statute defines "incapacitated":

"Incapacitated" means that an individual, as a result of the use of alcohol, is unconscious or has his or her mental or physical functioning so impaired that he or she either poses an immediate and substantial danger to his or her own health and

safety or is endangering the health and safety of the public.[3] [MCL 333.6104(3); MSA 14.15(6104)(3).]

III

In *Busby v Municipality of Anchorage*, 741 P2d 230 (Alas, 1987), the Alaska Supreme Court rejected immunity arguments in ruling that an action could be maintained under a statute similar to the Michigan statute against a municipality by a person who was incapacitated and who was struck by an automobile after an officer had failed to take him into protective custody. The court said:

> As the statute explicitly states, and as the trial court itself noted, AS 47.37.170(b) is intended to benefit and protect the health and well being of persons who are incapacitated by alcohol and imposes a mandatory duty upon law enforcement personnel to place such persons into protective custody. Cf. *Peter v State*, 531 P2d 1263, 1268 (Alas, 1975) (quoting House Concurrent Resolution No. 36 [1969] on treatment of problem drinkers and alcoholics); AS 47.37.010. In addition, accepting as true Busby's assertions that he was a person incapacitated by alcohol in a public place, he was clearly a member of the protected class and his accident was of the type against which the statute was designed to protect. Finally, it cannot be doubted that the statute prescribes specific conduct rather than merely states some general or abstract duty of care; Officer Foster was within that class of persons charged with observing the statute; as a municipal police officer, she can fairly be charged with awareness that the statute applied; and the statute can hardly be considered so outdated or arbitrary as to make inequitable its application as the appropriate standard of care. [*Id.* at 233-234.]

The Alaska court considered the Illinois intermediate appellate court decision, and said:

> *Marshall v Ellison*, 132 Ill App 3d 732; 87 Ill Dec 704; 477 NE2d 830 (1985), also involves an analogous factual situation and statute. Nevertheless, this case is also unpersuasive . . . .

* * *

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[3] As originally enacted, "incapacitated" was defined as follows:

> "Incapacitated" means that a person, as a result of the use of alcohol, is unconscious, exhibits withdrawal symptoms or other acute medical problems requiring medical assistance, or otherwise has his or her mental or physical functioning so impaired that he or she is incapable of realizing and making a rational decision with respect to his or her need for treatment. [MCL 325.752(ii)(g); MSA 18.1031(52)(ii)(g).]

> Despite the unambiguous mandatory language in the Illinois statute and without citation to legislative history or any other authority, the court simply concluded that the legislature did not intend to create a cause of action under the statute for failure to take a person into protective custody. *Id.* Whatever the merits of the *Marshall* court's conclusion with respect to interpretation of the Illinois statute, we decline to apply its reasoning here.
>
> We conclude then that AS 47.37.170(b) articulates an appropriate standard of care and thus hold that the Municipality has an affirmative duty to take persons incapacitated by alcohol in a public place into protective custody and transport them to an appropriate treatment facility. [*Id.* at 234.]

IV

As originally enacted in 1974 (see part II), the officers were given the option or "discretion" of either taking the incapacitated person to his home or to a facility. In 1977, the Legislature, in substituting "shall" for "may," eliminated the option of taking the person to his home.[4]

If, as appears from the plaintiff's statement of facts, the plaintiff's decedent was intoxicated to the level of 0.41 percent, could not walk, and could only be transported to his home by two men carrying him in the manner described in the plaintiff's statement of facts, the officers had no "discretion" to find that plaintiff's decedent was not incapacitated within the meaning of the statute (see part II for the statutory definition of "incapacitated"). Nor, in light of the elimination of the to-the-person's-home option, did the officers have the option or "discretion" of entrusting the plaintiff's decedent to two intoxicated companions to take him home. The legislative decision to eliminate such option or "discretion" may have been based on other case histories brought to its attention where the officers had entrusted an incapacitated person to incompetent persons or taken him home with similarly tragic results.

The Legislature's intention to permit maintenance of a civil action appears not only from the change from "may" to "shall" but also from the provision of the act immunizing officers from civil liability if they act in compliance with the act and are not grossly negligent or guilty of wilful and wanton misconduct:

> (1) A law enforcement officer, a member of the emergency service unit, or staff member of an approved service program or an emergency medical service who acts in compliance with this part is acting in the course of his or her official duty and is not criminally or civilly liable therefor.
>
> (2) Subsection (1) does not apply to a law enforcement officer, member of the emergency service unit, or staff member of an approved service program or an emergency medical service

[4] 1977 PA 110, MCL 325.753; MSA 18.1031(53).

who, while acting in compliance with this part, engages in behavior involving gross negligence or wilful and wanton misconduct.

(3) Approved service programs, staff of approved service programs, emergency medical services, staff of emergency medical services, law enforcement officers, and emergency service units shall not be criminally or civilly liable for the subsequent actions of the apparently incapacitated individual who leaves the approved service program or emergency medical service. [MCL 333.6508; MSA 14.15(6508).][5]

In light of the foregoing language, it is clear that the Legislature did not intend to immunize from liability officers who fail to comply with the statute especially where the trier of facts concludes that the officers were grossly negligent or guilty of wilful and wanton misconduct. The plaintiff's statement of facts indicates that the plaintiff could, if permitted to introduce her proofs, establish a prima facie case that the officers in the instant case were grossly negligent or guilty of wilful and wanton misconduct.

The judge-made rule of law immunizing "discretionary, as opposed to ministerial acts" has been justified on the basis that absent immunity for discretionary acts governmental officers and employees would be hesitant to act.[6]

---

[5] As originally enacted, this provision read:

(1) A law enforcement officer, members of the emergency service unit, or personnel of an approved service program or an emergency medical service who act in compliance with this act are acting in the course of their official duty and are not criminally or civilly liable therefor.

(2) Subsection (1) does not apply to a law enforcement officer, members of the emergency service unit, or personnel of an approved service program or an emergency medical service who, while acting in compliance with this act, engage in behavior involving gross negligence, or wilful and wanton misconduct. [MCL 325.759; MSA 18.1031(59).]

[6] [T]he rationale for official immunity is the promotion of fearless, vigorous, and effective administration of policies of government. [63A Am Jur 2d, Public Officers and Employees, § 358, p 924.]

Individual immunity exists to ensure that a decision-maker is free to devise the best overall solution to a particular problem, undeterred by the fear that those few people who are injured by the decision will bring suit. [*Ross, supra* at 631; *Canon v Thumudo,* 430 Mich 326, 335; 422 NW2d 688 (1988).]

In the instant case the officers failed to act. Conferring immunity on the basis that their failure to act was discretionary does not encourage officers and employees to act in compliance with the statute but rather provides them greater immunity than they would have if they had acted in compliance with the statute which clearly immunizes officers who do act in compliance with the statute only insofar as their actions are neither grossly negligent nor constitute wilful and wanton misconduct.

The Legislature manifestly has the power to impose a duty on law enforcement officers for the protection of the public. It has clearly evidenced, by the terms of the Substance Abuse Assistance Act, an intent to provide for civil liability if officers fail to comply with the statutory mandate. That expression of legislative intent supersedes the judge-made rule distinguishing between discretionary and ministerial acts.

To be sure, there is a judgment to be made whether the allegedly incapacitated person was in fact incapacitated, but the Legislature clearly intended that the correctness of the determination of the officers whether an individual is incapacitated could be challenged in an action asserting that the officers were subject to civil liability for failing to act in compliance with the statute.

We would affirm the judgment of the Court of Appeals.

*Leave to Appeal Denied November 14, 1988:*

PEOPLE v JIMMY ALLEN, No. 83211. The Court wishes to correct an error in the published opinion of the Court of Appeals in which it observed that our order in the case of *People v Dickerson,* 428 Mich 864; 400 NW2d 601 (1987), should not be considered as "precedent for anything," intimating that the Supreme Court may have "violated its own rules" by remanding in that case without the necessity of the prior filing of a motion to withdraw the plea. In *Dickerson,* the defendant had filed a motion to withdraw his plea in the trial court prior to raising on appeal the issue of noncompliance with MCR 6.101(F). Reported below: 168 Mich App 77.

*Summary Dispositions November 17, 1988:*

GREENE v CITIZENS INSURANCE COMPANY, No. 83190. In lieu of granting leave to appeal, the judgment of the Court of Appeals is reversed, the partial summary disposition of the Oakland Circuit Court is reversed, and the consent judgment of the Oakland Circuit Court is vacated. The case is remanded to the Oakland Circuit Court for trial on the issue of liability. MCR 7.302(F)(1). On the facts of this case, there was sufficient evidence of arson to conclude that the Oakland Circuit Court erred in entering summary disposition in favor of the plaintiff. If a party seeks to include the issue of damages at trial, the Oakland Circuit Court is to determine whether trial is also required on the issue of damages, or whether the issue of damages is

foreclosed by the parties' agreement to entry of the consent judgment. Court of Appeals No. 95772.

BY-PAS INTERNATIONAL CORPORATION v BY-PAS MANUFACTURING CORPORATION OF MICHIANA, No. 83247. In lieu of granting leave to appeal, that portion of the Court of Appeals judgment which reversed the judgment of the Ottawa Circuit Court on count II of the counterclaim is reversed, and the judgment of the Ottawa Circuit Court is reinstated. MCR 7.302(F)(1). In the context of the agreement, the term "all sales" was ambiguous. The scope of the licensing agreement was sales in Indiana and two counties in Michigan with future contingent rights in other specified states. There was a latent ambiguity in whether "all sales" referred to sales within the area contemplated by the contract. Evidence establishing and explaining the ambiguity was properly admitted without objection by the trial court and was properly used in resolving the ambiguity. See *Goodwin, Inc v Orson E Coe Pontiac, Inc,* 392 Mich 195 (1974). Court of Appeals No. 91598.

LEVIN, J., would not dispose of the case by peremptory order but would instead grant leave to appeal.

Reconsideration denied February 1, 1989.

PEOPLE v BAZE, No. 83299. In lieu of granting leave to appeal, the judgment of the Court of Appeals is vacated, and the case is remanded to that Court for reconsideration in light of *People v Ray,* 431 Mich 260 (1988). MCR 7.302(F)(1). Court of Appeals No. 91781.

FORT v CHRYSLER CORPORATION, No. 83357. In lieu of granting leave to appeal, the case is remanded to the Court of Appeals for consideration as on leave granted. MCR 7.302(F)(1). Court of Appeals No. 104281.

*Leave to Appeal Denied November 17, 1988:*

BOUCHER v CHIPPEWA CIRCUIT JUDGE, No. 83253; Court of Appeals No. 100876.

