MICHIGAN REPORTS

CASES DECIDED

IN THE

SUPREME COURT

OF

MICHIGAN

FROM

March 5, 2012, through July 13, 2012

JOHN O. JUROSZEK
REPORTER OF DECISIONS

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2013

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SUPREME COURT

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

Commissioners

MICHAEL J. SCHMEDLEN, Chief Commissioner[1]
DANIEL C. BRUBAKER, Chief Commissioner[2]
SHARI M. OBERG, Deputy Chief Commissioner

TIMOTHY J. RAUBINGER	MICHAEL S. WELLMAN
LYNN K. RICHARDSON	GARY L. ROGERS
NELSON S. LEAVITT	RICHARD B. LESLIE
DEBRA A. GUTIERREZ-McGUIRE	FREDERICK M. BAKER, Jr.
ANNE-MARIE HYNOUS VOICE	KATHLEEN M. DAWSON
DON W. ATKINS	RUTH E. ZIMMERMAN
JÜRGEN O. SKOPPEK	SAMUEL R. SMITH
DANIEL C. BRUBAKER[2]	ANNE E. ALBERS

State Court Administrator

CHAD C. SCHMUCKER

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

[1] To May 2, 2012.

[2] From May 2, 2012.

COURT OF APPEALS

	Term Expires January 1 of
Chief Judge	
WILLIAM B. MURPHY	2013
Chief Judge Pro Tem	
DAVID H. SAWYER	2017
Judges	
MARK J. CAVANAGH	2015
KATHLEEN JANSEN	2013
E. THOMAS FITZGERALD	2015
HENRY WILLIAM SAAD	2015
JOEL P. HOEKSTRA	2017
JANE E. MARKEY	2015
PETER D. O'CONNELL	2013
WILLIAM C. WHITBECK	2017
MICHAEL J. TALBOT	2015
KURTIS T. WILDER	2017
PATRICK M. METER	2015
DONALD S. OWENS	2017
KIRSTEN FRANK KELLY	2013
CHRISTOPHER M. MURRAY	2015
PAT M. DONOFRIO	2017
KAREN FORT HOOD	2015
STEPHEN L. BORRELLO	2013
DEBORAH A. SERVITTO	2013
JANE M. BECKERING	2013
ELIZABETH L. GLEICHER	2013
CYNTHIA DIANE STEPHENS	2017
MICHAEL J. KELLY	2015
DOUGLAS B. SHAPIRO	2013
AMY RONAYNE KRAUSE	2013
MARK T. BOONSTRA	2013[1]
MICHAEL J. RIORDAN	2013[2]

Chief Clerk/Research Director:
LARRY S. ROYSTER

[1] From March 20, 2012.

[2] From March 21, 2012.

CIRCUIT JUDGES

		Term Expires January 1 of
1.	MICHAEL R. SMITH	2015
2.	ALFRED M. BUTZBAUGH	2013
	JOHN E. DEWANE	2015
	JOHN M. DONAHUE	2017
	CHARLES T. LaSATA	2017
3.	DEBORAH ROSS ADAMS	2019
	DAVID J. ALLEN	2015
	WENDY M. BAXTER	2019
	ANNETTE J. BERRY	2019
	GREGORY D. BILL	2019
	SUSAN D. BORMAN	2015
	ULYSSES W. BOYKIN	2015
	MARGIE R. BRAXTON	2017
	MEGAN MAHER BRENNAN	2015
	JAMES A. CALLAHAN	2017
	MICHAEL J. CALLAHAN	2015
	JEROME C. CAVANAGH	2019
	ERIC WILLIAM CHOLACK	2017
	JAMES R. CHYLINSKI	2017
	ROBERT J. COLOMBO, Jr.	2019
	DAPHNE MEANS CURTIS	2015
	CHRISTOPHER D. DINGELL	2015
	GERSHWIN ALLEN DRAIN	2017
	PRENTIS EDWARDS	2013
	CHARLENE M. ELDER	2015
	VONDA R. EVANS	2015
	EDWARD EWELL, Jr.	2019
	PATRICIA SUSAN FRESARD	2017
	SHEILA ANN GIBSON	2017
	JOHN H. GILLIS, Jr.	2015
	DAVID ALAN GRONER	2017
	RICHARD B. HALLORAN, Jr.	2019
	AMY PATRICIA HATHAWAY	2019
	CYNTHIA GRAY HATHAWAY	2017

		Term Expires January 1 of
	MICHAEL M. HATHAWAY	2017
	SUSAN L. HUBBARD	2017
	MURIEL D. HUGHES	2017
	THOMAS EDWARD JACKSON	2013
	VERA MASSEY JONES	2015
	CONNIE MARIE KELLEY	2015
	TIMOTHY MICHAEL KENNY	2017
	ARTHUR J. LOMBARD	2015
	KATHLEEN I. MACDONALD	2017
	KATHLEEN M. McCARTHY	2019
	WADE H. McCREE	2015
	BRUCE U. MORROW	2017
	JOHN A. MURPHY	2017
	MARIA L. OXHOLM	2019
	LINDA V. PARKER	2019
	LYNNE A. PIERCE	2015
	LITA MASINI POPKE	2017
	DANIEL P. RYAN	2019
	MICHAEL F. SAPALA	2013
	RICHARD M. SKUTT	2015
	MARK T. SLAVENS	2017
	LESLIE KIM SMITH	2019
	VIRGIL C. SMITH	2019
	JEANNE STEMPIEN	2017
	CRAIG S. STRONG	2015
	BRIAN R. SULLIVAN	2017
	LAWRENCE S. TALON	2015
	DEBORAH A. THOMAS	2019
	MARGARET MARY VANHOUTEN	2015[1]
	CAROLE F. YOUNGBLOOD	2013
	ROBERT L. ZIOLKOWSKI	2015
4.	SUSAN E. BEEBE	2017
	RICHARD N. LAFLAMME	2017
	JOHN G. McBAIN, JR.	2015
	THOMAS D. WILSON	2019
5.	AMY McDOWELL	2015
6.	JAMES M. ALEXANDER	2015
	MARTHA ANDERSON	2015
	LEO BOWMAN	2019
	MARY ELLEN BRENNAN	2017
	RAE LEE CHABOT	2017

[1] From April 16, 2012.

		Term Expires January 1 of
	LISA ORTLIEB GORCYCA	2015
	NANCI J. GRANT	2015
	SHALINA D. KUMAR	2015
	DENISE LANGFORD-MORRIS	2019
	CHERYL A. MATTHEWS	2017
	RUDY J. NICHOLS	2015
	COLLEEN A. O'BRIEN	2017
	DANIEL PATRICK O'BRIEN	2017
	WENDY LYNN POTTS	2019
	EDWARD SOSNICK	2013
	MICHAEL D. WARREN, Jr.	2019
	JOAN E. YOUNG	2017
7.	DUNCAN M. BEAGLE	2017
	JOSEPH J. FARAH	2017
	JUDITH A. FULLERTON	2019
	JOHN A. GADOLA	2015
	ARCHIE L. HAYMAN	2019
	GEOFFREY L. NEITHERCUT	2019
	DAVID J. NEWBLATT	2017
	MICHAEL J. THEILE	2015
	RICHARD B. YUILLE	2015
8.	DAVID A. HOORT	2017
	SUZANNE KREEGER	2015
9.	GARY C. GIGUERE, Jr.	2015
	STEPHEN D. GORSALITZ	2017
	J. RICHARDSON JOHNSON	2017
	PAMELA L. LIGHTVOET	2019
	ALEXANDER C. LIPSEY	2017
10.	JANET M. BOES	2019
	FRED L. BORCHARD	2017
	DARNELL JACKSON	2019
	ROBERT L. KACZMAREK	2015
11.	WILLIAM W. CARMODY	2015
12.	CHARLES R. GOODMAN	2015
13.	THOMAS G. POWER	2017
	PHILIP E. RODGERS, Jr.	2015
14.	JAMES M. GRAVES, Jr.	2013
	TIMOTHY G. HICKS	2017
	WILLIAM C. MARIETTI	2017
	JOHN C. RUCK	2015
15.	PATRICK W. O'GRADY	2015
16.	JAMES M. BIERNAT, Sr.	2019
	RICHARD L. CARETTI	2017
	MARY A. CHRZANOWSKI	2017

		Term Expires January 1 of
	DIANE M. DRUZINSKI	2015
	JOHN C. FOSTER	2015
	PETER J. MACERONI	2015
	EDWARD A. SERVITTO, Jr.	2019
	MARK S. SWITALSKI	2019
	MATTHEW S. SWITALSKI	2015
	DAVID VIVIANO	2019
	TRACEY A. YOKICH	2019
17.	GEORGE S. BUTH	2017
	PAUL J. DENEFELD	2017
	KATHLEEN A. FEENEY	2015
	DONALD A. JOHNSTON, III	2019
	DENNIS B. LEIBER	2019
	JAMES ROBERT REDFORD	2017
	PAUL J. SULLIVAN	2015
	MARK A. TRUSOCK	2019
	CHRISTOPHER P. YATES	2019
	DANIEL V. ZEMAITIS	2015
18.	HARRY P. GILL	2017
	KENNETH W. SCHMIDT	2019
	JOSEPH K. SHEERAN	2015
19.	JAMES M. BATZER	2015
20.	KENT D. ENGLE	2017
	JON H. HULSING	2015
	EDWARD R. POST	2017
	JON VAN ALLSBURG	2019
21.	PAUL H. CHAMBERLAIN	2017
	MARK H. DUTHIE	2019
22.	ARCHIE CAMERON BROWN	2017
	TIMOTHY P. CONNORS	2019
	MELINDA MORRIS	2013
	DONALD E. SHELTON	2015
	DAVID S. SWARTZ	2015
23.	RONALD M. BERGERON	2015
	WILLIAM F. MYLES	2017
24.	DONALD A. TEEPLE	2015
25.	JENNIFER MAZZUCHI	2015
	THOMAS L. SOLKA	2017
26.	MICHAEL G. MACK	2015
27.	ANTHONY A. MONTON	2019
	TERRENCE R. THOMAS	2015
28.	WILLIAM M. FAGERMAN	2015
29.	MICHELLE M. RICK	2017

		Term Expires January 1 of
	RANDY L. TAHVONEN	2015
30.	ROSEMARIE ELIZABETH AQUILINA	2015
	LAURA BAIRD	2019
	CLINTON CANADY, III	2017
	WILLIAM E. COLLETTE	2015
	JOYCE DRAGANCHUK	2017
	JANELLE A. LAWLESS	2015
	PAULA J.M. MANDERFIELD	2013
31.	JAMES P. ADAIR	2013
	DANIEL J. KELLY	2015
	CYNTHIA A. LANE	2017
32.	ROY D. GOTHAM	2015
33.	RICHARD M. PAJTAS	2015
34.	MICHAEL J. BAUMGARTNER	2017
35.	GERALD D. LOSTRACCO	2015
36.	KATHLEEN BRICKLEY	2019[2]
	PAUL E. HAMRE	2015
37.	ALLEN L. GARBRECHT	2017
	JAMES C. KINGSLEY	2015
	STEPHEN B. MILLER	2017
	CONRAD J. SINDT	2019
38.	JOSEPH A. COSTELLO, JR.	2015[3]
	MICHAEL W. LABEAU	2019
	MICHAEL A. WEIPERT	2017
	DANIEL WHITE	2015[4]
39.	MARGARET MURRAY-SCHOLZE NOE	2015
	TIMOTHY P. PICKARD	2019
40.	MICHAEL P. HIGGINS	2015
	NICK O. HOLOWKA	2017
41.	MARY BROUILLETTE BARGLIND	2017
	RICHARD J. CELELLO	2015
42.	MICHAEL J. BEALE	2015
	JONATHAN E. LAUDERBACH	2013
43.	MICHAEL E. DODGE	2017
44.	MICHAEL P. HATTY	2019
	DAVID READER	2017
45.	PAUL E. STUTESMAN	2019
46.	JANET M. ALLEN	2011
	DENNIS F. MURPHY	2015

[2] From April 27, 2012.

[3] To April 13, 2012.

[4] From April 27, 2012.