TURNER v GUILD, No. 80308; Court of Appeals No. 87060.

NATIONAL BANK OF DETROIT v DEPARTMENT OF TREASURY, No. 82209; reported below: 166 Mich App 218.

MANUFACTURERS NATIONAL BANK OF DETROIT v DEPARTMENT OF TREASURY, No. 82608; reported below: 167 Mich App 467.

SARVER v SARVER, No. 82957. Leave to appeal as cross-appellant is also denied. Court of Appeals No. 97826.

MADLEY v THE EVENING NEWS ASSOCIATION, No. 83000; reported below: 167 Mich App 338. GRIFFIN, J., would grant leave to appeal.

PORTICE v OTSEGO COUNTY SHERIFF'S DEPARTMENT, No. 83072. Leave to appeal as cross-appellants is also denied. Reported below: 169 Mich App 563.

MARTIN v THE STROH BREWERY COMPANY, Nos. 83102-83112; Court of Appeals No. 107000-107010.

LOFTIS v G T PRODUCTS, INC, Nos. 83209, 83210; reported below: 167 Mich App 787. BOYLE, J., would grant leave to appeal.

CUNNINGHAM v SEALED POWER CORPORATION, No. 83302; Court of Appeals No. 103905.

LYONS v FRY, No. 83337; Court of Appeals No. 103708. ARCHER, J., would remand the case to the Court of Appeals for consideration as on leave granted.

BOCA v BOCA, No. 83393; Court of Appeals No. 95750.

COLEMAN v GENERAL MOTORS CORPORATION, No. 83597; reported below: 166 Mich App 784. RILEY, C.J., and BRICKLEY and GRIFFIN, JJ., would grant leave to appeal.

Reconsideration denied February 28, 1989.

*Interlocutory Appeals*

*Leave to Appeal Denied November 17, 1988:*

DIPPEL v TAUBER, No. 82743; Court of Appeals No. 80607.

NEWLAND v INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW, No. 83074; Court of Appeals No. 104005.

PACK v WHITE STAR TRUCKING, INC, No. 83093; Court of Appeals No. 103624.

CITY OF RIVERVIEW RETIREMENT SYSTEM v EOFF, No. 83305; Court of Appeals No. 104562.

*Summary Dispositions November 22, 1988:*

PEOPLE v KIRKPATRICK and PEOPLE v FOREMAN, Nos. 81196, 81219, 81220. In lieu of granting leave to appeal, the judgments of the Court of Appeals are vacated, and the cases are remanded to that Court for reconsideration in light of *People v Straight,* 430 Mich 418 (1988). MCR 7.302(F)(1). Jurisdiction is not retained. Reported below: 161 Mich App 14.

PEOPLE v WENZLICK, No. 83402. In lieu of granting leave to appeal, the April 8, 1988, order of the Court of Appeals is vacated, and the case is remanded to that Court for plenary consideration as on leave granted. MCR 7.302(F)(1). Jurisdiction is not retained. Court of Appeals No. 104202.

PEACOCK v CITY OF CLARE, No. 83403. In lieu of granting leave to appeal, the case is remanded to the Court of Appeals for consideration as on leave granted. MCR 7.302(F)(1). Court of Appeals No. 104337.

KOEHS v MUSKEGON TOWNSHIP, No. 83417. In lieu of granting leave to appeal, the judgment of the Court of Appeals is vacated, and the case is remanded to that Court for consideration of the argument that the Employment Relation Commission's final disposition of the duty of fair representation claim: (1) precludes a circuit court finding that the union discriminated against plaintiff on the basis of race or sex, and (2) precludes a circuit court determination that plaintiff was denied procedural due process in not being afforded an arbitration hearing at which he could challenge the loss of his employment. If any party so requests, the Court of Appeals is to receive and consider further briefs on these issues. MCR 7.302(F)(1). Leave to appeal as cross-appellant is denied because the Court is not persuaded that the questions presented should be reviewed. Jurisdiction is not retained. Court of Appeals No. 92694.

SPRUYTTE v DEPARTMENT OF CORRECTIONS, No. 83441. In lieu of granting leave to appeal, the order of the Court of Appeals certified April 5, 1988, dismissing defendant's appeal is vacated, and the case is remanded to that Court for reinstatement of defendant's appeal. MCR 7.302(F)(1). It was an abuse of discretion to dismiss defendant's appeal under the circumstances of this case. The Court of Appeals remains free to expedite the appeal or the briefing schedule in any fashion it deems appropriate, given the delay occasioned by the appellate proceedings in this Court. See MCR 7.212(A)(3), 7.216(A)(9). Jurisdiction is not retained. Court of Appeals No. 103059.

VIELE v DCMA, Nos. 83472, 83554. In lieu of granting leave to appeal, the judgment of the Court of Appeals is modified in the following respect: In addition to the directions given by the Court of Appeals, the Workers' Compensation Appeal Board is to reconsider its June 10, 1985, order staying payment of seventy percent benefits. MCR 7.302(F)(1). In all other respects leave to appeal is denied because the Court is not persuaded that the questions presented should now be reviewed. Jurisdiction is not retained. Reported below: 167 Mich App 571.

Reconsideration denied April 25, 1989.

CHILINGIRIAN v CITY OF FRASER, No. 83810. In lieu of granting leave to appeal, the case is remanded to the Court of Appeals for consideration as on leave granted. MCR 7.302(F)(1). Court of Appeals No. 107917.

PEOPLE v MONTAGUE, No. 84005. In lieu of granting leave to appeal, the judgment of the Court of Appeals is reversed, and the defendant's conviction is reinstated. MCR 7.302(F)(1). Absent a testimonial record made pursuant to *People v Ginther,* 390 Mich 436 (1973), the Court of Appeals clearly erred in deciding that the defendant's trial counsel was guilty of ineffective assistance but for which the defendant might reasonably have been acquitted. Court of Appeals No. 97638.

PEOPLE v PARMELEE, No. 84102. In lieu of granting leave to appeal, the case is remanded to the Washtenaw Circuit Court with direction that it order preparation of the transcript of the defendant's preliminary examination. MCR 6.101(J)(2), (3). MCR 7.302(F)(1). Court of Appeals No. 110602.

BOYLE, J., would grant leave to appeal.

*Leave to Appeal Denied November 22, 1988:*

PEOPLE v BRIGHTWELL JOHNSON, No. 82965; Court of Appeals No. 96100.

PEOPLE v ROSENBAUM, No. 83044; Court of Appeals No. 94321.

PEOPLE v MIDKIFF, No. 83325; Court of Appeals No. 83837.

*In re* PEOPLE v KALLABAT (WAYNE COUNTY PROSECUTOR v RECORDER'S COURT JUDGE #3), No. 83329; Court of Appeals No. 88244. CAVANAGH, J., would grant leave to appeal.

PEOPLE v PICKENS, No. 83460; Court of Appeals No. 99600. LEVIN, J., would grant leave to appeal.

JACKSON v CHRYSLER CORPORATION, No. 83482; Court of Appeals No. 95463.

PEOPLE OF THE CITY OF TROY v MARK HOFFMAN, No. 83483; Court of Appeals No. 104547. LEVIN and ARCHER, JJ., would remand the case to the Court of Appeals for consideration as on leave granted.

CHIPPEWA VALLEY SCHOOLS v AFSCME, MICHIGAN COUNCIL 25, LOCAL 1884, CHIPPEWA VALLEY CHAPTER, No. 83507; Court of Appeals No. 93337.

NATIONAL BIO-ANALYTICAL CLINICAL LABS, INC v METRIC MEDICAL LABORATORIES, No. 83522; Court of Appeals No. 96284. Reconsideration denied February 28, 1989.

SCHOONBECK v NORTHERN ASSURANCE COMPANY OF AMERICA, No. 83557; Court of Appeals No. 101369. Reconsideration denied April 25, 1989.

PEOPLE v PATTON, No. 83817; Court of Appeals No. 91049. RILEY, C.J., and BOYLE and GRIFFIN, JJ., would grant leave to appeal.

Reconsideration denied February 28, 1989.

PEOPLE v OLIVER, No. 83915; reported below: 170 Mich App 38.

PEOPLE v BRACY, No. 83993; Court of Appeals No. 93925. Reconsideration denied February 28, 1989. BOYLE, J., would grant leave to appeal.

*Interlocutory Appeals*

*Leave to Appeal Denied November 22, 1988:*

PEOPLE v PESCI #2, No. 83543. Leave to appeal as cross-appellant is also denied. Court of Appeals No. 98247.

BOYLE and GRIFFIN, JJ., would grant leave to appeal.

Reconsideration denied February 28, 1989.

LOPEZ v FORD MOTOR COMPANY, No. 83874; Court of Appeals No. 108627.

PEOPLE v TAYLOR, No. 83939; Court of Appeals No. 106384.

*Summary Dispositions November 30, 1988:*

HILL v FORD MOTOR COMPANY, No. 80476. In lieu of granting leave to appeal, the December 10, 1986 order of the Court of Appeals is vacated, and the case is remanded to that Court for consideration as on leave granted. MCR 7.302(F)(1). Jurisdiction is not retained. Court of Appeals No. 92542.

WEILER v NEW CENTURY BANK, No. 83609. In lieu of granting leave to appeal, the judgment of the Court of Appeals is vacated, and the case is remanded to the Bay Circuit Court for reconsideration in light of *Storey v Meijer, Inc,* 431 Mich 368 (1988). MCR 7.302(F)(1). Reported below: 168 Mich App 354.

*Leave to Appeal Denied November 30, 1988:*

CHASE v HEKMAN FURNITURE, No. 81657; Court of Appeals No. 101408.

JACKSON v KELSEY-HAYES COMPANY, No. 81700; Court of Appeals No. 101895.

CHILLIK v MICHIGAN BELL TELEPHONE COMPANY, No. 82432; Court of Appeals No. 103147.

PEOPLE v KISSANE, No. 82439; Court of Appeals No. 100347.

PEOPLE v O'CONNOR, No. 82505; Court of Appeals No. 95605.

SAMULSKI v WAYNE COUNTY PROBATE JUDGE, No. 83092; Court of Appeals No. 91659.

PEOPLE v BURNETT, No. 83164; reported below: 166 Mich App 741.

PEOPLE v PROCTOR-BEY, No. 83281; Court of Appeals No. 103626.

FAULKNER v CAMPBELL, WYANT & CANNON FOUNDRY, No. 83351; Court of Appeals No. 103712.

PEOPLE v GREGORY PORTER, No. 83398; Court of Appeals No. 97939.

PEOPLE v MORENO, No. 83508; Court of Appeals No. 103811.

PEOPLE v LARRY BROWN #1, No. 83513; Court of Appeals No. 100466.

CITY OF BAY CITY v SURATH, No. 83515; reported below: 170 Mich App 139.

PEKA v BOOSE, No. 83527; reported below: 172 Mich App 139.

PEOPLE v BUCHOLZ, No. 83536; Court of Appeals No. 94427.

*In re* ORTMANN ESTATE (BISHOP v GALLERANI), No. 83538; Court of Appeals No. 93483.

WARD v WASHTENAW COUNTY PROSECUTOR and WARD v INGHAM COUNTY SHERIFF DEPARTMENT, Nos. 83561, 83562; Court of Appeals Nos. 91649, 92391.

WILLIAMS v STUCKY, No. 83583; Court of Appeals No. 99320.

SMITH v DETROIT AUTOMOBILE INTER-INSURANCE EXCHANGE, No. 83587; Court of Appeals No. 100430. Reconsideration denied February 28, 1989.

SMUTEK v RAJAGOPAL, No. 83591; Court of Appeals No. 90222.

KINCAID v HARPER-GRACE HOSPITALS, INC, No. 83607; Court of Appeals No. 92598.

TAYLOR v PACK, No. 83628; Court of Appeals No. 97676.

PEOPLE v ELLIS, No. 83629; Court of Appeals No. 106579.

PEOPLE v LEWIS GRIFFIN, No. 83630; Court of Appeals No. 104131.

LERMA v HAYES-ALBION CORPORATION, No. 83646; Court of Appeals No. 98981.

PEOPLE v WALSH, No. 83658; Court of Appeals No. 104902.

*In re* VIRGINIA FISHER ESTATE (WILLIAM FISHER v SILVER), No. 83662; Court of Appeals No. 96755.

SMITH v FARAH, No. 83674; Court of Appeals No. 98849.

YEE v CHUDZINSKI, No. 83680; Court of Appeals No. 90320.

HARTMAN v BAUM'S CAFE, No. 83691; Court of Appeals No. 105530. Reconsideration denied March 29, 1989.

BROOKS v CITY OF TROY WATER DEPARTMENT, No. 83693; Court of Appeals No. 93986.

*In re* KOERNKE ESTATE (DEPARTMENT OF TREASURY v KOERNKE), No. 83696; reported below: 169 Mich App 397.

PEOPLE v CARL WHITE, No. 83702; reported below: 168 Mich App 596.

MORTIER v GRANDVIEW HOSPITAL, No. 83710; Court of Appeals No. 105405.

PEOPLE v DORCHY, No. 83718; Court of Appeals No. 94149.

HARVEY v JOHN CARLO, INC, No. 83727; Court of Appeals No. 89569. Reconsideration denied March 29, 1989.

EYDE BROTHERS DEVELOPMENT CORPORATION v ROSCOMMON COUNTY BOARD OF ROAD COMMISSIONERS, No. 83729; Court of Appeals No. 89101.

MUSIAL v GENERAL MOTORS CORPORATION, No. 83736; Court of Appeals No. 105402.

PEOPLE v ROSCOE, No. 83744; Court of Appeals No. 100156.

PEOPLE v LARRY BROWN #2, No. 83745; Court of Appeals No. 105808.

PEOPLE v BUFORD, No. 83757; Court of Appeals No. 105549.

PEOPLE v HARLEY, No. 83764; Court of Appeals No. 105149.

HELMAN v LOBDELL-EMERY MANUFACTURING COMPANY, No. 83769; Court of Appeals No. 105130.

ADAMS v CYRIL J BURKE, INCORPORATED, No. 83770; Court of Appeals No. 105309.

PEOPLE v GLAZE, No. 83778; Court of Appeals No. 107571.

MADDEN v SELBST, No. 83783; Court of Appeals No. 99925. Reconsideration denied February 28, 1989.

PEOPLE v ORDIWAY, No. 83809; Court of Appeals No. 96609.

PEOPLE v BOLEN, No. 83835; Court of Appeals No. 99214.

PEOPLE v DODGE, No. 83846; Court of Appeals No. 95133.

PEOPLE v LEO KELLY, No. 83868; Court of Appeals No. 98793.

STATE TREASURER v WHITE, No. 83872; Court of Appeals No. 102952.

PEOPLE v MORROW, No. 83928; Court of Appeals No. 94377.

SUGAR LOAF ASSOCIATES v CLEVELAND AND CENTREVILLE TOWNSHIPS, No. 83948; Court of Appeals No. 98987.

PEOPLE v LEE, No. 83981; Court of Appeals No. 92709.

PEOPLE v SWYSTUN, No. 84242; Court of Appeals No. 109287.

NICHOLAS v NICHOLAS, No. 84291; Court of Appeals No. 99010.

PEOPLE v WASHINGTON, No. 84380; Court of Appeals No. 95188.

*Interlocutory Appeals*

*Leave to Appeal Denied November 30, 1988:*

ATTORNEY GENERAL v LONDON MOTORS CORPORATION, No. 83016; Court of Appeals No. 101883.

McINTOSH v HENRY FORD HOSPITAL, No. 83654; Court of Appeals No. 104065.

LOCKE v HERD, No. 83781; Court of Appeals No. 105400.

WAGGONER v GOLDEN, No. 83886; Court of Appeals No. 106406.

PRATT v HIGHLAND PARK FEDERATION OF TEACHERS, No. 83916; Court of Appeals No. 92555.

PEOPLE v TALLEY, No. 83949; Court of Appeals No. 96280.

ROSSMAN v ROSSMAN #2, No. 84253; Court of Appeals No. 106743.

DeVISSER v BOHN, No. 84623; Court of Appeals No. 112661.

*Reconsideration Denied November 30, 1988:*

MICHIGAN MUTUAL INSURANCE COMPANY v AMERICAN COMMUNITY MUTUAL INSURANCE COMPANY, Nos. 82418, 82419. Leave to appeal was denied May 31, 1988, 430 Mich 884. Reported below: 165 Mich App 269.

*Summary Disposition December 2, 1988:*

THOMAS v THOMAS, No. 83245. In lieu of granting leave to appeal, the judgment of the Court of Appeals is vacated, and the case is remanded to that Court for further consideration. MCR 7.302(F)(1). If that Court intended to award the defendant $42,208 in 1981 dollars, then the failure to provide for interest on the award produced an unfair and inequitable result. On the other hand, if the Court intended to award $42,208 in 1987 dollars, the failure to award interest would not necessarily be unfair or inequitable if other factors justified the decision to award the defendant less than a one-eighth share of the 1981 present value of the professional degree. On remand, the Court of Appeals is to further explicate its decision. Jurisdiction is not retained. Reported below: (*After Remand*) 164 Mich App 618.

*Leave to Appeal Denied December 2, 1988:*

DAVE LOZUAWAY & ASSOCIATES, INC v WAYNE HOME EQUIPMENT COMPANY, No. 84641; Court of Appeals No. 109698.

*Summary Dispositions December 7, 1988:*

PEOPLE v MCMILLION, No. 83173. In lieu of granting leave to appeal, the judgment of the Court of Appeals is vacated, and the case is remanded to that Court as on rehearing granted for further consideration of the issues whether the police violated the rule of *Edwards v Arizona,* 453 US 477; 101 S Ct 1880; 68 L Ed 2d 378 (1981), and *People v Paintman,* 412 Mich 518; 315 NW2d 418 (1982), and, if so, whether the harmless error rule may be applied in these circumstances. Cf. *Chapman v California,* 386 US 18; 87 S Ct 824; 17 L Ed 2d 705 (1967). If requested, the Court of Appeals is to permit the parties to brief and orally argue these issues. MCR 7.302(F)(1). Jurisdiction is not retained. Court of Appeals No. 94169.

LAKESHORE BOARD OF EDUCATION v GRINDSTAFF, No. 83358. The case is remanded to the Court of Appeals for consideration of an issue previously raised by the plaintiff but, in light of the disposition of another issue, not considered by that Court, to wit: Whether the State Tenure Commission has the authority to reduce a discipline sanction from discharge to a suspension despite finding that the misconduct charges were proven. The Court of Appeals is to issue its supplemented opinion on remand within ninety days from the certification date of this order. The clerk of the Court of Appeals is to promptly file a copy of the opinion with the clerk of this Court, and notify the parties of that filing. The parties may file supplemental briefs in this Court within twenty-one days after the opinion is filed with the clerk of this Court. Jurisdiction is retained. Application for leave to appeal remains under consideration. Court of Appeals No. 98748.

PEOPLE v CHRYSLER, No. 83517. In lieu of granting leave to appeal, the judgment of the Court of Appeals and the judgment of the Livingston Circuit Court are reversed, and the case is remanded to the Livingston Circuit Court for a new trial. MCR 7.302(F)(1). The introduction of evidence concerning the defendant's lack of sexual activity with a person other than the alleged victim, together with the prosecutor's comments thereon, denied the defendant a fair trial. *People v Travis,* 246 Mich 514; 224 NW 329 (1929). Court of Appeals No. 98353.

*Leave to Appeal Denied December 7, 1988:*

THOMPSON v MICHIGAN BELL TELEPHONE COMPANY, No. 79978; Court of Appeals No. 90769. RILEY, C.J., and BRICKLEY and GRIFFIN, JJ., would grant leave to appeal.

Reconsideration denied April 25, 1989.

LEACH v DETROIT HEALTH CORPORATION, No. 79991; reported below: 156 Mich App 441. RILEY, C.J., and BRICKLEY and GRIFFIN, JJ., would grant leave to appeal.

Reconsideration denied February 28, 1989.

BAMBINO v DUNN (BAMBINO v LAURAINE), No. 82889; reported below: 166 Mich App 723. BOYLE and ARCHER, JJ., would grant leave to appeal.

MARINA BAY CONDOMINIUMS, INC v SCHLEGEL, No. 83062; reported below: 167 Mich App 602.

PEOPLE v CHAPDELAINE, No. 83139; Court of Appeals No. 90947. CAVANAGH, J., would grant leave to appeal.

MADDEN v EMPLOYERS INSURANCE OF WAUSAU (MADDEN v TRUCKS), No. 83180; reported below: 168 Mich App 33. GRIFFIN, J., would grant leave to appeal.

LOWER v LIQUOR CONTROL COMMISSION, No. 83205; Court of Appeals No. 102904.

BENSON v DEPARTMENT OF MANAGEMENT AND BUDGET, No. 83319; reported below: 168 Mich App 302. LEVIN, CAVANAGH, and ARCHER, JJ., would grant leave to appeal.