		Term Expires January 1 of
47.	STEPHEN T. DAVIS	2017
48.	MARGARET BAKKER	2017
	KEVIN W. CRONIN	2015
49.	SCOTT P. HILL-KENNEDY	2019
	RONALD C. NICHOLS	2015
50.	NICHOLAS J. LAMBROS	2013
51.	RICHARD I. COOPER	2015
52.	M. RICHARD KNOBLOCK	2015
53.	SCOTT LEE PAVLICH	2017
54.	PATRICK REED JOSLYN	2013
55.	THOMAS R. EVANS	2015
	ROY G. MIENK	2019
56.	THOMAS S. EVELAND	2013
	CALVIN E. OSTERHAVEN	2015
57.	CHARLES W. JOHNSON	2019

DISTRICT JUDGES

		Term Expires January 1 of
1.	MARK S. BRAUNLICH	2015
	TERRENCE P. BRONSON	2019
	JACK VITALE	2017
2A.	LAURA J. SCHAEDLER	2017
	JAMES E. SHERIDAN	2015
2B.	DONALD L. SANDERSON	2015
3A.	BRENT R. WEIGLE	2015
3B.	JEFFREY C. MIDDLETON	2015
	WILLIAM D. WELTY	2013
4.	STACEY A. RENTFROW	2015
5.	GARY J. BRUCE	2017
	ANGELA PASULA	2015
	SCOTT SCHOFIELD	2015
	STERLING R. SCHROCK	2019
	DENNIS M. WILEY	2017
7.	ARTHUR H. CLARKE, III	2015
	ROBERT T. HENTCHEL	2017
8-1.	ANNE E. BLATCHFORD	2019
	PAUL J. BRIDENSTINE	2019
	CAROL A. HUSUM	2017
8-2.	ROBERT C. KROPF	2015
8-3.	RICHARD A. SANTONI	2015
	VINCENT C. WESTRA	2017
10.	SAMUEL I. DURHAM, Jr.	2017
	JOHN A. HALLACY	2015
	JOHN R. HOLMES	2019
	FRANKLIN K. LINE, Jr.	2015
12.	JOSEPH S. FILIP	2017
	DANIEL GOOSTREY	2013[1]
	JAMES M. JUSTIN	2013[2]
	MICHAEL J. KLAEREN	2015
	R. DARRYL MAZUR	2015
14A.	RICHARD E. CONLIN	2015
	J. CEDRIC SIMPSON	2019

[1] From April 25, 2012.

[2] To April 25, 2012.

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

		Term Expires January 1 of
	ESTHER LYNISE BRYANT-WEEKES	2015
	RUTH C. CARTER	2017
	DONALD COLEMAN	2019
	PRENTIS EDWARDS, Jr.	2019
	DEBORAH GERALDINE FORD	2017
	RUTH ANN GARRETT	2019
	RONALD GILES	2015
	KATHERINE HANSEN	2017
	SHANNON A. HOLMES	2015
	PAULA G. HUMPHRIES	2017
	PATRICIA L. JEFFERSON	2015
	VANESA F. JONES-BRADLEY	2013
	KENNETH J. KING	2015
	DEBORAH L. LANGSTON	2019
	WILLIE G. LIPSCOMB, Jr.	2015[3]
	LEONIA J. LLOYD	2017
	MIRIAM B. MARTIN-CLARK	2017
	WILLIAM McCONICO	2019
	DONNA R. MILHOUSE	2019
	B. PENNIE MILLENDER	2017
	CYLENTHIA L. MILLER	2017
	KEVIN F. ROBBINS	2019
	DAVID S. ROBINSON, Jr.	2019
	BRENDA KAREN SANDERS	2015
	MICHAEL E. WAGNER	2015
37.	JOHN M. CHMURA	2019
	JENNIFER FAUNCE	2015
	DAWNN M. GRUENBURG	2017[4]
	MATTHEW P. SABAUGH	2013
38.	CARL F. GERDS III	2015
39.	JOSEPH F. BOEDEKER	2015
	MARCO A. SANTIA	2019
	CATHERINE B. STEENLAND	2017
40.	MARK A. FRATARCANGELI	2019
	JOSEPH CRAIGEN OSTER	2015
41A.	MICHAEL S. MACERONI	2015
	DOUGLAS P. SHEPHERD	2019
	STEPHEN S. SIERAWSKI	2017
	KIMBERLEY ANNE WIEGAND	2019
41B.	LINDA DAVIS	2015
	CARRIE LYNN FUCA	2017
	SEBASTIAN LUCIDO	2019
42-1.	DENIS R. LeDUC	2015
42-2.	WILLIAM H. HACKELL III	2019
43.	CHARLES G. GOEDERT	2015

[3] To May 11, 2012.

[4] To May 21, 2012.

		Term Expires January 1 of
	KEITH P. HUNT	2019
	JOSEPH LONGO	2017
44.	TERRENCE H. BRENNAN	2015
	DANIEL SAWICKI	2013
45A.	JAMES L. WITTENBERG	2015
45B.	MICHELLE FRIEDMAN APPEL	2015
	DAVID M. GUBOW	2015
46.	SHEILA R. JOHNSON	2015
	SUSAN M. MOISEEV	2013
	WILLIAM J. RICHARDS	2017
47.	JAMES BRADY	2015
	MARLA E. PARKER	2017
48.	MARC BARRON	2017
	DIANE D'AGOSTINI	2019
	KIMBERLY SMALL	2015
50.	RONDA FOWLKES GROSS	2019
	MICHAEL C. MARTINEZ	2015
	PRESTON G. THOMAS	2017
	CYNTHIA THOMAS WALKER	2015
51.	JODI R. DEBBRECHT SWITALSKI	2019
	RICHARD D. KUHN, Jr.	2015
52-1.	ROBERT BONDY	2019
	BRIAN W. MacKENZIE	2015
	DENNIS N. POWERS	2017
52-2.	JOSEPH G. FABRIZIO	2015
	KELLEY RENAE KOSTIN	2017
52-3.	LISA L. ASADOORIAN	2019
	NANCY TOLWIN CARNIAK	2017
	JULIE A. NICHOLSON	2015
52-4.	WILLIAM E. BOLLE	2015
	DENNIS C. DRURY	2013
	KIRSTEN NIELSEN HARTIG	2017
53.	THERESA M. BRENNAN	2015
	L. SUZANNE GEDDIS	2017
	CAROL SUE READER	2019
54A.	LOUISE ALDERSON	2017
	PATRICK F. CHERRY	2015
	FRANK J. DeLUCA	2019
	CHARLES F. FILICE	2015
54B.	RICHARD D. BALL	2017
	DAVID L. JORDON	2013
55.	DONALD L. ALLEN	2017
	THOMAS P. BOYD	2015
56A.	HARVEY J. HOFFMAN	2017
	JULIE H. REINCKE	2015
56B.	MICHAEL LEE SCHIPPER	2019
57.	WILLIAM A. BAILLARGEON	2019
	JOSEPH S. SKOCELAS	2015

		Term Expires January 1 of
58.	SUSAN A. JONAS	2015
	RICHARD J. KLOOTE	2013
	BRADLEY S. KNOLL	2015
	KENNETH D. POST	2017
59.	PETER P. VERSLUIS	2017
60.	HAROLD F. CLOSZ, III	2015
	MARIA LADAS HOOPES	2015
	MICHAEL JEFFREY NOLAN	2019
	ANDREW WIERENGO	2017
61.	DAVID J. BUTER	2015
	J. MICHAEL CHRISTENSEN	2017
	JEANINE NEMESI LaVILLE	2019
	BEN H. LOGAN, II	2019
	DONALD H. PASSENGER	2017
	KIMBERLY A. SCHAEFER	2015
62A.	PABLO CORTES	2015
	STEVEN M. TIMMERS	2019
62B.	WILLIAM G. KELLY	2015
63-1.	STEVEN R. SERVAAS	2015
63-2.	SARA J. SMOLENSKI	2015
64A.	RAYMOND P. VOET	2015
64B.	DONALD R. HEMINGSEN	2015
65A.	RICHARD D. WELLS	2015
65B.	STEWART D. McDONALD	2015
66.	WARD L. CLARKSON	2019
	TERRANCE P. DIGNAN	2015
67-1.	DAVID J. GOGGINS	2015
67-2.	JOHN L. CONOVER	2015
	MARK W. LATCHANA	2017
67-3.	LARRY STECCO	2015
67-4.	MARK C. McCABE	2015
	CHRISTOPHER ODETTE	2019
68.	TRACY L. COLLIER-NIX	2015
	WILLIAM H. CRAWFORD, II	2019
	MARY CATHERINE DOWD	2017
	HERMAN MARABLE, Jr.	2019
	NATHANIEL C. PERRY, III	2015
70-1.	TERRY L. CLARK	2019
	M. RANDALL JURRENS	2017
	M. T. THOMPSON, Jr.	2015
70-2.	CHRISTOPHER S. BOYD	2017
	ALFRED T. FRANK	2015
	KYLE HIGGS TARRANT	2019
71A.	LAURA CHEGER BARNARD	2015
	JOHN T. CONNOLLY	2013
71B.	KIM DAVID GLASPIE	2015
72.	MICHAEL L. HULEWICZ	2017
	JOHN D. MONAGHAN	2019

		Term Expires January 1 of
	CYNTHIA SIEMEN PLATZER	2015
73A.	GREGORY S. ROSS	2015
73B.	DAVID B. HERRINGTON	2015
74.	MARK E. JANER	2015
	TIMOTHY J. KELLY	2013
	DAWN A. KILDA	2015
75.	STEVEN CARRAS	2017
	JOHN HENRY HART	2015
76.	WILLIAM R. RUSH	2015
77.	SUSAN H. GRANT	2015
78.	H. KEVIN DRAKE	2015
79.	PETER J. WADEL	2015
80.	JOSHUA M. FARRELL	2015
81.	ALLEN C. YENIOR	2015
82.	RICHARD E. NOBLE	2015
83.	DANIEL L. SUTTON	2015
84.	DAVID A. HOGG	2015
85.	BRENT V. DANIELSON	2015
86.	MICHAEL J. HALEY	2015
	THOMAS J. PHILLIPS	2013
	MICHAEL STEPKA	2017
87.	PATRICIA A. MORSE	2015
88.	THEODORE O. JOHNSON	2015
89.	MARIA L. BARTON	2015
90.	RICHARD W. MAY	2015
91.	ELIZABETH BIOLETTE CHURCH	2015
92.	BETH GIBSON	2015
93.	MARK E. LUOMA	2009
94.	GLENN A. PEARSON	2015
95A.	JEFFREY G. BARSTOW	2015
95B.	CHRISTOPHER S. NINOMIYA	2015
96.	DENNIS H. GIRARD	2017
	ROGER W. KANGAS	2015
97.	MARK A. WISTI	2015
98.	ANDERS B. TINGSTAD, Jr.	2015

MUNICIPAL JUDGES

	Term Expires January 1 of
RUSSELL F. ETHRIDGE	2016
CARL F. JARBOE	2014
MATTHEW R. RUMORA	2014

PROBATE JUDGES

County		Term Expires January 1 of
Alcona	LAURA A. FRAWLEY	2019
Alger/Schoolcraft	CHARLES C. NEBEL	2019
Allegan	MICHAEL L. BUCK	2019
Alpena	THOMAS J. LaCROSS	2019
Antrim	NORMAN R. HAYES	2019
Arenac	RICHARD E. VOLLBACH, Jr.	2019
Baraga	TIMOTHY S. BRENNAN	2019
Barry	WILLIAM M. DOHERTY	2013
Bay	KAREN TIGHE	2013
Benzie	NANCY A. KIDA	2013
Berrien	MABEL JOHNSON MAYFIELD	2015
Berrien	THOMAS E. NELSON	2019
Branch	FREDERICK L. WOOD	2013
Calhoun	MICHAEL L. JACONETTE	2017
Cass	SUSAN L. DOBRICH	2019
Cheboygan	ROBERT JOHN BUTTS	2019
Chippewa	LOWELL R. ULRICH	2013
Clare/Gladwin	THOMAS P. McLAUGHLIN	2019
Clinton	LISA SULLIVAN	2019
Crawford	MONTE BURMEISTER	2019
Delta	ROBERT E. GOEBEL, Jr.	2019
Dickinson	THOMAS D. SLAGLE	2019
Eaton	THOMAS K. BYERLEY	2019
Emmet/Charlevoix	FREDERICK R. MULHAUSER	2019
Genesee	JENNIE E. BARKEY	2015
Genesee	F. KAY BEHM	2019
Gogebic	JOEL L. MASSIE	2019
Grand Traverse	DAVID L. STOWE	2013
Gratiot	JACK T. ARNOLD	2013
Hillsdale	MICHAEL E. NYE	2013
Houghton	FRASER T. STROME	2019
Huron	DAVID L. CLABUESCH	2019
Ingham	R. GEORGE ECONOMY	2019

Ingham	RICHARD JOSEPH GARCIA	2015
Ionia	ROBERT SYKES, JR.	2019
Iosco	JOHN D. HAMILTON	2013
Iron	C. JOSEPH SCHWEDLER	2019
Isabella	WILLIAM T. ERVIN	2019
Jackson	DIANE M. RAPPLEYE	2019
Kalamazoo	CURTIS J. BELL, JR.	2019
Kalamazoo	PATRICIA N. CONLON	2015
Kalamazoo	DONALD R. HALSTEAD	2017
Kalkaska	LYNNE MARIE BUDAY	2019
Kent	NANARUTH H. CARPENTER	2017
Kent	PATRICIA D. GARDNER	2019
Kent	G. PATRICK HILLARY	2019
Kent	DAVID M. MURKOWSKI	2015
Kent	GEORGE JAY QUIST	2017
Keweenaw	JAMES G. JAASKELAINEN	2019
Lake	MARK S. WICKENS	2019
Lapeer	JUSTUS C. SCOTT	2019
Leelanau	LARRY J. NELSON	2019
Lenawee	GREGG P. IDDINGS	2019
Livingston	CAROL HACKETT GARAGIOLA	2013
Luce/Mackinac	W. CLAYTON GRAHAM	2019
Macomb	KATHRYN A. GEORGE	2015
Macomb	PAMELA GILBERT O'SULLIVAN	2013
Manistee	THOMAS N. BRUNNER	2019
Marquette	MICHAEL J. ANDEREGG	2013
Mason	MARK D. RAVEN	2013
Mecosta/Osceola	MARCO S. MENEZES	2019
Menominee	WILLIAM A. HUPY	2019
Midland	DORENE S. ALLEN	2019
Missaukee	CHARLES R. PARSONS	2019
Monroe	JOHN A. HOHMAN, JR.	2019
Montcalm	CHARLES W. SIMON, III	2019
Montmorency	JOHN E. FITZGERALD	2013
Muskegon	NEIL G. MULLALLY	2017
Muskegon	GREGORY C. PITTMAN	2019
Newaygo	GRAYDON W. DIMKOFF	2019
Oakland	LINDA S. HALLMARK	2019
Oakland	DANIEL A. O'BRIEN	2015
Oakland	ELIZABETH M. PEZZETTI	2017
Oakland	KATHLEEN A. RYAN	2017
Oceana	BRADLEY G. LAMBRIX	2019
Ogemaw	SHANA A. LAMBOURN	2019
Ontonagon	JANIS M. BURGESS	2019
Oscoda	KATHRYN JOAN ROOT	2019

Otsego	MICHAEL K. COOPER	2019
Ottawa	MARK A. FEYEN	2019
Presque Isle	DONALD J. McLENNAN	2019
Roscommon	DOUGLAS C. DOSSON	2019
Saginaw	FAYE M. HARRISON	2015
Saginaw	PATRICK J. McGRAW	2019
St. Clair	ELWOOD L. BROWN	2015
St. Clair	JOHN TOMLINSON	2019
St. Joseph	THOMAS E. SHUMAKER	2013
Sanilac	R. TERRY MALTBY	2013
Sanilac	GREGORY S. ROSS	2015
Shiawassee	JAMES R. CLATTERBAUGH	2013
Tuscola	W. WALLACE KENT, JR.	2013
Van Buren	FRANK D. WILLIS	2019
Washtenaw	NANCY CORNELIA WHEELER	2015
Washtenaw	DARLENE A. O'BRIEN	2019
Wayne	JUNE E. BLACKWELL-HATCHER	2019
Wayne	FREDDIE G. BURTON, JR.	2019
Wayne	JUDY A. HARTSFIELD	2015
Wayne	MILTON L. MACK, JR.	2017
Wayne	CATHIE B. MAHER	2017[1]
Wayne	MARTIN T. MAHER	2015
Wayne	FRANK S. SZYMANSKI	2019
Wexford	KENNETH L. TACOMA	2019

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Barry	Hastings	5
Bay	Bay City	18
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Berrien	St. Joseph	2
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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
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Marquette	Marquette	25
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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
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Oceana	Hart	27
Ogemaw	West Branch	34
Ontonagon	Ontonagon	32
Osceola	Reed City	49
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ADMINISTRATIVE ORDER No. 2012-1

ADOPTION OF CONCURRENT JURISDICTION PLAN FOR THE 10TH CIRCUIT COURT, THE 70TH DISTRICT COURT, AND THE SAGINAW COUNTY PROBATE COURT

Entered April 4, 2012, effective August 1, 2012 (File No. 2004-04)—REPORTER.

Administrative Order No. 2003-1 and MCL 600.401 *et seq*. authorize Michigan trial courts to adopt concurrent jurisdiction plans within a county or judicial circuit, subject to approval of the Court.

The Court hereby approves adoption of the following concurrent jurisdiction plan effective August 1, 2012:

- The 10th Circuit Court, the 70th District Court, and the Saginaw County Probate Court

The plan shall remain on file with the state court administrator.

Amendments to concurrent jurisdiction plans may be implemented by local administrative order pursuant to MCR 8.112. Plan amendments shall conform to the requirements of Administrative Order No. 2003-1 and MCL 600.401 *et seq*.

AMENDED ADMINISTRATIVE ORDER No. 2011-1

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

Entered April 4, 2012, effective immediately (File No. 2002-37)—REPORTER.

On order of the Court, effective immediately, Administrative Order No. 2011-1, as entered February 1, 2011, and as amended June 28, 2011, is further amended as follows. Changes are indicated in underlining and strikeover.

1. [Unchanged.]

2. Definitions

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

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

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

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

(e) "Pilot Program" means the initiative by the 3rd Judicial Circuit Court, and the Wayne County Clerk in conjunction with Tyler Technologies, Inc., and under the supervision of the State Court Administrative Office to facilitate the electronic filing of pleadings, mo-

tions, briefs, responses, lists, orders, judgments, notices, and other documents. ~~The Pilot Program will begin testing with all pending cases in the "CK" case type. The 3rd Circuit Court and the Wayne County Clerk plan to expand the testing into the remainder of case types in the Civil Division upon approval by the Supreme Court.~~

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

3. Participation in the Pilot Program

(a) Participation in the pilot project shall be mandatory in all pending "CK" type cases. All judges in the 3rd Circuit Court's Civil Division shall participate. Expansion into the other Civil Division case types will occur ~~after approval by the Supreme Court~~ as follows: upon the effective date of this order, the court may (except for good cause as stated in the paragraph below) include the following case-type codes in the e-filing project: CB (business claims), CC (condemnation), CD (employment discrimination), CE (environment), CF (forfeiture claims), CH (housing and real estate), CL (labor relations), CP (antitrust, franchising, and trade regulations), CR (corporate receivership), CZ (general civil), and PZ (miscellaneous proceedings, except tax foreclosure cases, which are currently assigned to the chief judge's docket). Two months after the effective date of this order, the court may (except for good cause as stated in the paragraph below) include the following case-type codes in the e-filing project: ND (property damage, auto negligence), NF (no-fault auto insurance), and NI (personal injury auto negligence).

(b) [Unchanged]

4.-15. [Unchanged.]

AMENDMENTS OF MICHIGAN COURT RULES OF 1985

Entered March 7, 2012 (File No. 2010-20)—REPORTER.

On order of the Court, the proposed amendment of Rule 6.302 of the Michigan Court Rules having been published for comment at 490 Mich 1203-1205, and an opportunity having been provided for comment and at a public hearing, the Court declines to adopt the proposed amendment. This administrative file is closed without further action.

MARILYN KELLY, J. I would amend the rule to require the trial court judge to advise a defendant who pleads guilty that the defendant's maximum sentence may be longer than the maximum possible prison sentence for the offense if the defendant is subject to the habitual offender statute (MCL 769.13).

CAVANAGH, J., concurred with MARILYN KELLY, J.

Adopted April 4, 2012, effective May 1, 2012 (File No. 2010-26)—REPORTER.

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

RULE 7.210. RECORD ON APPEAL.

(A) [Unchanged.]

(B) Transcript.

(1) [Unchanged.]

(2) Transcript Unavailable. When a transcript of the proceedings in the trial court or tribunal cannot be obtained from the court reporter or recorder, the appellant shall take the following steps to settle the record and to cause the filing of a certified ~~file a~~ settled statement of facts to serve as a substitute for the transcript.

(a) No later than 56 days after the filing of the available transcripts, or 28 days after the filing of the available transcripts in a child custody case or interlocutory criminal appeal, or, if no transcripts are available, within ~~Within~~ 14 days after filing the claim of appeal, the appellant shall file with the trial court or tribunal clerk, and serve on each appellee, a motion to settle the record and, where reasonably possible, a proposed statement of facts. A ~~The~~ proposed statement of facts must concisely set forth the substance of the testimony, or the oral proceedings before the trial court or tribunal if no testimony was taken, in sufficient detail to ~~inform the Court of Appeals of the nature of the controversy and of the proceedings in the trial court or tribunal~~ provide for appellate review.

(b) Except as otherwise provided, the~~The~~ appellant shall notice the motion to settle the record for hearing ~~proposed statement of facts for prompt settlement~~ before the trial court or tribunal to be held within 21 days of the filing of the motion. If it is not the typical practice of a tribunal to conduct hearings, the motion to settle the record must be filed with the tribunal for consideration by the tribunal within 21 days of the filing of the motion. The motion shall be filed and served at least 14 days before the date noticed for hearing or consideration to settle the record. If appel-

lant filed a proposed statement of facts with the motion, appellee must file and serve on the appellant and other appellees an ~~An~~ amendment or objection to the proposed statement of facts ~~must be in writing, filed~~ in the trial court or tribunal at least 7 days before the time set for the settlement hearing or consideration~~, and served on the appellant and any other appellee~~. The trial court may adopt and file appellant's proposed statement of facts as the certified settled statement of facts.

(c) The trial court or tribunal shall settle any controversy and certify a settled statement of facts as an accurate, fair, and complete statement of the proceedings before it. The certified settled statement of facts must concisely set forth the substance of the testimony, or the oral proceedings before the trial court or tribunal if no testimony was taken, in sufficient detail to provide for appellate review.

(d) The appellant shall file the settled statement of facts and the certifying order ~~must be filed~~ with the trial court or tribunal clerk and ~~a copy of the certifying order must be filed with~~ the Court of Appeals.

(3) [Unchanged.]

(C)-(I) [Unchanged.]

RULE 7.212. BRIEFS.

(A) Time for Filing and Service.

(1) Appellant's Brief.

(a) Filing. The appellant shall file 5 typewritten, xerographic, or printed copies of a brief with the Court of Appeals within

(i) 28 days after the claim of appeal is filed, the order granting leave is certified, ~~or~~ the transcript is filed with the trial court, or a settled statement of facts and certifying order is filed with the trial court or tribunal,

whichever is later, in a child custody case or an interlocutory criminal appeal. This time may be extended only by the Court of Appeals on motion; or

(ii) the time provided by MCR 7.208(B)(5)(a), 7.208(B)(6), or 7.211(C)(1), in a case in which one of those rules applies; or

(iii) 56 days after the claim of appeal is filed, the order granting leave is certified, ~~or~~ the transcript is filed with the trial court or tribunal, or a settled statement of facts and certifying order is filed with the trial court or tribunal, whichever is later, in all other cases. In a criminal case in which substitute counsel is appointed for the defendant, the time runs from the date substitute counsel is appointed, ~~or~~ the transcript is filed, or a settled statement of facts and certifying order is filed, whichever is later. The parties may extend the time within which the brief must be filed for 28 days by signed stipulation filed with the Court of Appeals. The Court of Appeals may extend the time on motion.

(b) [Unchanged.]

(2)-(5) [Unchanged.]

(B)-(I) [Unchanged.]

Staff Comment: The amendments of MCR 7.210 and MCR 7.212 extend the time period in which parties may request that a court settle a record for which a transcript is not available and clarify the procedure for doing so.