*Interlocutory Appeal*

*Leave to Appeal Denied December 7, 1988:*

SIPKA v SIPKA, No. 84706; Court of Appeals No. 111863.

*Appeal Dismissed December 9, 1988:*

HARRIGAN v FORD MOTOR COMPANY, No. 81410. Appeal dismissed upon stipulation of the parties, with prejudice and without costs. Leave to appeal was granted December 30, 1987, 429 Mich 887. Reported below: 159 Mich App 776.

*Leave to Appeal Granted December 15, 1988:*

CITY OF NOVI v CITY OF DETROIT, No. 82769. Limited to the issues (1) whether the standard for judicial review of municipal utility water rates has been changed by 1981 PA 89, MCL 123.141(2); MSA 5.2581(2) and, if so, what is that standard of review, and (2) whether the rate set by the defendant was based on the actual cost of services as provided by MCL 123.141(2); MSA 5.2581(2). Reported below: 166 Mich App 397.

BORG-WARNER ACCEPTANCE CORPORATION v DEPARTMENT OF STATE, No. 83010; Court of Appeals No. 95356.

PLYMOUTH-CANTON COMMUNITY SCHOOL DISTRICT v STATE TENURE COMMISSION, No. 83160; reported below: 166 Mich App 331.

PEOPLE v STAFFORD, No. 83317. Limited to the issues (1) whether the circuit court erred by remanding this case to the district court so that the prosecutor could present additional evidence and arguments

supporting a bindover on open murder charges, and (2) whether the district judge erred by binding over the defendant on a second-degree murder charge after hearing the prosecutor's additional evidence and arguments. Reported below: 168 Mich App 247.

STEVENS v MCLOUTH STEEL PRODUCTS CORPORATION, No. 83356. Limited to the issues (1) whether defendant-appellant may be held liable under a successor liability theory on plaintiff-appellee's age discrimination claim when the plaintiff-appellee admits he never filed age discrimination charges with any administrative agency and never, prior to the filing of this lawsuit, gave actual notice of any age discrimination charges or claim to the defendant-appellant or its predecessor, and (2) whether a genuine issue of material fact exists as to the establishment by plaintiff-appellee of a prima facie case of age discrimination. Court of Appeals No. 99517.

PEOPLE v GATES, No. 83363. Limited to the issue whether, in view of the prior proceedings in probate court, principles of collateral estoppel prohibited the subsequent prosecution of this defendant for criminal sexual conduct. Reported below: 168 Mich App 384.

PEOPLE OF THE CITY OF DETROIT v QUALLS, No. 83408; reported below: (*On Remand*) 166 Mich App 587.

PEOPLE v JAMIESON, No. 83446. Limited to the issue whether the trial court clearly erred in dismissing on the basis of entrapment the charges of unlawful delivery of controlled substances that were brought against defendants. Reported below: 168 Mich App 332.

PEOPLE v LANDRUM, No. 83994. Limited to the issues (1) whether the trial court erred in not giving, sua sponte, an instruction on the offense of involuntary manslaughter, (2) if so, whether the error was harmless, and (3) whether the trial court's instructions adequately presented the defendant's claim of self-defense to the jury. The Court has determined not to entertain argument regarding the doctrine of imperfect self-defense. The case is to be argued and submitted with *People v Heflin,* No. 79423. Leave to appeal as cross-appellant is also granted. Reported below: (*On Remand*) 171 Mich App 148.

PEOPLE v CRUSOE, No. 84017. The certification by the Court of Appeals pursuant to Administrative Order No. 1984-2 that its decision in this case conflicts with its decision in *People v Buckles,* 155 Mich App 1 (1986), is considered, and leave to appeal is granted limited to the issue whether the trial court erred in holding that the defendant's confession was admissible because the defendant had waived his rights under *Miranda v Arizona,* 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966). Reported below: 170 Mich App 403.

PEOPLE v EWING, No. 84137. Limited to the issues (1) whether the Court of Appeals misapplied the rule of *People v Grimmett,* 388 Mich 590, 608 (1972), concerning the use of unsupported assumptions of guilt of other crimes as a factor in imposing sentence, and (2) if the Court of Appeals properly applied the rule of *Grimmett* to the facts of

this case, whether the Court should overrule or otherwise modify the rule of *People v Grimmett.* Court of Appeals No. 104146.

*Leave to Appeal Denied December 19, 1988:*

PEOPLE v ELBERT BOYD, No. 83935; Court of Appeals No. 95220.

BRICKLEY and BOYLE, JJ., dissent and state as follows:

We would grant leave to appeal to decide the issue of jurisprudential significance in this case, namely, whether, in the absence of government action, due process requires the suppression of identification testimony that is the product of an earlier suggestive confrontation or whether the factfinder should be allowed to hear all the circumstances and determine the reliability of the testimony.

RILEY, C.J., would grant leave to appeal.

*Summary Disposition December 20, 1988:*

FLINT SCHOOL DISTRICT v SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO, LOCAL 591, No. 83207. In lieu of granting leave to appeal, the judgments of the Court of Appeals and the Genesee Circuit Court are reversed, and the case is remanded to the Genesee Circuit Court for further proceedings. MCR 7.302(F)(1). The arbitrator did not exceed the scope of his authority. See *United Steelworkers v Warrior & Gulf Navigation Co,* 363 US 574 (1960), and *Port Huron Area School Dist v Port Huron Ed Ass'n,* 426 Mich 143 (1986). Jurisdiction is not retained. Reported below: 168 Mich App 180.

Reconsideration denied April 25, 1989.

*Leave to Appeal Denied December 20, 1988:*

*In re* FORFEITURE OF $7,390.41, No. 82344; Court of Appeals No. 88598. ARCHER, J., would grant leave to appeal to consider the analysis of Judge WAHLS in his dissenting opinion in the Court of Appeals.

SNELLENBERGER v CELINA MUTUAL INSURANCE COMPANY, No. 82920; reported below: 167 Mich App 83.

CHAMBERLAIN v CHAMBERLAIN-HEMPHILL AND BARGER AGENCY, INC, No. 83259; Court of Appeals No. 95035. ARCHER, J., would grant leave to appeal.

HOERNER v MILJOUR, No. 83576; Court of Appeals No. 97514.

PEOPLE v GIBBS, No. 83595; Court of Appeals No. 93027. LEVIN, ARCHER, and GRIFFIN, JJ., would remand the case to the trial court for an evidentiary hearing on the question whether relief should be granted to the defendant on the authority of *Batson v Kentucky,* 476 US 79 (1986).

Reconsideration denied March 29, 1989. LEVIN, J., would grant reconsideration and remand to the trial court for an evidentiary hearing as set forth in the December 20, 1988, statement, *supra.*

*In re* PRICHARD ESTATE (PARAGON TRANSPORT, INC v MURRELL and COMERICA BANK—DETROIT v PARAGON TRANSPORT, INC), Nos. 83620, 83621; reported below: 169 Mich App 140.

PEOPLE v JOANNE JACKSON, No. 84162; Court of Appeals No. 82473. BOYLE and GRIFFIN, JJ., would grant leave to appeal.

FITZPATRICK v SECRETARY OF STATE, No. 84201; Court of Appeals No. 105053. BRICKLEY, J., would grant leave to appeal.

PEOPLE v LAGORE, No. 84254. The certification by the Court of Appeals pursuant to Administrative Order No. 1984-2 that its decision in this case conflicts with its decision in *People v Reinhardt,* 141 Mich App 173 (1985), is considered, and the Court declines to order further consideration of the questions presented. Court of Appeals No. 98220.

ARCHER, J., would grant leave to appeal.

Reconsideration denied March 29, 1989.

*Leave to Appeal Granted December 29, 1988:*

EDWARD ROSE BUILDING COMPANY v INDEPENDENCE TOWNSHIP, No. 82572. Limited to the issue whether the Tax Tribunal correctly determined the value of the petitioner's property. Reported below: 164 Mich App 324.

*Summary Dispositions December 29, 1988:*

WOJCIECHOWSKI v GENERAL MOTORS CORPORATION, No. 79264. In lieu of granting leave to appeal, the case is remanded to the Court of Appeals for reconsideration in light of *White v General Motors Corp,* 431 Mich 387 (1988). MCR 7.302(F)(1). In all other respects leave to appeal and the application for leave to appeal as cross-appellant are denied because the Court is not persuaded that the questions presented should now be reviewed. Reported below: 151 Mich App 399.

AUTO-OWNERS INSURANCE COMPANY v CORDUROY RUBBER COMPANY, No. 81266. In lieu of granting leave to appeal, the judgment of the Court of Appeals is vacated, and the case is remanded to that Court for reconsideration in light of *Teper v Park West Galleries, Inc,* 431 Mich 202 (1988). MCR 7.302(F)(1). Court of Appeals No. 90026.

NELSON v GENERAL MOTORS CORPORATION, No. 82101. In lieu of granting leave to appeal, the judgment of the Court of Appeals is vacated, and the case is remanded to that Court for reconsideration in light of *White v General Motors Corp,* 431 Mich 387 (1988). MCR 7.302(F)(1). Court of Appeals No. 101516.

PEOPLE v SHERWOOD, No. 83162. In lieu of granting leave to appeal, the judgment of the Court of Appeals is reversed and the judgment of the Kent Circuit Court is reinstated. MCR 7.302(F)(1). Each portion of the statutory test was satisfied in this case. MCL 780.653; MSA 28.1259(3). *People v Sherbine,* 421 Mich 502; 364 NW2d 658 (1984). Reported below: 171 Mich App 103.

BOYLE, J., dissents and states as follows:

The Court of Appeals in this published opinion has concluded that this Court's decision in *People v Sherbine,* 421 Mich 502; 364 NW2d 658 (1984), requires invalidation of a search warrant and suppression of the evidence seized during execution.

The warrant was based on the affidavit of a police officer and set forth the fact that on three separate days within a month a fellow police officer (also named) had inspected garbage in front of the premises and found drugs and drug paraphernalia. The affidavit further set forth that the paraphernalia recovered on the last of these occasions had been determined by " 'Michigan State Police chemist Allen Kamppainen,' " to have cocaine on it. 171 Mich App 103, 106; 429 NW2d 805 (1988).