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

Entered May 16, 2012 (File No. 2010-16)—REPORTER.

On order of the Court, the proposed amendments of Rule 6.302 and Rule 6.610 of the Michigan Court Rules having been published for comment at 486 Mich 1216-1218 (2010), and an opportunity having been provided for comment and at a public hearing, the Court declines

to adopt the proposed amendment. This administrative file is closed without further action.

MARILYN KELLY, J. (*dissenting*). I would not close this file. I believe the Court should adopt the rule changes drafted by the State Bar of Michigan Criminal Issues Initiative. The initiative's proposal best complies with the mandates of *Padilla v Kentucky*, 559 US 356; 130 S Ct 1473 (2010). The State Appellate Defender Office and the Detroit and Michigan National Lawyers Guild also support this proposal.

It requires that, before the factual basis for a plea of guilty or *nolo contendere* is heard, a trial judge must advise the defendant that a plea made by a noncitizen "may result in deportation, exclusion from admission to the United States, or denial of naturalization" under federal law. The judge must ask defendants in felony cases heard in circuit court, where most defendants are represented by counsel, "whether the defendant's lawyer and the defendant have discussed the possible risk of deportation that may be caused by the conviction if the defendant is not a citizen." Upon request in district court, where many defendants are not represented by counsel, the judge must "allow the defendant a reasonable amount of additional time to consider the appropriateness of the plea in light of the advisement." The proposal also addresses cases in which the defendant submits a plea in writing without appearing before the judge. In these cases, the plea would include the defendant's signed acknowledgment that he or she knows that, in making the plea, a noncitizen risks deportation, exclusion from admission to the country or denial of naturalization.

CAVANAGH, J., concurred with MARILYN KELLY, J.

Adopted May 24, 2012, effective immediately (File No. 2006-47)—REPORTER.

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

RULE 1.109. PAPER AND TYPE-SIZE STANDARDS; SIGNATURES.

(A)-(B) [Unchanged.]

(C) Signatures.

(1) A signature, as required by these court rules and law, means a written signature as defined by MCL 8.3q or an electronic signature as defined by this subrule.

(2) An electronic signature means an electronic sound, symbol, or process, attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record.

(3) If a law or court rule requires a signature to be notarized or made under oath, the requirement is satisfied if the electronic signature of the person authorized to perform those acts, together with all other information required to be included by other applicable law or court rule, is attached to or logically associated with the signature.

(4) Retention of a signature electronically affixed to a document that will be retained by the court in electronic format must not be dependent upon the mechanism that was used to affix that signature.

Staff Comment: This amendment explicitly allows for the use of an electronic signature, and allows notarization by electronic process.

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

Adopted May 24, 2012, effective September 1, 2012 (File No. 2006-04)—REPORTER.

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

RULE 3.204. PROCEEDINGS AFFECTING CHILDREN.

(A) Unless the court orders otherwise for good cause, if a circuit court action involving child support, custody, or parenting time is pending, or if the circuit court has continuing jurisdiction over such matters because of a prior action:

(1) A new action concerning support, custody or parenting time of the same child must be filed as a motion ~~or supplemental complaint~~ in the earlier action~~.~~ ~~The new action shall be filed as a motion~~ if the relief sought would have been available in the original cause of action. If the relief sought was not available in the original action, the new action must be filed as a ~~supplemental~~ new complaint.

(2) A new action for the support, custody, or parenting time of a different child of the same parents must be filed ~~as a supplemental complaint in the earlier action if the court has jurisdiction and the new action is not an action for divorce, annulment, or separate maintenance.~~

~~(3) A new action for divorce, annulment, or separate maintenance that also involves the support, custody, or parenting time of that child must be filed~~ in the same county as the prior action if the circuit court for that county has jurisdiction over the new action and the new case must be assigned to the same judge to whom the previous action was assigned.

(3) Whenever possible, all actions involving the custody, parenting time, and support of children of the same parents shall be administered together. Unless the court finds that good cause exists not to do so, when the court enters a final order in a new action involving a new child

of those parents, the order shall consolidate the provisions for custody, parenting time, and support for both that child and any children named in previous actions over which the court has jurisdiction involving the same parents. The order must reference the other cases and state that it supersedes the custody, parenting time, and support provisions of the orders entered previously in those cases. In the new action, the court may modify custody, parenting time, and support provisions in preexisting orders involving another child or children of the same parents, provided that the modification is supported by evidence presented in the new case and both parents have had an opportunity to be heard concerning the proposed modifications.

~~(4) A party may file a supplemental pleading required by this subrule without first seeking and obtaining permission from the court. The supplemental pleading must be served as provided in MCR 3.203(A)(2), and an answer must be filed within the time allowed by MCR 2.108. When this rule requires a supplemental pleading, all filing and judgment entry fees must be paid as if the action was filed separately.~~

(B) When more than one circuit court action involving support, custody, or parenting time of a child is pending, or more than one circuit court has continuing jurisdiction over those matters because of prior actions, ~~an original or supplemental~~ a complaint for the support, custody, or parenting time of a different child of the same parents must be filed in whichever circuit court has jurisdiction to decide the new action. If more than one of the previously involved circuit courts would have jurisdiction to decide the new action, or if the action might be filed in more than one county within a circuit:

(1) The new action must be filed in the same county as a prior action involving the parents' separate maintenance, divorce, or annulment.

(2) If no prior action involves separate maintenance, divorce, or annulment, the new action must be filed:

(a) in the county of the circuit court that has issued a judgment affecting the majority of the parents' children in common, or

(b) if no circuit court for a county has issued a judgment affecting a majority of the parents' children in common, then in the county of the circuit court that has issued the most recent judgment affecting a child of the same parents.

(C) The court may ~~consolidate actions~~ enter an order that consolidates the custody, parenting time, and support provisions of multiple orders administratively ~~without holding a consolidation hearing~~ when:

(1) the cases involve different children of the same parents but all other parties are the same, or

(2) more than one action involves the same child and parents.

The order must reference the other cases and state that it supersedes the custody, parenting time, and support provisions of the orders in those cases.

~~(D) If a new action for support is filed in a circuit court in which a party has an existing or pending support obligation, the new case must be assigned to the same judge to whom the other case is assigned, pursuant to MCR 8.111(D).~~

~~(E)~~(D) In a case involving a dispute regarding the custody of a minor child, the court may, on motion of a party or on its own initiative, for good cause shown, appoint a guardian ad litem to represent the child and assess the costs and reasonable fees against the parties involved in full or in part.

Staff Comment: The amendment of MCR 3.204 removes the requirement to file a new action as a supplemental complaint, which allows trial courts to consolidate cases in a way that is more compatible with trial court case management systems.

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

Entered May 24, 2012 (File No. 2010-33)—REPORTER.

On order of the Court, the proposed adoption of new Rule 3.220 of the Michigan Court Rules having been published for comment at 490 Mich 1240-1242 (2011), and an opportunity having been provided for comment and at a public hearing, the Court declines to adopt the proposed amendment. This administrative file is closed without further action.

Adopted May 24, 2012, effective immediately (File No. 2012-05)—REPORTER.

By order dated February 1, 2012, this Court adopted new Rule 3.616 of the Michigan Court Rules, effective immediately. 490 Mich ccxxviii (2012). At the same time, the Court stated that it would consider at a future public hearing whether to retain the amendment. Notice and an opportunity for comment at a public hearing having been provided, MCR 3.616 is retained.

On further order of the Court, the following amendment of Rule 3.616 of the Michigan Court Rules is adopted, effective immediately:

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

RULE 3.616. PROCEEDING TO DETERMINE CONTINUATION OF VOLUNTARY FOSTER CARE SERVICES.

(A)-(D) [Unchanged.]

(E) Ex Parte Petition; Filing, Contents, Service. Within 150 days after the signing of a voluntary foster care agreement, the Department of Human Services shall file with the family division of the circuit court, in the county where the youth resides, an ex parte petition requesting the court's determination that continuing in voluntary foster care is in the youth's best interests.

(1) Contents of Petition. The petition shall contain

(a) the youth's name, date of birth, race, gender, and current address;

(b) the name, date of birth, and residence address of the youth's parents or legal custodian (if parental rights have not been terminated);

(c) the name and address of the youth's foster parent or parents;

(d) a statement that the youth has been notified of the right to request a hearing regarding continuing in foster care;

(e) a showing that jurisdiction of a court over the youth's child protective proceeding has been terminated, including the name of the court and the date jurisdiction was terminated; and

~~(f) a statement of facts that supports the voluntary foster care agreement and includes both~~

~~(i) the reasonable efforts made to achieve permanency for the youth, and~~

~~(ii) the reasons why it remains in the youth's best interests to continue in voluntary foster care; and~~

~~(g)~~(f) any other information the Department of Human Services, parent or legal custodian, youth, or foster parent wants the court to consider.

(2) [Unchanged.]

(3) Service. The Department of Human Services shall serve the petition on

~~(i)~~(a)-~~(iii)~~(c) [Relettered, but otherwise unchanged.]

(F) [Unchanged.]

(1) [Unchanged.]

(2) Service. The court shall serve the order on

~~(i)~~(a)-~~(iv)~~(d) [Relettered, but otherwise unchanged.]

Staff Comment: The amendment inserts reference to the youth's race, which would make the rule consistent with MCL 400.655(a). In addition, the requirement in subsection (f) is deleted because that information already must be included in the report provided in subsection (E)(2).

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

Adopted June 20, 2012, effective immediately (File No. 2011-18)—REPORTER.

On order of the Court, in light of the Court's recently released opinion in *People v Cole*, 491 Mich 325 (2012), this is to advise that the Court is adopting an amendment of Rule 6.302 of the Michigan Court Rules, effective immediately and pending public comment. This notice is given to afford interested persons the opportunity to comment on the form or the merits of the amendment or to suggest alternatives. The Court welcomes the views of all. This matter will be considered at a public hearing. The notices and agendas for public hearings are posted at www.courts.michigan.gov/supremecourt/resources/administrative/ph.htm.

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

RULE 6.302. PLEAS OF GUILTY AND NOLO CONTENDERE.

(A) Plea Requirements. The court may not accept a plea of guilty or nolo contendere unless it is convinced

that the plea is understanding, voluntary, and accurate. Before accepting a plea of guilty or nolo contendere, the court must place the defendant or defendants under oath and personally carry out subrules (B)-(E).

(B) An Understanding Plea. Speaking directly to the defendant or defendants, the court must advise the defendant or defendants of the following and determine that each defendant understands:

(1) the name of the offense to which the defendant is pleading; the court is not obliged to explain the elements of the offense, or possible defenses;

(2) the maximum possible prison sentence for the offense and any mandatory minimum sentence required by law, including a requirement for mandatory lifetime electronic monitoring under MCL 750.520b or 750.520c;

(3)-(5) [Unchanged.]

(C)-(F) [Unchanged.]

Staff Comment: This amendment codifies the holding of the recently released opinion in *People v Cole*, 491 Mich 325 (2012), in which this Court held that a trial court must advise a defendant who is subject to lifetime electronic monitoring requirement of that part of the sentence during the plea proceeding.

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

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on this amendment may be sent to the Supreme Court Clerk in writing or electronically by October 1, 2012, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2011-18. Your comments and the comments of others will be posted at www.courts.mi.gov/supremecourt/resources/administrative/index.htm.

AMENDMENTS OF LOCAL COURT RULES

THIRTEENTH JUDICIAL CIRCUIT AND GRAND TRAVERSE COUNTY PROBATE COURT

Approved June 20, 2012, effective July 1, 2012 (File No. 2011-22)—REPORTER.

[The following is a new local court rule for the 13th Judicial Circuit Court and the Grand Traverse County Probate Court.]

RULE 3.800. NOTICE FOR COURT APPOINTED SPECIAL ADVOCATES.

In the interest of justice, the Court Appointed Special Advocate appointed to work for a child in any abuse and neglect case shall be afforded notice of any adoption hearing that may occur on behalf of the child.

Staff Comment: This local court rule allows a Court Appointed Special Advocate who works with a child as part of an abuse/neglect proceeding to receive notice of an adoption hearing that also involves the child.

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

FORTY-EIGHTH JUDICIAL CIRCUIT

Approved June 27, 2012, effective September 1, 2012 (File No. 2011-17)—REPORTER.

RULE 2.503. ADJOURNMENTS.

(A) This rule applies to any motion pending before the Court.

(B) The Court will allow one adjournment, in total, based upon the oral request of either party or his or her attorney provided that the oral request is made at least 7 (seven) days prior to the date the motion is scheduled to be heard.

(C) At the time the proceeding is adjourned, the motion must be rescheduled for a specific date and time. The attorney/party making the request for adjournment is responsible for noticing the new date and time set after consulting with the opposing party or attorney and obtaining a mutually satisfactory date for the rescheduled motion hearing. The attorney/party making the request for adjournment must provide notice of the new date and time as soon as possible.

(D) Any subsequent or other request for adjournment by either party or attorney shall be by written motion, properly noticed for hearing, and shall be in conformity with the requirements of MCR 2.503.

(E) No adjournments will be granted pursuant to stipulation beyond the oral request noted in (B) above. Stipulations may be presented to the Court at the hearing on the motion for adjournment for the Court's consideration.

(F) The only exceptions to the above will be those adjournments required by MCR 2.503(F).

Staff Comment: Rule 2.503 of the Local Court Rules of the 48th Judicial Circuit Court has been adopted to impose time restrictions on requests to adjourn motion proceedings and establish local procedures for adjournment of a motion hearing.

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

MARILYN KELLY, J., dissented and would not have approved the local court rule.

AMENDMENTS OF THE RULES FOR THE BOARD OF LAW EXAMINERS

Adopted June 13, 2012, effective January 1, 2013 (File No. 2010-31)—REPORTER.

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

RULE 5. ADMISSION WITHOUT EXAMINATION.

(A) An applicant for admission without examination must

(1) qualify under Rules 1 and 2(B);

(2) be licensed to practice law in the United States, its territories, or the District of Columbia;

(3) be a member in good standing of the Bar where admitted;

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

(5<u>4</u>) intend to practice law in Michigan, or to be a full-time instructor in a reputable and qualified Michigan law school; and

(6<u>5</u>) have, after being licensed and for 3 of the 5 years preceding the application,

(a) actively practiced law as a principal business or occupation in a jurisdiction where admitted (the practice of law under a special certificate pursuant to Rule

5[D] or as a special legal consultant pursuant to Rule 5[E] does not qualify as the practice of law required by this rule);

(b) been employed as a full-time instructor in a reputable and qualified law school in the United States, its districts, or its territories; or

(c) been on active duty (other than for training or reserve duty) in the United States armed forces as a judge advocate, legal specialist, or legal officer. The judge advocate general (or a comparable officer) or delegate must certify the assignment and the inclusive dates.

The Supreme Court may, for good cause, increase the 5-year period. Active duty in the United States armed forces not satisfying Rule 5(A)(6)(c) may be excluded when computing the 5-year period.

(B)-(E) [Unchanged.]

Staff Comment: The amendment of BLE Rule 5 eliminates the requirement that an applicant for admission by motion be required to express an intention to maintain an office in the state.

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

YOUNG C.J. (*concurring in part and dissenting in part*). I concur with amending Rule 5 of the Rules for the Board of Law Examiners to eliminate the requirement that an application for admission without examination assert the intent to maintain an office in Michigan for the practice of law. However, I dissent from giving this change effect prior to the amendment of MCL 600.946, which provides the identical requirement. Therefore, until MCL 600.946 is amended, the adopted rule change will not solve the problem it is designed to cure and amounts to no more than a gesture by this Court.



CONRAD L. MALLETT, JR.

PRESENTATION OF THE PORTRAIT OF THE HONORABLE CONRAD L. MALLETT, JR.

APRIL 25, 2012

CHIEF JUSTICE ROBERT P. YOUNG, JR.: Good afternoon and welcome. As Chief Justice MALLETT knows, not every one of the chief justice's responsibilities is felicitous, but this is one of them. We get to preside over what I'm sure is going to be a wonderful ceremony that we sometimes call the hanging. But it's my pleasure to welcome you all to this occasion, on behalf of each of my colleagues on the Court, to receive the portrait of former Chief Justice CONRAD L. MALLETT, JR. And we particularly welcome his friends and his family, and I see his wife [Denise Mallett] here, I believe. And we don't often have best-dressed people visit us, but she's one of them and was honored as such in [Hour Detroit] magazine recently. And we see, obviously, Governor James Blanchard and his wife Janet. Welcome here all of you. These proceedings are being taped for later broadcast by Michigan Government TV, and, in addition, will be memorialized in a volume of *Michigan Reports*.

Now many of you know that in 1999, some of you dread it, but some celebrate—fewer—I succeeded Justice MALLETT when he resigned to accept a position with the Detroit Medical Center as Senior Vice President and General Counsel, later becoming President of Sinai-Grace. However, before he departed in 1999, he made national news by becoming the first African-American

Chief Justice of the Michigan Supreme Court. And as chief he took very seriously the administration of the state court system. And some of the goals he pursued have been realized such as this magnificent Hall of Justice that we, the Supreme Court and the Court of Appeals, are so happy to be temporary residents in. And what this did was brought together in one building many of the disparate parts of our family including the [State] Court Administrative Office.

In addition, under Chief Justice MALLETT's watch the Court oversaw the organization of the family court and adopted Supreme Court Administrative Order 1997-10,[1] through which this Court for the first time bound itself to make public a wide variety of financial and administrative information about the Court and our State [Court] Administrative Office. He had other goals that we continue to pursue such as streamlining the operations of our trial courts to achieve greater efficiency and better public service.

With that I won't take any thunder from the rest of the speakers and I will welcome the first speaker, Wallace D. Riley, President of the Michigan Supreme Court Historical Society, to tell us about their work on preserving and commissioning Justices' portraits. Wally.

MR. WALLACE D. RILEY: Thank you, Mr. Chief Justice. Mr. Chief Justice, the associate justices here today, Justice MALLETT, distinguished judges who are in attendance, and the Mallett family and friends. It's a pleasure for me, on behalf of the Michigan Supreme Court Historical Society, to welcome you and to thank the Court for the opportunity to appear here and to partici-

[1] Administrative Order No. 1997-10, 456 Mich clxxi (1997).

pate in this special session of the Court. It is a special session. It is being recorded. It will appear in the *Michigan Reports*.

Many of you here today are familiar with the work of the Michigan Supreme Court Historical Society because you're members of the society. And for those of you who are not members or who are not familiar with the society, allow me to say that we were organized in 1988 with the mission to preserve documents, records, and memorabilia of the Michigan Supreme Court and to promote public education and awareness of the historical significance of our Supreme Court. The historic portrait collection has always been figured prominently in the work of the society.

In fact, the care of these artifacts was one of the driving forces behind the creation of the society. DOROTHY COMSTOCK RILEY, when she was then Chief Justice, recognized that the portraits were not being properly cared for or properly displayed and she decided to do something about it. So she formed and founded the Michigan Supreme Court Historical Society. The society gathers all of the portraits; we catalogue them; we've repaired many of them; we've commissioned portraits for the justices we didn't have portraits of who were still living, and we now have a total of 88 portraits of former justices of the Supreme Court, which are hanging in this building and in buildings throughout the court system, in our collection. And in the same 24 years since our founding, we have participated in, 18 now, presentations like this one today where we present the portraits.

For nearly 25 years now, the society has been privileged to be involved in events such as the one today honoring Chief Justice MALLETT. We're happy to be here again. We thank the Court for allowing us to participate, and we

thank the Court for its continuing support, and we offer our congratulations to Chief Justice MALLETT.

CHIEF JUSTICE YOUNG: Thank you. We now move to the part of the program where we recognize and recall the many accomplishments of Chief Justice MALLETT. And first in line to do that is former Governor Dorian Gray—I mean Jim Blanchard. [Laughter.]

GOVERNOR JAMES J. BLANCHARD: I love it. Mr. Chief Justice, members of the Michigan Supreme Court, ladies and gentlemen, most especially CONRAD MALLETT, JR. I feel better than my voice indicates so I hope not to get—I'm a recovering politician and I'm recovering from a bad cold. Now let me just say, I'm delighted to be here. I will be brief. I took lessons from Joe Biden so it will only be about 45 minutes. [Laughter.]

It's hard to believe that it's 30 years ago when young attorney CONRAD MALLETT, JR., escorted me and our team all around Detroit and all around our state in what turned out to be a successful campaign for Governor. In fact, many members of our team—you see, of course, Janet Blanchard—but many members of our team are here today, and I'm not going to name them, but it was a wonderful time. We had a ball as you recall Mr. Justice—Mr. former Chief Justice. It was an exciting time. You've always been a part of our team, a part of our state, and part of our hearts.

It's interesting, one of the things that's really unknown, really unappreciated, is that while judges are elected in Michigan, if there's a vacancy the Governor gets to appoint them. And during my time of eight years, we were able to appoint 160 judges including 3 to the Michigan Supreme Court. And, of course, it was a delight to appoint CONRAD MALLETT, JR. to the bench, which at the time was unexpected for a lot of different reasons. In fact, many people wanted the appointment

and they were qualified. Some even held rallies as I recall, but common sense prevailed and Conrad was my appointment.

And it was a real pleasure to appoint him. And let me give you an aside as to why it was especially, I think, appropriate. Recently, I served on a commission to develop a program to improve our national parks. It's a small group chaired by Howard Baker, and on that commission was former U.S. Supreme Court Justice Sandra Day O'Connor. And she used to sit there and talk to people like me and others and say, "You've gotta make sure the President appoints people to the U.S. Supreme Court that have practical experience, that have done something other than be law review, clerk for a judge, a law school, major firm, and then a judge." And she, of course, looked back on her days not only on the Arizona Supreme Court, but she'd been a state senator, she'd been a senate majority leader, she'd helped her family run a major business, she really, and to this day truly, believes that people on the bench—and we have some examples here today—must have a varied experience when they start interpreting the laws and make sure that they understand the consequences, the real-world consequences, of what they do. Sure, we believe in the common law and the Constitution, but how it works is, of course, quite another matter. And that's important—a living breathing document.

And the nice thing about CONRAD MALLETT, JR. was when he became a justice on the Michigan Supreme Court, CONRAD MALLETT, JR.—as some call him young MALLETT—I'm gonna call him Mr. Chief Justice MALLETT, he had already worked as an advisor to the mayor of Detroit, he'd already worked in two major law firms, he'd already worked for a U.S. Congressman in Washington. He had served as the Governor's legal advisor, and also a

lobbyist with the Legislature during a very deep financial crisis, and then some. He had, in a sense, he had worked hard with the people who make laws, who write laws, and who execute the laws. It was a perfect combination. And Conrad you served with great distinction. I might also add, thank you for continuing to serve our state both in terms of the finances of one of our major cities and the healthcare for all of our people. We thank you. Congratulations on this wonderful day. And Mr. Chief Justice and members of the Court thank you for letting me speak. Thank you very much. [Applause.]

CHIEF JUSTICE YOUNG: Thank you. I didn't think I'd have to remind a group as august as this, but if your phone is on, I'd like you to put it on stun now. And now I'm pleased to call to the podium Ms. Janet Welch, who is the Executive Director of the State Bar of Michigan. I can't think of anything funny to say about Janet, she's really very effective. I'm working on you Alex [Parrish], however.

MS. JANET WELCH: Chief Justice YOUNG, justices of the Court, Justice MALLETT, the Mallett family, distinguished guests, I'm honored by the invitation to speak on this occasion. I am acutely aware that unlike the other speakers today, illustrious in their own right, I'm contributing the viewpoint of someone whose relationship to the subject of today's proceeding was one of subservience and I am eager to share that perspective.

The invitation to speak has allowed me to revisit an exceptional period of my own personal history. It was largely defined by an exceptional and unforgettable human being. That period began for me in an abrupt and dramatic way, and it is worth describing that event briefly because of what it reveals about CONRAD MALLETT, JR.

It's important to know first that at least during the dozen years that I was employed at the Supreme Court,

the period leading up to the election of a new chief justice was an anxious time, especially so, as was the case at the end of 1996, when the current chief justice is not in the running. Despite the fact that the changeover rarely has had any, if any, staffing impact, even veteran Supreme Court staff can't help but fret just a little about their job security and the quality of their work life when a change in the chief justice is imminent. That anxiety about the changeover is most acute for the handful of people who work in the office of the chief justice.