The Court of Appeals reasoned that the magistrate could not make the finding of reliability required by *Sherbine,* because the affiant did not show how the chemist determined the presence of cocaine, "it might not have been from personal knowledge . . . ." *Id.* at 107. This decision appears to be in conflict with that of another Court of Appeals panel, *People v Sellars,* 153 Mich App 22; 394 NW2d 133 (1986), which has held that *Sherbine* does not apply to informant information "confirmed by independent investigation by the police . . . ." *Id.* at 27. The issue, which is one of constantly recurring significance to law enforcement and magistrates, is whether *Sherbine* applies to hearsay supplied by a fellow officer.

This Court did not hold in *Sherbine* that MCL 780.653; MSA 28.1259(3) requires that an affidavit based on information from other named police officers must affirmatively show either personal knowledge by or the reliability of, the furnishing officer. Moreover, such a construction of the statute would be inconsistent with the long established principle that "another law enforcement officer is a reliable source and that consequently no special showing of reliability need be made as part of the probable cause determination," LaFave & Israel, Criminal Procedure, § 3.3(e), p 207. Compare *United States v Ventresca,* 380 US 102; 85 S Ct 741; 13 L Ed 2d 684 (1965), with *Whiteley v Warden,* 401 US 560; 91 S Ct 1031; 28 L Ed 2d 306 (1971).

This Court should grant leave to appeal and address the question whether *Sherbine* applies in this situation and if so whether each named police officer in a common investigation must speak with personal knowledge or otherwise demonstrate credibility (as in this case for example by a police chemist's showing that his laboratory results were reliable). I would grant leave to appeal.

Reconsideration denied March 29, 1989.

GORDON FOOD SERVICE, INC v GRAND RAPIDS MATERIAL HANDLING COMPANY, No. 83814. In lieu of granting leave to appeal, the case is remanded to the Court of Appeals for consideration as on leave granted. MCR 7.302(F)(1). Court of Appeals No. 108962.

PELSHAW v BARNETT, No. 83885. In lieu of granting leave to appeal, the judgment of the Court of Appeals on the requirement of a hearing pursuant to MCR 2.420 is modified in part. MCR 7.302(F)(1). The case is remanded to the Oakland Circuit Court with the direction that it conduct a hearing to determine if the settlement in this case is fair and in the minor's best interest, as provided in MCR 2.420(B). If, following the hearing, the court finds that the settlement is unfair to the minor or that the settlement is not in the best interest of the minor, the court is to vacate the judgment, is to set aside the acceptance of mediation by the plaintiff, and is to proceed toward trial. In all other respects leave to appeal is denied because the Court is not persuaded that the remaining question presented should be reviewed. Jurisdiction is not retained. Reported below: 170 Mich App 280.

MOX v JORDAN, No. 83927. In lieu of granting leave to appeal, the case is remanded to the Court of Appeals for consideration as on leave granted. MCR 7.302(F)(1). Jurisdiction is not retained. Court of Appeals No. 105570.

WILLIAMS v RICHARDSON, No. 83936. In lieu of granting leave to appeal, the Court of Appeals order of July 13, 1988, and the trial court's default judgment of October 18, 1987, are vacated, and the case is remanded to the Oakland Circuit Court for trial. *Bowerman v MacDonald,* 431 Mich 1, 23 (1988). MCR 7.302(F)(1). Court of Appeals No. 105343.

PEOPLE v POPE, No. 84314. In lieu of granting leave to appeal, the case is remanded to the Court of Appeals for consideration as on leave granted. MCR 7.302(F)(1). Court of Appeals No. 109634.

*Leave to Appeal Denied December 29, 1988:*

PEOPLE v BENDA, No. 79806; Court of Appeals No. 86413.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK v INSURANCE BUREAU, No. 80167; Court of Appeals No. 93182.

PEOPLE v ALTMAN, No. 81969; Court of Appeals No. 87123.

MORTON v GOLDBERG, No. 82856. Leave to appeal as cross-appellant is denied as moot. Reported below: 166 Mich App 366.

LEVIN, J., would grant leave to appeal.

Reconsideration denied April 25, 1989. LEVIN, J., would grant reconsideration and would grant leave to appeal.

GADWELL v LIVINGSTON COUNTY ROAD COMMISSION, No. 83061; Court of Appeals No. 95009.

GRAND RAPIDS PUBLIC SCHOOLS v FALKENSTERN, GRAND RAPIDS PUBLIC SCHOOLS v MCDONALD, and GRAND RAPIDS PUBLIC SCHOOLS v HUNSBERGER, Nos. 83224-83226; reported below: 168 Mich App 529.

PEOPLE v LANGSTON, No. 83322; Court of Appeals No. 95650.

PEOPLE v AUBREY, No. 83324; Court of Appeals No. 88007.

TAYLOR FEDERATION OF TEACHERS, MFT, AFT, AFL-CIO v TAYLOR BOARD OF EDUCATION, No. 83404; reported below: 167 Mich App 474. Reconsideration denied March 29, 1989.

WOJAS v ROSATI, No. 83434; Court of Appeals No. 103978.

LOYER EDUCATIONAL TRUST v WAYNE COUNTY ROAD COMMISSION, No. 83452. Leave to file a brief amicus curiae is granted. Reported below: 168 Mich App 587.

Reconsideration denied March 29, 1989.

PEOPLE v MCDONALD, No. 83459; Court of Appeals No. 94982. Reconsideration denied April 25, 1989.

PENN v DETROIT FREE PRESS, INC, No. 83577; Court of Appeals No. 91992.

COMSTOCK VILLAGE LIMITED DIVIDEND HOUSING ASSOCIATION v COMSTOCK TOWNSHIP, No. 83610. Leave to appeal as cross-appellant is also denied. Reported below: 168 Mich App 755.

PEOPLE OF THE CITY OF EAST LANSING v WILLIAM SIMPSON, No. 83618. Motion to waive fees is granted. Court of Appeals No. 108113.

Reconsideration denied February 28, 1989.

PEOPLE v HOOPER, No. 83656; Court of Appeals No. 104897.

GERALD'S FRANKLIN SALON, INC v CATT, No. 83661; Court of Appeals No. 93140.

PEOPLE v NATHANIEL WILLIAMS, No. 83708; Court of Appeals No. 92679.

DAHLMANN v OAKLAND UNIVERSITY, No. 83737; reported below: 172 Mich App 502.

PEOPLE v HRYSHKO, No. 83738; reported below: 170 Mich App 368.

CAUSIE v DARNIELLE, No. 83755; Court of Appeals No. 98804.

SMITH v DEPARTMENT OF SOCIAL SERVICES, No. 83779; Court of Appeals No. 105607.

PEOPLE v HODGES, No. 83787; Court of Appeals No. 102997.

THOMAS v BOATS, No. 83793; Court of Appeals No. 93809.

PEOPLE v GULLEY, No. 83799; Court of Appeals No. 103733.

LEDDELL v HUTZEL HOSPITAL, No. 83815; Court of Appeals No. 91512.

HINES v STATE OF MICHIGAN, Nos. 83821, 83845; Court of Appeals No. 101966.

ANSORGE v KELLOGG, No. 83822. Leave to appeal as cross-appellant is also denied. Reported below: 172 Mich App 63.

PEOPLE v MCCULLUM, No. 83834; Court of Appeals No. 101917.

PEOPLE v DORSEY, No. 83838; Court of Appeals No. 103479.

PEOPLE v GARNER, No. 83847; Court of Appeals No. 106204.

LEVIN, J., would grant leave to appeal to consider the retroactivity of *Sandstrom v Montana,* 442 US 510; 99 S Ct 2450; 61 L Ed 2d 39 (1979). In the Sixth Circuit, see, e.g., *Conway v Anderson,* 698 F2d 282, 284 (CA 6, 1983); *Williams v Engle,* 683 F2d 152 (CA 6, 1982); *Krzeminski v Perini,* 614 F2d 121 (CA 6, 1980), cert den 449 US 866 (1980); *Burton v Bergman,* 649 F2d 428, 431, n 3 (CA 6, 1981), vacated and remanded on other grounds 456 US 953 (1982). Similarly, see *Guthrie v Warden, Maryland Penitentiary,* 683 F2d 820, 823, n 3 (CA 4, 1982); *Bonnett v Solem,* 640 F2d 125 (CA 8, 1981); *Dietz v Solem,* 640 F2d 126, 130 (CA 8, 1981).

PEOPLE v MINOR, No. 83858; Court of Appeals No. 105715. Reconsideration denied March 29, 1989.

MYERS v MICHIGAN BASIC PROPERTY INSURANCE ASSOCIATION, No. 83859; Court of Appeals No. 96444.

GWIZDALA v TAHERI, No. 83860; Court of Appeals No. 98048.

JAMES v LECO CORPORATION, No. 83866; reported below: 170 Mich App 184. Reconsideration denied March 29, 1989.

PEOPLE v FARRELL, Nos. 83869, 83870; Court of Appeals Nos. 100435, 100662.

PEOPLE v STEWART, No. 83883; Court of Appeals No. 97987.

PEOPLE v MALACHI WHITE, No. 83894; Court of Appeals No. 103204.

BAKER #1 v STATE OF MICHIGAN, No. 83903. Motion for waiver of fees is granted. Court of Appeals No. 104744.

AMERICAN STATES INSURANCE COMPANY v LAMPOS, No. 83905; Court of Appeals No. 92996.

PEOPLE v HAACK, No. 83907; Court of Appeals No. 103692.

CITY OF SOUTHGATE v GUARANTY NATIONAL INSURANCE COMPANY, No. 83917; Court of Appeals No. 92408.

PEOPLE v ROY WHITE, No. 83923; Court of Appeals No. 106555.

COOK v RUS, No. 83943; Court of Appeals No. 95030.

REDMAN v MICHIGAN STATE UNIVERSITY, No. 83951; Court of Appeals No. 98275.

PEOPLE v BRADEN, No. 84013; Court of Appeals No. 101010.

PEOPLE v PATRICK, No. 84054; Court of Appeals No. 97534.

DEAN v CHRYSLER CORPORATION, No. 84065. Leave to appeal as cross-appellant is also denied. Court of Appeals No. 98898.

PEOPLE v LAMONTAGNE, No. 84139; Court of Appeals No. 107777.

PEOPLE v RANDLE, No. 84142; Court of Appeals No. 96521.

PEOPLE v MULLER, No. 84176; Court of Appeals No. 92573.

PEOPLE v PARKER, No. 84180; Court of Appeals No. 93293.

*In re* BERGREN (DEPARTMENT OF SOCIAL SERVICES v WHITE), No. 84384. Motion to waive fees is granted. Court of Appeals No. 105346.

PEOPLE v LOUKOJARVI, No. 84404; Court of Appeals No. 106093.

PEOPLE v YAROCH, No. 84445; Court of Appeals No. 103265. Reconsideration denied February 28, 1989.