In addition to that source of anxiety, the waning months of 1996 were, to put it mildly, an unsettled time for Michigan's judiciary. The task of modernizing Michigan's trial court system had been expressly engaged a few years before by Chief Justice DOROTHY COMSTOCK RILEY's twenty-first century courts initiative commission and advanced by Chief Justice MICHAEL CAVANAGH's Charting the Course initiative and demonstration court projects during his tenure as chief.

It had been outgoing Chief Justice Jim BRICKLEY's fate to preside over the politics of court reform while the Court was deciding the *Grand Traverse* case[2]—a case in which the Court ultimately declined the tempting invitation of the Michigan Association of Counties to fully shift the burden of trial court funding from counties and cities to the state. That decision was just over a year old as 1996 drew to a close. To be sure, state funding would have simplified the challenge that the Supreme Court had explicitly taken on to make Michigan's trial court system more efficient, cohesive, and accountable. In fact, state court funding was almost certainly a policy preference of the justices, but in a principled unanimous decision they denied themselves

[2] *Grand Traverse Co v Michigan*, 450 Mich 457; 538 NW2d 1 (1995).

the authority to dictate state funding. That was the right thing to do, but it did not win the Court any points in Lansing—even with the Legislature to whom they were deferring. In the aftermath of the *Grand Traverse* decision, the Legislature; the circuit, probate, and district judges; the counties; the county clerks; and the state bar all became even more entrenched in incompatible positions and more insistent about their demands.

To make matters more complicated, during this period, the state court administrator, who was also chief of staff to the chief justice, had suffered disabling injuries that were soon to result in her retirement. As the governmental relations analyst in the Office of the Chief Justice, I found myself at the center of these challenges. I got the news that Justice MALLETT would be the new chief justice while vacationing up north with my family. My first thought on getting the news was I hardly know anything about him. And my second, more alarming, thought was: and he hardly knows anything about me. [Laughter.] And that was more or less pretty much all that was going on in my head all the way on the trip home to Lansing until the moment when my husband, who was driving, suffered a massive seizure and lost consciousness.

And so it came to pass that a day later, on a Sunday night the day before I should have been preparing for my first day working for the new chief justice, I found myself writing him a message from my husband's hospital bedside. I explained that I was eager to serve in the Office of Chief Justice under his command in whatever capacity he saw fit to use me, that I offered him the very best I knew how to give without reservation, but at the moment my husband was in a coma and the doctors did not have a clue what was going on.

It would have been easy, probably even prudent, for the new chief justice—the youngest member of the Court and the next to lowest in seniority, faced with some really intractable problems—to take a wait and see approach to my message. That's almost certainly what I would have done, probably a short prompt note of sympathy and encouragement with no commitment, but that's not what happened. Instead, I got a call at the hospital from the new chief justice telling me that he considered me an indispensable part of the team he was assembling, that I should pick a title, take care of my family, and get back to work as soon as I could but not a moment sooner than I should. With that conversation I went from knowing next to nothing about CONRAD MALLETT, JR., to knowing one of the most important things about him—the size of his heart.

So what happened next? There were brush fires burning all across the court reform landscape. At some point in the months that followed, as we were getting to know one another, Chief Justice MALLETT and I discovered that we were both fans of the writer Walter Mosley. Mosely's character, Easy Rawlins, says in one of his novels, "You step out your door in the morning and you're already in trouble. The only question is, are you on top of the trouble or not."[3] It soon became apparent the new chief justice was definitely on top of the trouble. And he went about the task of putting out the brush fires immediately and methodically. The pace was breathless. My colleague Anne Vrooman, recruited from the State Court Administrative Office to the Office of the Chief Justice, perfectly captured the moment. Coming into my office one day after we had just received our latest marching orders from the chief, she said, "We'd

[3] Mosley, *Devil in a Blue Dress* (New York: W.W. Norton & Co., Inc., 1990).

better make sure the high beams are on because he's driving awfully fast." [Laughter.]

The times required CONRAD MALLETT, JR.'s public policy training and experience and especially his ability to motivate, persuade, charm, and inspire. As my colleague then and now Nkrumah Johnson-Wynn says, when CONRAD MALLETT believes something, he believes it with his whole being. A week later, upon more facts and more reflection, he might believe something slightly different, but he believes that too with this whole being, [laughter] and so too most likely do you believe it if you are in his vicinity.

As is true of the most effective and dynamic leaders, CONRAD MALLETT's open-mindedness and ability to pivot while moving forward were important and impressive compliments to his determination and conviction. What CONRAD MALLETT introduced most effectively into the conversation about court reform in Michigan was the vision of shared responsibility, cooperation, and accountability for the business of safeguarding and advancing justice. It was a vision powered by his determination, political savvy, and relentless energy that broke the back of a costly and paralyzing power struggle between the courts and funding units and within the judiciary itself. His was an affirming and positive spirit, rejecting the intransigence of those who opposed all efforts at reform. He would insist you have to be for something, you can't just be against change. With Chief Justice MALLETT in charge, change did come and at an unprecedented speed.

I can't claim, of course, that CONRAD MALLETT solved all the problems of Michigan's judicial system during his two-year tenure as Chief Justice. A generous man, he did leave a few things to future chief justices, including this one, to dig into, but he laid a foundation critical for the

modernization of our state court system. The evidence of the magnitude and importance of the breakthrough he engineered can be seen in the titles of seven—yes, seven—major administrative orders adopted by the Court just in the first year of his tenure, two of which you've already heard about. Administrative Order 1997-1,[4] implementing the family division of the circuit court; 1997-6,[5] on resolving disputes between courts and funding units; 1997-7,[6] establishing the Child Support Coordinating Council; 1997-8,[7] establishing court data standards; 1997-10,[8] the judicial branch's freedom of information procedures; 1997-11,[9] the judicial branch's open-meetings procedures; and 1997-12,[10] authorizing consolidating courts pilot projects.

And, as if this were not enough of a legacy, you have already heard about this magnificent building. Governor John Engler said it best at the dedication of the Hall of Justice. He said CONRAD MALLETT made legislative approval a personal crusade, meeting at the critical time with every member of the Legislature who had a concern or question about the Hall of Justice and its funding. For those of us lucky enough to be working for the Court at this time, it was an exciting and exhilarating time. For me, to paraphrase Detroit's own Grace Boggs, it was also a soul-growing time.

Throughout this period my husband, last seen in this narrative in a coma, was being treated for what was eventually diagnosed as a grade III malignant brain

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[4] Administrative Order No. 1997-1, 454 Mich cxiii (1997).

[5] Administrative Order No. 1997-6, 456 Mich cliii (1997).

[6] Administrative Order No. 1997-7, 456 Mich clxvi (1997).

[7] Administrative Order No. 1997-8, 456 Mich clxix (1997).

[8] AO 1997-10.

[9] Administrative Order No. 1997-11, 456 Mich clxxviii (1997).

[10] Administrative Order No. 1997-12, 456 Mich clxxxi (1997).

tumor. His recovery from that bleak diagnosis has been as remarkable as the two-year whirlwind of achievements orchestrated by CONRAD MALLETT during his tenure as chief justice. I am grateful beyond words for this opportunity to tell Justice MALLETT what his faith in me meant to me and how proud I am to have been allowed to play a part in his remarkable legacy. [Applause.]

CHIEF JUSTICE YOUNG: Our next speaker is Mr. Alex Parrish, senior partner in the law firm of Honigman Miller Schwartz and Cohn.

MR. ALEX PARRISH: Thank you Chief Justice and members of the Court. Ladies and gentlemen, former chief justice, I'm delighted to be here to have a little time to talk about my dear friend and colleague CONRAD MALLETT, JR. And I'm also pleased to be here for the unveiling of another portrait by the great painter Simmie Knox. See Conrad, ten years ago I served as cochairman of the portrait committee for appeals judge Damon J. Keith, and his portrait now hangs in the federal courthouses in Detroit and in Cincinnati. And like Thurgood Marshall and now CONRAD MALLETT, JR., his portrait was also painted by Mr. Simmie Knox.

Former Chief Justice MALLETT and I have known each other since I moved to Detroit 28 years ago. We've been neighbors, we are fraternity brothers, our wives know each other, we've worked together on many, many community projects, but I know Chief Justice MALLETT best as a distinguished member of our legal profession and also as a business leader. We started out as contemporaries at large law firms in Detroit—me at Honigman and Conrad at Miller Canfield and then Jaffe Raitt. I think we got to know each other well when we had just made partner in our respective firms and we were

[among] the few minorities in the profession at that rank—far outranked by then—by now Chief Justice YOUNG. [Laughter.]

CHIEF JUSTICE YOUNG: I'm just older. [Laughter.]

MR. PARRISH: Rising from associate to partner we were occasional legal adversaries, but more often we were supporters of each other's careers. And we shared similar objectives regarding improving our profession particularly with regard to diversity in the profession in terms of increasing the numbers of minorities and women who practice law in our law firms and in our corporations. Later on, we happened to serve together as cocounsel on some cases, and then I actually worked with Conrad for a year as outside counsel when he was general counsel of a client of ours.

So I've known the guy a long time, and sometimes when you know people for a long time in many different capacities and circumstances, the truth is, the regard you have for that person can change. Sometimes it doesn't hold up; sometimes it diminishes or narrows. And what they say about familiarity—I don't know if it breeds contempt necessarily, but sometimes it breeds, you know, I'm not so impressed anymore. [Laughter.] Well, that's completely untrue about my good friend CONRAD MALLETT.

From the start, I knew he was a smart, energetic, compassionate human being; then later on, I learned that he's also extremely courageous. And I'm afraid he's also brutally honest. Believe me, don't ask this man a question if you can't handle the honest feedback. [Laughter.] That's one of his most endearing qualities. But I think that kind of honesty is really a virtue, and I'm glad that the current Governor apparently sees that too when it comes to CONRAD MALLETT. No, my long

years of knowing Conrad have not diminished my esteem for the man one iota.

In fact, over the years I've actually come to the conclusion that Conrad's one of those rare people who can do any job in the world not just capably but exceptionally. You see most of us are outstanding in maybe two or three things, you know, if you're lucky—you know lawyer, husband, and father. But not Conrad, he's—as the Governor mentioned, he's an excellent advisor. He's an excellent strategist, he's an excellent senior government executive, excellent campaign manager, excellent advocate, excellent business executive, and he was truly an excellent jurist. And I have it on good authority, Denise, that he's a heck of a husband and father too. So I'm not kidding; I truly believe Conrad can do just about anything well—not only well, but exceptionally.

And we should have learned that when Governor Blanchard appointed CONRAD MALLETT to the bench in 1990. I was new to town, but I remember a lot of the criticism back then. I heard that Conrad had no judicial experience, that he had never argued a case before the Supreme Court, that he was too political—but gee, that's true of me, all that except for the political part—but it didn't take long for the critics to be silenced. As Conrad went on to establish himself as one of the most respected jurists in the state of Michigan—elected twice by the citizens of Michigan and eventually, in 1997, selected by his peers as the Chief Justice of the state of Michigan.

And what else has he done in an excellent manner besides successfully practicing law and presiding on the bench? Well, he's now one of our great corporate executives in Detroit. He's run one of the most significant hospital organizations in Michigan before his most

recent promotion at the DMC. He's a director on the boards of two of our most important corporations in Michigan—both Fortune 500 companies. And, as of late, as Governor Blanchard mentioned, Governor Snyder has called upon him to play a critical role in the necessary financial restructuring of our largest city, Detroit. So I am convinced that Conrad can do just about anything and do it well. And we, the citizens of Michigan, were extremely lucky to have eight years of Conrad's life as a Justice of the Michigan Supreme Court. I think that may have been the longest time he served in any one place. [Laughter.] Well, he did a marvelous job serving on the Court, and it's only right, proper, and fitting that we take this opportunity this afternoon to thank Conrad—to formally recognize and thank him for that great service. And I want to thank you, Chief Justice CONRAD MALLETT. [Applause.]

JUSTICE CONRAD L. MALLET, JR.: Thank you, Alex.

CHIEF JUSTICE YOUNG: Thank you Alex for that left-handed comment about my age. He's now a titan in the city, but I want you to know that he's not even the best lawyer in his own household. [Laughter.] And now the final speaker before the portrait is presented, Mr. Michael Duggan, who is the President and CEO of the Detroit Medical Center.