*In re* RYAN (DEPARTMENT OF SOCIAL SERVICES v RYAN), No. 84448; Court of Appeals No. 105223.

COLE v WASHTENAW COUNTY, No. 84493; Court of Appeals No. 107948. Reconsideration denied April 25, 1989.

BAKER #2 v STATE OF MICHIGAN, No. 84903. Motion for waiver of fees is granted. Court of Appeals No. 108140.

*Interlocutory Appeals*

*Leave to Appeal Denied December 29, 1988:*

POIRIER v GRAND BLANC TOWNSHIP, No. 83780; reported below: 167 Mich App 770.

YOUNG ESTATE v UNIVERSITY OF MICHIGAN REGENTS, No. 83968; Court of Appeals No. 91499.

PEOPLE v WAGNER, No. 84204; Court of Appeals No. 103321.

*Motion for Clarification Granted December 29, 1988:*

HOREN v COLECO INDUSTRIES, INC, No. 84244. The time for filing an application is tolled during the pendency of the stay under 11 USC 362. The application for leave to appeal is dismissed without prejudice to refiling after expiration of the stay. Jurisdiction is not retained. Reported below: 169 Mich App 725.

# SPECIAL ORDERS

In this section are orders of the Court (other than grants and denials of leave to appeal from the Court of Appeals) of general interest to the bench and bar of the state.

*Order Published July 8, 1988:*

EXTENSION AND PROPOSED AMENDMENT OF MCR 3.211. On May 28, 1987, the Court adopted MCR 3.211, effective October 1, 1987, for a period of one year. On order of the Court, MCR 3.211 shall remain in effect until further order of this Court.

On further order of the Court, this is to advise that the Court is considering whether to amend MCR 3.211. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford any interested person the opportunity to comment on the form or the merits of the proposal, the text of which is as follows:

[The present language is repealed and replaced by the following language unless otherwise indicated below:]

RULE 3.211. DOMESTIC RELATIONS MEDIATION.

(A) [Unchanged.]

(B) Referral to Mediation.

(1) The judge to whom a case is assigned or the chief judge may refer the contested issues to mediation under this rule by written order on written stipulation by the parties or on written motion by a party, if the court finds that

(a) discovery is complete,

(b) the value of the marital estate and the income of the parties are sufficient to justify the expense of mediation, and

(c) mediation under this rule would be helpful in achieving settlement of the action.

(2)-(4) [Unchanged.]

(C)-(J) [Unchanged.]

*Staff Comment:* The July 8, 1988, order extends the effectiveness of MCR 3.211, which was due to expire on September 30, 1988, until further order of the Court.

The proposed amendment of subrule (B) would eliminate the provision permitting a court to order a case submitted to mediation on its own initiative.

The staff comment is published only for the benefit of the bench and bar and is not an authoritative construction by the Court.

> Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption in its present form. Timely comments will be substantively considered, and your assistance is appreciated by the Court.

A copy of this order will be given to the secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on this proposal may be sent to the Supreme Court Clerk within 60 days after it is published in the Michigan Bar Journal.

*Leave to Appeal From Attorney Discipline Board Denied July 25, 1988:*

GRIEVANCE ADMINISTRATOR v JUTKOWITZ, No. 82654.

*Complaint for Superintending Control Granted July 26, 1988:*

GRAVES v COURT OF APPEALS, No. 82972. It is apparent that neither the defendant nor his attorney received a copy of the Court of Appeals opinion or had knowledge of its release until more than two months after its release. Due to the unique circumstances of this case, the Court of Appeals is to reissue the opinion of the panel which decided this matter. All time limits for further appeal are to be calculated from the date of reissuance of the Court of Appeals opinion. Jurisdiction is not retained.

*Rehearing Denied July 27, 1988:*

WILLIAMS v HOFLEY MANUFACTURING COMPANY, No. 79949. Reported at 430 Mich 603.

*Orders Published August 26, 1988:*

PROPOSED AMENDMENTS OF MCR 2.113 AND 8.111. On order of the Court, this is to advise that the Court is considering whether to amend MCR 2.113 and 8.111. Before determining whether the proposals should be adopted, changed before adoption, or rejected, this notice is given to afford any interested person the opportunity to comment on the form or the merits of the proposals, the texts of which are as follows:

[The present language is to be repealed and replaced by the following language unless otherwise indicated below:]

RULE 2.113. FORM OF PLEADINGS AND OTHER PAPERS.

(A)-(B) [Unchanged.]

(C) Captions.

(1) [Unchanged.]

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

(a) There is no other civil action between these parties arising out of the same transaction or occurrence as alleged in this complaint pending in this court, nor has any such action been previously filed and dismissed or transferred after having been assigned to a judge, nor do I know of any other civil action, not between these parties, arising out of the same transaction or occurrence as alleged in this complaint pending in this court.

(b) There is now on file in this court a civil action between these parties or other parties arising out of the same transaction or occurrence as alleged in the complaint. The action is pending [was dismissed or transferred] and is No. _____. The action was assigned to Judge _____.

(3) [Unchanged.]

(D)-(G) [Unchanged.]

RULE 8.111. ASSIGNMENT OF CASES.

(A)-(C) [Unchanged.]

(D) Actions Arising Out of Same Transaction or Occurrence. Subject to subrule 8.110(E),

(1)-(3) [Unchanged.]

(4) The chief judge may reassign cases, other than those encompassed by subrule 8.111(D)(1), in order to correct docket control problems resulting from the requirements of this rule.

*Staff Comment:* The proposed amendment of MCR 2.113(C)(2) requires the filing attorney's statement to include a reference to other known cases arising out of the same transaction or occurrence as the action being filed, even where such other cases do not involve the same parties. The proposed amendment of MCR 8.111 authorizes the chief judge to reassign cases where necessary to correct any workload imbalance resulting from the rule's requirements.

The staff comment is published only for the benefit of the bench and bar and is not an authoritative construction by the Court.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption in its present form. Timely comments will be substantively considered, and your assistance is appreciated by the Court.

A copy of this order will be given to the secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on this proposal may be sent to the Supreme Court Clerk within 60 days after it is published in the Michigan Bar Journal. When filing a comment, please refer to our file number 88-09.

PROPOSED AMENDMENT OF MCR 2.516(B). On order of the Court, this is to advise that the court is considering whether to amend MCR 2.516(B). Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford any interested person the opportunity to comment on the form or the merits of the proposal, the text of which is as follows:

[The present language is to be repealed and replaced by the following language unless otherwise indicated below:]

RULE 2.516. INSTRUCTIONS TO JURY.

(A) [Unchanged.]

(B) Instructing the Jury.

(1)-(2) [Unchanged.]

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

(4)-(5) [Unchanged.]

(C)-(D) [Unchanged.]

*Staff Comment:* The proposed amendment was spurred by a request from the Michigan Judges Association that the state rule be brought into conformity with FR Civ P 51, as amended effective August 1, 1987. At present, MCR 2.516(B)(3) provides that the court must charge the jury after final arguments are completed. The proposed amendment would permit the court, at its election, to give the instructions either before or after arguments or at both times.

The staff comment is published only for the benefit of the bench and bar and is not an authoritative construction by the Court.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption in its present form. Timely comments will be substantively considered, and your assistance is appreciated by the Court.

A copy of this order will be given to the secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on this proposal may be sent to the Supreme Court Clerk within 30 days after it is

published in the Michigan Bar Journal. When filing a comment, please refer to our file number 87-51.

*Leave to Appeal From Attorney Discipline Board Denied September 7, 1988:*

GRIEVANCE ADMINISTRATOR v LUPILOFF, No. 83004.

*Rehearing Denied September 8, 1988:*

EIDE v KELSEY-HAYES COMPANY, No. 79392. Reported *ante,* 26.

*Order Published September 9, 1988:*

PROPOSED MCR 2.316. On order of the Court, this is to advise that the Court is considering whether to adopt new MCR 2.316. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford any interested person the opportunity to comment on the form or the merits of the proposal, the text of which is as follows:

RULE 2.316. REMOVAL OF DISCOVERY MATERIALS FROM FILE.

(A) Definition. For the purpose of this rule, "discovery material" means deposition transcripts, audio or video recordings of depositions, interrogatories, and answers to interrogatories and requests for admission.

(B) Removal From File. In civil actions, discovery materials may be removed from files and destroyed in the manner provided in this rule.

(1) By Stipulation. If the parties stipulate to the removal of discovery materials from the file, the clerk may remove the materials and dispose of them in the manner provided in the stipulation.

(2) By the Clerk.

(a) The clerk may initiate the removal of discovery materials from the file in the following circumstances.

(i) If an appeal has not been taken, 18 months after entry of judgment on the merits or dismissal of the action.

(ii) If an appeal has been taken, 91 days after the appellate proceedings are concluded, unless the action is remanded for further proceedings in the trial court.

(b) The clerk shall notify the parties and counsel of record, when possible, that discovery materials will be removed from the file of the action and destroyed on a specified date at least 28 days after the notice is served unless within that time

(i) the party who filed the discovery material retrieves it from the clerk's office, or

(ii) a party files a written objection to removal of discovery materials from the file.

If an objection to removal of discovery materials is filed, the discovery materials may not be removed unless the court so orders after notice and opportunity for the objecting party to be heard. The rules governing motion practice apply. The clerk may schedule a hearing and give notice to the parties.

(3) By Order. After notice and hearing, the court may order discovery materials removed at any other time the materials are not necessary, Provided, however, that no discovery materials will be destroyed by court personnel or the clerk until the periods set forth in (2)(a)(i) or (2)(a)(ii) have passed.

*Staff Comment:* The proposed rule is based on a submission of the Michigan Judges Association. It reflects concern by the bench over the very substantial amount of discovery material stored, at significant cost, where these records cannot or will not ever be used.

The staff comment is published only for the benefit of the bench and bar and is not an authoritative construction by the Court.

> Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption in its present form. Timely comments will be substantively considered, and your assistance is appreciated by the Court.

A copy of this order will be given to the secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on this proposal may be sent to the Supreme Court Clerk within 60 days after it is published in the Michigan Bar Journal. When filing a comment, please refer to our file number 88-07.

*Certified Question Granted September 28, 1988:*

*In re* CERTIFIED QUESTION, PREFERRED RISK MUTUAL INSURANCE COMPANY v MICHIGAN CATASTROPHIC CLAIMS ASSOCIATION, No. 82968. The request to answer the question certified by the United States Court of Appeals for the Sixth Circuit Court is granted. The case is to be argued and submitted with *League General Ins Co v Michigan Catastrophic Claims Ass'n,* No. 82417.

*Order Published October 19, 1988:*

GRIEVANCE ADMINISTRATOR v SMITH, No. 83777. In lieu of granting leave to appeal, the discipline imposed in this case is reduced to a suspension of eight months. MCR 7.302(F)(1).

*Rehearing Denied October 25, 1988:*

PEOPLE v CIPRIANO, Nos. 77682, 77683. Reported *ante,* 315.

*Rehearings Denied October 26, 1988:*

UNION CARBIDE CORPORATION v PUBLIC SERVICE COMMISSION, Nos. 79148, 79150. Reported *ante,* 135.

TEPER v PARK WEST GALLERIES, INC, No. 79642. Reported *ante,* 202.

*Order Published October 31, 1988:*

LARIVEE v LARIVEE, No. 83733. The certification by the Court of Appeals pursuant to Administrative Order No. 1984-2 that its decision in this case conflicts with its decision in *Hall v Hall,* 157 Mich App 239 (1987), is considered and, in the absence of an application for leave to appeal, the Court declines to order further consideration of the question presented. Court of Appeals No. 102654.

*Leave to Appeal From Attorney Discipline Board Denied November 17, 1988:*

*GRIEVANCE ADMINISTRATOR v ESTON, No. 82999.*

Reconsideration denied February 22, 1989. ARCHER, J., would grant reconsideration because of what he perceives to be disparate treatment of respondent as compared with a similarly situated individual.

*Orders Published November 17, 1988:*

PAASO v PAASO, No. 83946. The certification by the Court of Appeals pursuant to Administrative Order No. 1984-2 that its decision in this case conflicts with its decision in *Felcoski v Felcoski,* 159 Mich App 762 (1987), is considered, and in the absence of an application for leave to appeal, the Court declines to order further consideration of the question presented. Reported below: 170 Mich App 628.

*In re* STORMS (DEPARTMENT OF SOCIAL SERVICES v STORMS), No. 83985. The certification by the Court of Appeals pursuant to Administrative Order No. 1984-2 that its decision in this case conflicts with its decision in *In re Smebak,* 160 Mich App 122 (1987), is considered along with the brief filed by the Muskegon County Prosecutor, and in the absence of an application for leave to appeal, the Court declines to order further consideration of the question presented. See also MCL 712A.19b; MSA 27.3178(598.19b), as added by 1988 PA 224. Reported below: 170 Mich App 713.

*Orders Published November 18, 1988:*

PROPOSED AMENDMENT OF MCR 4.101. On order of the Court, this is to advise that the Court is considering whether to amend MCR 4.101. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford any inter-

ested person the opportunity to comment on the form or the merits of the proposal, the text of which is as follows:

[The present language is repealed and replaced by the following language unless otherwise indicated below:]

RULE 4.101. CIVIL INFRACTION ACTIONS.

(A) [Unchanged.]

(B) Appearances; Failure to Appear; Default Judgment.

(1)-(3) [Unchanged.]

(4) If a defendant fails to appear or otherwise to respond to any matter pending relative to a civil infraction traffic action, the court:

(a) must enter a default against the defendant;

(b) must make a determination of responsibility, if the complaint is sufficient;

(c) must impose a sanction by entering a default judgment, upon a finding of responsibility;

(d) must send the defendant notice of the entry of the default judgment and the sanctions imposed;

(e) must notify the secretary of state of entry of the default judgment, as required by MCL 257.732; MSA 9.2432;

(f) may, after 28 days, initiate statutory remedies for failure to comply with an order or judgment of the court;

(g) must provide notice to the defendant and to the secretary of state, as required by MCL 257.321a(1); MSA 9.2021(1)(1), if the defendant fails to pay a fine or fails to comply with the order or judgment of the court;

(h) may retain the driver's license of a nonresident as permitted by statute, if it has received that license pursuant to statute. The court need not retain the license past its expiration date.

(C)-(E) [Unchanged.]

(F) Post-Determination Order; Sanctions, Fines, and Costs; Schedules.

(1) Upon a finding of responsibility in a civil infraction action, the court:

(a) may not increase a scheduled fine because the defendant requested a hearing;

(b) must inform the secretary of state of the finding, as required by MCL 257.732; MSA 9.2432;

(c) must provide notice to the defendant and to the secretary of state, as required by MCL 257.321a(1); MSA 9.2021(1)(1), if the defendant fails to pay a fine or fails to comply with the order or judgment of the court.

(G) [Unchanged.]

*Staff Comment:* The proposed court rule amendments were suggested by the Task Force on Reporting Traffic-Related Offenses, and comport with recent statutory changes.

The staff comment is published only for the benefit of the bench and bar and is not an authoritative construction by the Court.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption in its present form. Timely comments will be substantively considered, and your assistance is appreciated by the Court.

A copy of this order will be given to the secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on this proposal may be sent to the Supreme Court Clerk within 60 days after it is published in the Michigan Bar Journal. When filing a comment, please refer to our file number 88-06.

PROPOSED AMENDMENT OF MCR 4.102. On order of the Court, this is to advise that the Court is considering whether to amend MCR 4.102. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford any interested person the opportunity to comment on the form or the merits of the proposal, the text of which is as follows:

[The present language is repealed and replaced by the following language unless otherwise indicated below:]

RULE 4.102. MISDEMEANOR CASES.

(A) [Unchanged.]

(B) Appearances; Failure to Appear. If a defendant fails to appear or otherwise to respond to any matter pending relative to a misdemeanor traffic citation, the court shall proceed as provided in this subrule:

(1) If the defendant is a Michigan resident, the court:

(a) must initiate the procedures required by MCL 257.321a(1); MSA 9.2021(1)(1) for the failure to answer a citation;

(b) may issue a warrant for the defendant's arrest after a sworn complaint is filed with the court.

(2) [Unchanged.]

(C)-(E) [Unchanged.]

*Staff Comment:* The proposed court rule amendment was suggested by the Task Force on Reporting Traffic-Related Offenses, and comports with recent statutory changes.

The staff comment is published only for the benefit of the bench and bar and is not an authoritative construction by the Court.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption in its present form. Timely comments will be substantively considered, and your assistance is appreciated by the Court.

A copy of this order will be given to the secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on this proposal may be sent to the Supreme Court Clerk within 60 days after it is published in the Michigan Bar Journal. When filing a comment, please refer to our file number 88-06.

PROPOSED AMENDMENT OF MCR 8.105. On order of the Court, this is to advise that the Court is considering whether to amend MCR 8.105. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford any interested person the opportunity to comment on the form or the merits of the proposal, the text of which is as follows:

[The present language is repealed and replaced by the following language unless otherwise indicated below:]

RULE 8.105. GENERAL DUTIES OF CLERKS.

(A)-(E) [Unchanged.]

(F) Reporting Duties.

(1) The clerk of every court shall submit reports and records as required by statute, including but not limited to the duties prescribed by:

(i) MCL 722.717; MSA 25.497 (paternity records);

(ii) MCL 769.16a; MSA 28.1086(1) and MCL 712A.18(16); MSA 27.3178(598.18)(16) (criminal and juvenile-offense dispositions and dismissals);

(iii) MCL 333.2864; MSA 14.15(2864) (divorce records);

(iv) MCL 333.16243(2); MSA 14.15(16243)(2) (medical malpractice judgments); and

(v) MCL 257.732; MSA 9.2432 and MCL 257.321a; MSA 9.2021(1) (traffic offenses).

(2) The clerk of every court shall submit reports as required by the State Court Administrative Office.

*Staff Comment:* The proposed court rule amendment was suggested by the Task Force on Reporting Traffic-Related Offenses, and comports with recent statutory changes.

The staff comment is published only for the benefit of the bench and bar and is not an authoritative construction by the Court.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption in its present form. Timely comments will be substantively considered, and your assistance is appreciated by the Court.

A copy of this order will be given to the secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on this proposal may be sent to the Supreme Court Clerk within 60 days after it is published in the Michigan Bar Journal. When filing a comment, please refer to our file number 88-06.

*Order Published November 22, 1988:*

*In re* MERRITT, No. 84239. On order of the Court, this Court having received the decision of the Judicial Tenure Commission and its recommendation for an order of discipline, and having received the respondent's stipulation to the commission's findings and his consent to the recommended discipline, we adopt the following findings of the commission:

1. The respondent is now, and at all pertinent times has been, a judge of the 53rd District Court.

2. On August 4, 1982, the respondent opened a checking account that was denominated as the HELP fund account. This fund had for its original purpose the assistance of indigent drug and alcohol abusers who appeared before the 53rd District Court. The respondent maintained signatory power over this account and, from time to time, made or directed disbursement of certain of the funds deposited in this account. The remaining balance of the HELP fund account ($585.36) was contributed to the Livingston County United Way Fund by respondent on September 23, 1986.

3. Funds in this account came from a variety of sources and were commingled. Some of the money was obtained by the respondent in the course of performing his judicial duties. Contributions to the HELP fund were received from attorneys whom the respondent amerced for the late filing of pretrial statements, for tardy appearances, or for failure to appear on court dates. Other receipts and disbursements of funds in this account were unrelated to the respondent's performance of his official duties.

4. In essence, the respondent's conduct, whether well intentioned or not, gave the appearance of using the powers of his judicial office to solicit monies from attorneys for the HELP fund.

The commission having found that the respondent's conduct "constitutes misconduct in office, and that such conduct was clearly prejudicial to the administration of justice, violative of Const 1963, art 6, § 30, MCR 9.104(4), and Canons 1, 2(A), and 3(A)(9) of the Code of Judicial Conduct," and the respondent having stipulated to such a finding and to the commission's recommendation of discipline, it is ordered that the respondent be and hereby is publicly censured, and the respondent is further required to make restitution of the amerced amounts stated in paragraph 4 of the commission's decision and recommendation for order of discipline.

*Rehearing Denied December 15, 1988:*

PEOPLE v ROBERT FINLEY, No. 81221. Reported *ante,* 506.

*Rehearing Denied December 19, 1988:*

GUIDER v SMITH, Nos. 80577, 80578, 80804. Reported *ante*, 559.