MR. MICHAEL DUGGAN: Thank you Mr. Chief Justice and members of the Court and to Justice MALLETT's friends and family. I get a chance to come speak from the perspective of a friend. And Conrad and I have been friends since the mid-1980s when he was the deputy mayor to Coleman Young and I was the deputy county executive to Ed McNamara, and our lives have been intertwined at several different points. And I don't know that we ever thought we'd end up together in the hospital business, but there has been a force behind it.

But in 1990 as Governor Blanchard left office and appointed CONRAD MALLETT justice, as Alex mentioned, there was a fair amount of criticism. I think it was Brooks Patterson who called him Blanchard's revenge, [laughter] midnight appointments, and there was an assumption that he was going to get clobbered in the next election. It was pretty much a foregone conclusion except people forgot that you have a very smart, hard-working person.

And Justice MALLETT confounded everybody—he didn't become a predictable vote on either side. He looked at each issue, he wrote brilliant opinions, and when the election rolled around we had a case to make. Except we had a problem. The Republicans nominated Mike TALBOT right out of central casting: longstanding judge, great law and order credentials; we couldn't have had a tougher opponent, and we really didn't know how we were gonna win. But Conrad was smarter—"Go get Rick [Wiener]. We need him to run the campaign," and asked me to do the media. But as Judge TALBOT rolled along, we got further and further behind and Julie Dade, Conrad's friend, would end every campaign meeting, no matter how bad the meeting went, by saying, "You haven't finished your ballot until you vote for MALLETT." [Laughter.] And we'd roll our eyes and say, "Julie, that is so corny—stop saying that."

It got to be about eight weeks out; we were getting beat pretty good. We had enough money for about 10 days of TV, and Rick and I sat down and said if we go on TV for 10 days we don't have a chance. On the other hand, we read through his opinions, and they were brilliant. We looked at the cases where he was the deciding vote in a 4-3 case. There was one where a worker would have lost his right to sue for a serious injury, and Justice MALLETT cast the deciding vote with

the Democrats. The next month there was a case where somebody was convicted of child abuse of an infant and was going to be set free, and Justice MALLETT voted with the Republicans to uphold the conviction. And as Rick and I looked at this we said what if we forget about criticizing TALBOT. What if we run ads for the next six weeks on the radio and explain what kind of justice he's been. And as we kicked it around, Rick says, "That's all good except we've got a problem: we're way behind on name ID and without TV, how are we gonna do it?" I said, "Rick there's only one way we're gonna get people to remember it." And he said, "Oh no, we can't tell Conrad." [Laughter.] So we convinced Conrad to forget the TV and go on the radio, but we don't tell him what the ad's going to say. And I remember to this day when he heard the ad for the first time—with you haven't finished your ballot til you vote for MALLETT—he calls me up and he says, "I am a Justice of the Michigan Supreme Court with all the dignity attached thereto and I'm running a campaign based on a jingle that sounds like it was written by a preschooler! What are you doing?" I said, "Well Conrad, it's too late the ads are already bought." [Laughter.]

With about three weeks to go there was a major TV debate at which everybody assumed that Judge TALBOT, with his experience, would wipe the floor with the young justice, and, in fact, it was a very memorable debate because just the opposite happened. CONRAD MALLETT impressed everybody with his intellect and his debating skills, and the buzz in the whole campaign started to turn. But I will never forget with one week to go he calls me from his cell phone—a conversation I can remember—he says, "Mike, I'm gonna win." I said, "How do you know that?" He says, "I was just at a rally with Bill Clinton"—it was the '92 presidential, 5,000 people there. Because Conrad was on the ticket, they let

him speak for five minutes. So Conrad gets up in front of the crowd of 5,000, with the president-to-be standing behind him, and Conrad says, "You haven't finished your ballot"—5,000 people roared back—"until you vote for MALLETT." [Laughter.] He says Clinton said it was the greatest thing he ever heard. [Laughter.] And, of course, Conrad did, in fact, pull a major upset. In the next cycle, he came back and won easily and was unanimously elected by his colleagues as Chief Justice, validating the fact that Governor Blanchard made a very wise choice in that original appointment.

But it's been a fun ride, and we have been blessed that after a career on the Supreme Court that would have been enough for most people, he came down and provided yet another career to the people of the city of Detroit. And another place where he went in and was criticized for not having experience and took a hospital on the west side of Detroit, with 2,000 employees that was about to close, and he turned it around and saved it for that community. And it's just the same thing he's been doing over and over his entire life. So if you know Conrad, you know that he's brilliant, he's honest, somewhat opinionated, [laughter] but above all else he's a true friend. I'm glad to be here today. [Applause.]

CHIEF JUSTICE YOUNG: We will now have the portrait presentation by artist Simmie Knox. Mr. Knox will do the unveiling. [Portrait is unveiled.] [Applause.] It's amazing what you can do with paint. [Laughter.] At our last portrait dedication, which was for former Chief Justice Cliff TAYLOR, some of us were joking that these occasions were sort of like wakes except the body was not only present but expected to speak. [Laughter.] And in this case, as in Cliff's, the body is here, and we look forward to hearing what it has to say. I want to say personally that I've always been deeply envious because

not much rhymes with YOUNG that is worth advertising. [Laughter.] Chief Justice CONRAD MALLETT, JR. [Applause.]

JUSTICE MALLET: Mr. Chief Justice, I always wanted to say this, may it please the Court, [laughter] and to all my friends here. I want to thank Mr. Wally Riley of the Michigan Supreme Court Historical Society, my family, and all of my friends gathering here today. Governor Blanchard, Janet, Mike, Alex, thank you. I want to especially thank my wife, Denise; my daughters, Kristan and Lauren; my godmother and my Aunt, Nora; my mother's baby sister, my Aunt Jackie; my cousin Leslie; my wife's Aunt Debra for helping make this great day very, very special. I want to thank all of my friends for gathering here today and many people gathered here are from the DMC and many of them are from the greatest hospital in southeastern Michigan, Sinai-Grace. Can I have my Sinai-Grace people stand up who are here? [Applause.]

And I want to thank the Court as well. I know this day is really only special to the presenters. I myself remember saying to my colleagues, I was always joking and getting in trouble with Mike CAVANAGH, my God, did you see how many people are on the speakers list—this is gonna go on all day. [Laughter.] But in this case I chose wisely, I chose as short as I could, only four. Michael and I have seen other people do it much longer, so I appreciate your patience.

I'm very proud actually at what I'd been able to do on the Supreme Court, and I'm proud that during my time the Court got a couple of things done that frankly still remain today.

I'm more proud of the men and women with whom I served. Justice RILEY, on my first day, and Wally greeted me with warmth and enthusiasm that I had not ex-

pected nor had I earned. Justice [PATRICIA] BOYLE and Justice [CHARLES] LEVIN spent hours tutoring me on the intricacies and fine points of criminal law. And I was privileged, as most of the Court was, to listen to some of the greatest criminal law academic arguments between two of the greatest academic legal minds that the Michigan Supreme Court has ever known. And that's not something that I say, that's something that is said by the people who disagreed with almost everything that each of them, respectively, wrote. I remember with great fondness the great judge, Justice BRICKLEY. His common sense and uncommon humanity made the Court better. His deep sense of fair play and his long prior history of prior public service caused me especially to pay attention to the things that he said and the things that he wrote. For many reasons, when I was on the Court I felt a special kinship to Justice CAVANAGH. My father was one of his brother Jerry [Cavanagh]'s first mayoral appointments, and I was pleased with him to share a really brief moment in Detroit's history in our own little small version of Camelot. I was privileged to watch Justice CAVANAGH and Justice RILEY serve as chief, and I modeled my tenure, quite frankly, after theirs. I served with Justice [MARILYN] KELLY, Justice TAYLOR, Justice [ELIZABETH] WEAVER. Justice KELLY is here today, and I'm honored by her presence. All three of these Court members, two of them former, are my friends whose work on the Court I respect, whose work on behalf of the people of the state of Michigan has always been honorable. I am pleased to count them as colleagues.

God has blessed me many, many, many times over. My time on the Court was a heaven-sent gift for which I will always be grateful. And I want to thank all of you for your gift of friendship, of your time today, and for your

attention. For all of that, for this day, I am grateful. Chief Justice thank you. [Applause.]

CHIEF JUSTICE YOUNG: Thank you very much. On behalf of the Michigan Supreme Court I am pleased to accept this portrait of Chief Justice MALLETT. Alexis de Tocqueville once said that history is a gallery of pictures in which there are few originals and many copies. Today the Supreme Court adds a true original to the gallery, not only the artwork but the Justice it depicts. Thank you very much. We are adjourned.

SUPREME COURT CASES

PEOPLE v EVANS

Docket No. 141381. Argued October 4, 2011 (Calendar No. 1). Decided March 26, 2012. Reversed, 568 US ___; 133 S Ct 1609. Vacated, 493 Mich 959.

Lamar Evans was charged in the Wayne Circuit Court with burning other real property, MCL 750.73. At the close of the prosecution's proofs, the court, Deborah A. Thomas, J., granted defendant's motion for a directed verdict and dismissed the case on the ground that the prosecution had failed to produce evidence to establish that the building burned was not a dwelling house. The prosecution appealed, contending that it was not required to prove that the burned building was not a dwelling house to establish that defendant had violated MCL 750.73. The Court of Appeals, CAVANAGH, P.J., and O'CONNELL and WILDER, JJ., reversed and remanded the case, holding that the trial court had erred by ruling that the prosecution was required to prove that the burned building was not a dwelling house. The Court of Appeals further held that the directed verdict did not constitute an acquittal for double-jeopardy purposes because the trial court had not addressed any of the elements that actually must be satisfied to establish the offense of burning other real property. 288 Mich App 410 (2010). The Supreme Court granted defendant's application for leave to appeal. 488 Mich 924 (2010).

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

A trial court's grant of a defendant's motion for a directed verdict on the basis of an error of law that did not resolve any factual element of the charged offense does not constitute an acquittal for the purposes of double jeopardy.

1. The United States and Michigan Constitutions protect a person from being placed in jeopardy twice for the same offense in order to prevent the state from making repeated attempts at convicting an individual for an alleged crime. This prohibition provides related protections against a second prosecution for the same offense after acquittal, second prosecution for the same offense after conviction, and multiple punishments for the same offense. An acquittal for double-jeopardy purposes is a trial court

ruling that actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged.

2. The United States Supreme Court has determined that an acquittal bars retrial even if the acquittal was based on an erroneous evidentiary ruling that precluded the prosecution from introducing evidence that would have been sufficient to convict the defendant, but it has not directly considered whether an acquittal based on insufficient evidence bars retrial if the trial court erroneously added an extraneous element to the charge. Although the Michigan Supreme Court indicated in *People v Nix*, 453 Mich 619 (1996), that retrial would be barred in this situation, it did so in nonbinding obiter dicta, and its decision to apply the *Nix* rule in *People v Szalma*, 487 Mich 708 (2010), without considering whether *Nix* was correctly decided was necessitated by the fact that the prosecution in *Szalma* had conceded the underlying erroneous statement of the elements at trial.

3. Defendant's retrial is not barred because the trial court's ruling dismissing the case did not constitute an acquittal for the purposes of double jeopardy. The trial court granted defendant's motion for a directed verdict under MCR 6.419(A) because the prosecution had failed to provide evidence that the burned house was not a dwelling, which is not an element of the crime with which defendant was charged, burning other real property. Whether a directed verdict constitutes an acquittal for double-jeopardy purposes is not determined by the trial court's characterization of its ruling or by the form of the action but by whether the ruling actually represented a resolution, correct or not, of some or all of the factual elements of the offense charged. The trial court did not resolve or even address any factual element necessary to establish a conviction for burning other real property; rather, the substance of the ruling was entirely focused on the extraneous element. Consequently, the trial court's decision was based on an error of law unrelated to defendant's guilt or innocence on the elements of the charged offense and the trial court's dismissal of the charge did not constitute an acquittal.

Affirmed and remanded for further proceedings.

Justice CAVANAGH, joined by Justice MARILYN KELLY, dissenting, would have reversed, stating that the majority had effectively overruled *Nix*—which was founded on the United States Supreme Court's well-established rule that the bar on reviewing acquittal verdicts attaches even to preverdict acquittals that are based on egregiously erroneous legal rulings—without a persuasive explanation. Creating a distinction between improperly adding an

element to an offense, as in this case, and misconstruing an actual element of a statute elevates form over substance.