*Rehearing Denied December 29, 1988:*

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1. Hearing procedures mandated by the Department of Social Services for claimants challenging the denial or reduction of public assistance, which would provide only for telephone hearings conducted outside the presence of a hearing referee or for regional hearings in the presence of a referee, but outside the presence of a department representative, are inconsistent with existing department rules governing the conducting of fair hearings; in addition, their promulgation violates the rule-making provisions of the Administrative Procedures Act (MCL 24.231-24.264, 400.8, 400.9; MSA 3.560[131]-3.560[164], 16.408, 16.409; 1979 AC, R 400.907, 400.912). *Coalition for Human Rights v DSS,* 431 Mich 172.
2. Department of Social Services rules regarding the conducting of hearings for claimants who contest the denial or reduction of public assistance provide that hearings be held at a reasonable time, date, and place, which normally will be in the county where the claimant resides, contemplate hearings at which the claimant appears at the place where the decision-maker observes, considers, and evaluates the evidence (1979 AC, R 400.907). *Coalition for Human Rights v DSS,* 431 Mich 172.

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2. In addressing the issue of qualified immunity in an action brought under 42 USC 1983, trial courts must consider objective factors: whether the alleged conduct establishes a constitutional violation and whether the constitutional standard was clearly established at the time in question; if the undisputed facts show that the defendant's conduct violated no clearly established constitutional standards, qualified immunity applies as a matter of law; if the law was clearly established, however, the immunity defense will fail unless it can be proved that, because of extraordinary circumstances, the defendant government official neither knew nor should have known the relevant legal standard. *Guider v Smith,* 431 Mich 559.
3. Ordinarily, the issue of qualified immunity is not appropriate for the jury; the threshold test of a clearly established violation is one of law for the court to decide; if there is a factual dispute, i.e., a genuine issue of material fact, involving an issue on which immunity turns, so that it cannot be determined before trial what the defendants' acts were or whether exceptional circumstances existed, the case should proceed to trial. *Guider v Smith,* 431 Mich 559.
4. Failure of a defendant government official in an action brought under 42 USC 1983 to move for summary disposition does not waive entitlement to offer the defense of qualified immunity; the properly pleaded defense may be raised prior to, during, or after trial. *Guider v Smith,* 431 Mich 559.

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CRIMINAL LAW.

1. A criminal defendant's right against self-incrimination and right to consult with counsel exist at a postconviction court-ordered presentence psychiatric examination (US Const, Ams V, VI). *People v Wright,* 431 Mich 282.
2. A postconviction presentence psychiatric examination of a defendant, ordered by the trial court in the presence of defense counsel without objection and conducted two weeks later outside the presence of counsel, which was referred to by the trial court in imposing sentence, did not violate the defendant's

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Fifth Amendment right against self-incrimination or his Sixth Amendment right to counsel (US Const, Ams V, VI, MCL 771.14; MSA 28.1144). *People v Wright,* 431 Mich 282.

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CONFESSIONS.
3. Neither state or federal law nor public policy requires the automatic suppression at trial of statements made by a defendant during the administration of a polygraphic examination. *People v Ray,* 431 Mich 260.
4. Where a defendant did not challenge the voluntariness of a confession and no alerting circumstances clearly and substantially raised the question of voluntariness, a trial court did not have a duty, sua sponte, to conduct a separate hearing out of the presence of the jury to inquire into the voluntariness of the defendant's statements. *People v Ray,* 431 Mich 260.

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5. Retrial of a criminal defendant is barred where the prosecutor intended to goad the defendant into moving for a mistrial (US Const, Am V; Const 1963, art 1, § 15). *People v Dawson,* 431 Mich 234.
6. Retrial of a criminal defendant may be barred on double jeopardy grounds where a mistrial is declared; the focus is on the nature of the conduct prompting the mistrial, and retrial will be allowed if the declaration of the mistrial was manifestly necessary; however, where a defendant's motion for mistrial is prompted by intentional prosecutorial misconduct the defendant may not have waived double jeopardy protection (US Const, Am V; Const 1963, art 1, § 15). *People v Dawson,* 431 Mich 234.

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7. Unnecessary delay prior to arraignment is only one factor to be taken into account in evaluating the voluntariness of a confession; if the totality of the surrounding circumstances indicates that a confession was voluntarily given, it should not be excluded from evidence solely because of prearraignment delay (MCL 764.13, 764.26; MSA 28.871[1], 28.885). *People v Cipriano,* 431 Mich 315.
8. A confession should be determined to be voluntary where,

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considering the totality of the circumstances, it is the product of an essentially free and unconstrained choice by its maker; in determining voluntariness, a trial court should consider an accused's age, lack of education, and intelligence level; the extent of the accused's previous experience with the police; the repeated and prolonged nature of the questioning; the length of the detention before the statement in question was given; the lack of any advice of constitutional rights; whether there was an unnecessary delay in bringing the accused before a magistrate before the confession was given; whether the accused was injured, intoxicated, drugged, or in ill health when the statement was made; whether the accused was deprived of food, sleep, or medical attention, or was physically abused or threatened with abuse; the absence or presence of any one of these factors is not necessarily conclusive on the issue of voluntariness (MCL 764.13, 764.26; MSA 28.871[1], 28.885). *People v Cipriano,* 431 Mich 315.

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1. The highest executive officials of local government are not immune from tort liability for acts outside their executive authority; whether particular acts are within executive authority depends on factors including the nature of the specific acts alleged, the position of the official alleged to have performed the acts, the definition of the official's authority in the charter, ordinance, or other local law, and the structure and allocation of powers in the particular level of government. *Marrocco v Randlett,* 431 Mich 700.

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1. Workers' compensation benefits received by a federal employee under the Federal Employees' Compensation Act, which

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2. Uninsured motorists are subject to tort liability for noneconomic loss only if the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement (MCL 500.3135[1]; MSA 24.13135[1]). *Auto Club Ins Ass'n v Hill,* 431 Mich 449.
3. Medical benefits paid by the federal government to a member of the armed forces pursuant to 10 USC 1071 *et seq.* for injuries suffered in an automobile accident constitute "other health and accident coverage" under § 3109a of the no-fault act; where benefits of an insured fall within §§ 3109a and 3109(1), an insurer must offer a coördinated policy. *Tatum v GEICO,* 431 Mich 663.

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1. A verified complaint filed by the mother of a child in accordance with § 4 of the Paternity Act is sufficient grounds upon which to order blood and tissue tests; neither a search warrant nor an evidentiary hearing is required prior to the ordering of the tests; refusal by a defendant father to submit to such tests may be sanctioned by the use of a court's contempt power, however, the entry of a default judgment against him for refusal to submit conflicts with the act and may not be used as a sanction (MCL 722.714, 722.716, 722.717; MSA 25.494, 25.496, 25.497; MCR 2.311, 2.313). *Bowerman v MacDonald,* 431 Mich 1.

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1. The Public Service Commission is vested with the power to regulate public utilities, including utility rates and charges; the power to fix just and reasonable rates, however, does not carry with it, explicitly or implicitly, the power to make management decisions (MCL 460.6[1]; MSA 22.13[6][1]). *Union Carbide v PSC*, 431 Mich 135.

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1. Decisions of the State Tenure Commission in cases in which a teacher requests a private hearing as provided under the

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teacher tenure act are exempt from disclosure under the Michigan Freedom of Information Act only during the administrative stage of the teacher's appeal; once a final decision has been rendered and the appeal period of the Administrative Procedures Act has run, the FOIA provides no basis for withholding a decision, and a request for disclosure must be honored (MCL 15.243[1][d], 38.104, 38.121; MSA 4.1801[13][1][d], 15.2004, 15.2021). *Hagen v Dep't of Ed,* 431 Mich 118.

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2. The discovery of controlled substances pursuant to a warrant to search a private residence provided probable cause to arrest the occupants of the residence, and the search of an occupant prior to arrest was proper because the occupant could have been searched incident to arrest (US Const, Am IV). *People v Arterberry,* 431 Mich 381.

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2. The amendment of the labor dispute disqualification provision of the Employment Security Act, 1974 PA 104, which provides new objective criteria for evaluating the substantiality of interim employment of striking workers, governs benefit eligibility for benefit weeks following June 9, 1974, its effective

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date, permitting the Employment Security Commission to properly charge an employer's rating account for benefits paid prior to the effective date and precluding charges against the account for benefits paid with respect to benefit weeks after the effective date (MCL 421.29[8]; MSA 17.531[8]). *Dow Chemical Co v Curtis,* 431 Mich 471.

UNINSURED MOTORISTS—*See*
INSURANCE 2

VOLUNTARINESS—*See*
CRIMINAL LAW 4, 7, 8

*WALKER* HEARINGS—*See*
CRIMINAL LAW 4

WEEKLY COMPENSATION RATE—*See*
WORKERS' COMPENSATION 4

WORDS AND PHRASES—*See*
WORKERS' COMPENSATION 4

WORKERS' COMPENSATION.

ADJUSTMENT OF MAXIMUM BENEFITS.

1. The doctrine of res judicata does not bar application of the rule that the provision of § 355 of the workers' compensation act for annual adjustment of weekly benefit rates applies only to maximum, and not minimum, rates, to all benefits due or paid after December 30, 1981 (MCL 418.351[1], 418.355; MSA 17.237[351][1], 17.237[355]). *Riley v N'land Geriatric (Aft Rem),* 431 Mich 632.

REDETERMINATION OF DEPENDENCY.

2. The gender-based conclusive presumption of the workers' compensation act is violative of the Equal Protection Clause of the Fourteenth Amendment; the doctrine of res judicata did not preclude a redetermination of dependency of the wife of an injured worker (US Const, Am XIV; MCL 418.353[1][a][i]; MSA 17.237[353][1][a][i]). *Pike v City of Wyoming,* 431 Mich 589.

RETIREES.

3. *White v General Motors Corp,* 431 Mich 387.

SUPPLEMENTAL BENEFITS.

4. The phrase "weekly compensation rate" as used in § 352(1) of the Workers' Disability Compensation Act, which provides cost-of-living supplemental benefits, refers only to the amount of weekly compensation payable as the obligation of the employer; the words do not refer to or include the amount of differential benefits payable under § 521(2) as the obligation of the Second Injury Fund (MCL 418.352[1], 418.521[2]; MSA 17.237[352][1], 17.237[521][2]). *Kincaid v Detroit Mutual Ins Co,* 431 Mich 426.

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WORKERS' COMPENSATION APPEAL BOARD.

5. A worker who has obtained an award of workers' compensation benefits is not required, while the award is pending on appeal before the Workers' Compensation Appeal Board, to seek to present to the board evidence of a change in physical condition, which occurred after the award and which the worker claims supports a further and separate claim of benefits arising from the same injury, in order to avoid the bar of res judicata and to preserve the right to a separate hearing on the claim (MCL 419.859; MSA 17.237[859]). *Askew v Ann Arbor Public Schools,* 431 Mich 714.

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