Justice HATHAWAY, dissenting, disagreed with the majority's distinction between a trial court's erroneous ruling related to a required element of an offense and a trial court's erroneous ruling related to a mistakenly added element of an offense and would have reversed because *Nix* was controlling precedent.

CONSTITUTIONAL LAW — DOUBLE JEOPARDY — ACQUITTALS BASED ON LEGAL ERROR — EXTRANEOUS ELEMENTS.

An acquittal for double-jeopardy purposes is a ruling of the judge that actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged; a trial court's grant of a defendant's motion for a directed verdict on the basis of an error of law that did not resolve any factual element of the charged offense, including an erroneous determination of what elements constitute the charged offense, does not constitute an acquittal for the purposes of double jeopardy; the contrary holding in *People v Nix*, 453 Mich 619 (1996), was incorrect and is nonbinding obiter dicta.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Kym L. Worthy*, Prosecuting Attorney, and *Timothy A. Baughman*, Chief of Research, Training and Appeals, for the people.

Jonathan B.D. Simon for defendant.

ZAHRA, J. This case presents the question whether the Double Jeopardy Clauses of the state and federal constitutions bar defendant's retrial. Defendant was accused of burning a vacant house and charged on that basis with burning other real property in violation of MCL 750.73. There is no dispute that the trial court wrongly added an extraneous element to the statute under which defendant was charged. Specifically, the trial court ruled that the prosecution was required to present proof that the burned house was not a dwelling, which is not a required element of MCL 750.73. As a result of the trial court's erroneous addition of this

extraneous element to the charged offense, it granted defendant's motion for a directed verdict and entered an order of acquittal, dismissing the case. We hold that when a trial court grants a defendant's motion for a directed verdict on the basis of an error of law that did not resolve any factual element of the charged offense, the trial court's ruling does not constitute an acquittal for the purposes of double jeopardy and retrial is therefore not barred. Accordingly, because the trial court's actions did not constitute an acquittal for the purposes of double jeopardy, we affirm the judgment of the Court of Appeals and remand the case for further proceedings not inconsistent with this opinion.

I. FACTS AND PROCEDURAL HISTORY

Defendant, Lamar Evans, was charged with burning other real property, MCL 750.73,[1] for starting a fire in a vacant house. At trial, two Detroit police officers testified that while on routine patrol on September 22, 2008, they observed a house on fire at 9608 Meyers Street and investigated. After hearing an explosion at the burning house, the officers observed defendant running away from the side of the house with a gasoline can. Officer Jermaine Owens got out of the patrol car and told defendant to stop. When defendant continued to run, Officer Owens chased defendant on foot. Defendant dropped the gasoline can during the chase, and Officer Owens caught defendant after he tripped and fell. Officer Cyril Davis, who had initially joined the chase

[1] MCL 750.73 provides:

> Any person who wilfully or maliciously burns any building or other real property, or the contents thereof, other than those specified in the next preceding section of this chapter, the property of himself or another, shall be guilty of a felony, punishable by imprisonment in the state prison for not more than 10 years.

on foot, returned to the patrol car and drove it to where Officer Owens had detained defendant. The officers testified that defendant told them he had made a mistake and burned down the house.

An arson investigator from the Detroit Fire Department, Lieutenant Christopher Smith, determined that the burn patterns in the house indicated the use of ignitable liquid accelerants. Further testing showed that gasoline had been poured in the kitchen, dining room, and a bedroom. As a result, Smith concluded that the fire was arson. No one was living in the house at the time of the fire, and the house lacked gas, electricity, and water service. The homeowner testified that he was in the process of purchasing the house, which needed repairs, and that he and his family had begun moving their belongings into the house.

Upon the close of the prosecution's proofs, defense counsel moved for a directed verdict under MCR 6.419(A),[2] arguing that the prosecution had failed to prove that the burned building was not a dwelling house. Defense counsel argued that the jury instructions indicated that a necessary element of the burning of other real property is that the building was *not* a dwelling, while the prosecution's evidence reflected only that it *was* a dwelling. The prosecutor argued that nothing in MCL 750.73 required proof that the building

[2] MCR 6.419(A) provides:

> After the prosecutor has rested the prosecution's case-in-chief and before the defendant presents proofs, the court on its own initiative may, or on the defendant's motion must, direct a verdict of acquittal on any charged offense as to which the evidence is insufficient to support conviction. The court may not reserve decision on the defendant's motion. If the defendant's motion is made after the defendant presents proofs, the court may reserve decision on the motion, submit the case to the jury, and decide the motion before or after the jury has completed its deliberations.

was not a dwelling. The prosecutor also argued that it was unnecessary to read the instructions for the element that the building was not a dwelling and that the jury instructions are only a guide. The trial court then made the following ruling:

> *The Court*: The Court does not have an option of not reading all of the required elements in a jury instruction, and there are no optional elements in [CJI2d] 31.3. All of them are required. And the instructions are not a guide. They are what is required by law.[3]
>
> Looking at the commentary, it refers to a distinction between [CJI2d] 31.2 and 31.3. [CJI2d] 31.2 is the instruction that is required for burning [a] dwelling house.
>
> The commentary, speaking of CJI 2nd 31.1 [sic, 31.3], Burning Other Real Property, the commentary: "This offense is similar to the one described in CJI 2nd 31.2, except that an essential element is that the structure burned is not"—which is in italicized writing print—"a dwelling house." And then it cites People v Antonelli, A-n-t-o-n-e-l-l-i, 64 Mich App 620, 238 NW 2nd 363 [1975], and notes that it was reversed on other grounds, and gives the citation as 66 Mich App 138, 238 NW 2nd 551 (1975).
>
> And the commentary goes on to say: "As the Court explained on rehearing, common law arson required that the building be a dwelling. In creating the less serious crime of burning buildings other than dwellings, the legis-

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[3] Contrary to the assertion of the trial court, the Michigan Criminal Jury Instructions are not binding on trial courts. These instructions are offered merely to assist a trial court in executing its duty to instruct on the law. See *People v Petrella*, 424 Mich 221, 277; 380 NW2d 11 (1985). As we will discuss, the trial court ignored a use note in the instructions indicating that it was not appropriate to require proof that the building was not a dwelling unless instructing on the crime of burning other property as a lesser included offense of burning a building. Notwithstanding its failure to properly apply the use note, when there is the potential for inconsistency between a proposed instruction and the applicable law, the trial court had not only the right, but the obligation to reject or modify the instruction to bring it into conformity with the law.

lature simply eliminated the element of habitation. Other real property is all real property not included in MCL 750.72."

And the People in this case have relied on MCL 750.73, which specifically says it cannot be a dwelling.

[*Prosecutor*]: Judge, could I have a moment to go upstairs and pull the statute and make sure that the statute addressed that. Because my understanding of the law is that it doesn't matter whether it's a dwelling or not, it just has to be a structure. And that's the reason for the—

The Court: Other than a house, because the legislature has imposed a higher penalty for one burning a house.

[MCL] 750.73 reads: "Burning of Other Real Property – Any person who willfully or maliciously burns any building or other real property, or the contents thereof, other than those specified in the next preceding section of this chapter, the property of himself or another, shall be guilty of a felony . . . [.]" I won't give the term of punishment.

And it says: "Other than those specified in the next preceding." Isn't preceding before? The next preceding section of this chapter would be [MCL] 750.72. [MCL] 750.72 is entitled "Burning Dwelling House," and reads: "Any person who willfully or maliciously burns any dwelling house, either occupied or unoccupied, or the contents thereof, whether owned by him or another, or any building within the curtilage of such dwelling house, or the contents thereof, shall be guilty of a felony." I will not read the term of punishment, but it is twice that which is specified in [MCL] 750.73.

So reading the language of [MCL] 750.73, which refers back to [MCL] 750.72, a dwelling house, either occupied or unoccupied, is excluded by law.

[*Prosecutor*]: Judge, may I have a moment to go upstairs and consult with my supervisors?

The Court: You can consult with them when you tell them I've granted the motion.

[*Defense Counsel*]: Thank you, Judge.

The Court: As a matter of law.

The testimony was this was a dwelling house, paid for for [sic] forty-some-odd thousand dollars. That the folks had moved some stuff into it, even though it doesn't matter.

Motion granted.

The prosecution appealed, and in an authored opinion, the Court of Appeals reversed the trial court's order granting defendant's motion for a directed verdict and remanded for further proceedings.[4] The panel stated that it was undisputed that the trial court had erred by concluding that the prosecution was required to prove that the burned building was not a dwelling to convict defendant of burning other real property.[5] The panel took note of this Court's statement in *People v Nix*, 453 Mich 619; 556 NW2d 866 (1996), that retrial is barred when the trial court grants a directed verdict of acquittal even when the trial court is " 'wrong with respect to whether a particular factor is an element of the charged offense.' "[6] Nonetheless, the panel characterized that statement as dicta because "the majority in *Nix* . . . acknowledg[ed] that it was unclear whether the situation that concerned the dissent, that dismissal of the case was premised on the prosecution's failure to establish a nonelement of an offense, had even occurred."[7]

The panel then considered the dissenting opinion in *Nix*, finding it persuasive to support its holding that "an actual acquittal occurs, for double jeopardy purposes, 'only when the trial court's action, whatever its form, is a resolution in the defendant's favor, correct or not, of a

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[4] *People v Evans*, 288 Mich App 410, 411; 794 NW2d 848 (2010).

[5] *Id*. at 416-417.

[6] *Evans*, 288 Mich App at 418, quoting *Nix*, 453 Mich at 628.

[7] *Evans*, 288 Mich App at 419.

factual element necessary for a criminal conviction.' "[8] Applying this holding, the panel concluded that double-jeopardy principles did not bar retrial because the trial court had not resolved a factual element necessary to establish a conviction.[9] Rather, the trial court had based its directed verdict solely on the prosecution's failure to present any evidence establishing that the burned building was not a dwelling, which was not an element of the charged offense.[10]

Defendant applied for leave to appeal in this Court, and we granted leave to address "whether [defendant's] retrial is barred under the double jeopardy clauses of the state and federal constitutions where the trial court's grant of defendant's motion for a directed verdict was based on an error of law and did not determine any actual element of the charged offense."[11]

II. STANDARD OF REVIEW

Defendant's claim that the double-jeopardy provisions of the United States and Michigan Constitutions bar his retrial is reviewed de novo.[12]

III. ANALYSIS

The United States and Michigan Constitutions protect a person from being twice placed in jeopardy for the same offense[13] in order "to prevent the state from

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[8] *Id*. at 421-422, quoting *Nix*, 453 Mich at 634-635 (BOYLE, J., dissenting).

[9] *Evans*, 288 Mich App at 423.

[10] *Id*.

[11] *People v Evans*, 488 Mich 924 (2010).

[12] *People v Szalma*, 487 Mich 708, 715; 790 NW2d 662 (2010).

[13] US Const, Am V (protecting a criminal defendant from "be[ing] subject for the same offence to be twice put in jeopardy of life or limb");

making repeated attempts at convicting an individual for an alleged crime."[14] "[T]he double jeopardy prohibition 'is not against being twice punished, but against being twice put in jeopardy; and the accused, whether convicted or acquitted, is equally put in jeopardy at the first trial.' "[15] In addition, this prohibition provides related protections against a second prosecution for the same offense after acquittal, second prosecution for the same offense after conviction, and multiple punishments for the same offense.[16] The protection against a second prosecution for the same offense after an acquittal is at issue here.[17] In considering whether retrying defendant would violate this protection, we must examine whether the trial court's ruling constituted an acquittal for the purposes of double jeopardy.

The United States Supreme Court set forth the stan-

Const 1963, art 1, § 15 ("No person shall be subject for the same offense to be twice put in jeopardy."). The Michigan Constitution's double-jeopardy provision is construed consistently with the Double Jeopardy Clause in the Fifth Amendment of the United States Constitution. *Szalma*, 487 Mich at 716.

[14] *People v Torres*, 452 Mich 43, 63; 549 NW2d 540 (1996), citing *People v Dawson*, 431 Mich 234, 250; 427 NW2d 886 (1988).

[15] *Szalma*, 487 Mich at 717, quoting *Ball v United States*, 163 US 662, 669; 16 S Ct 1192; 41 L Ed 300 (1896); see also *United States v Martin Linen Supply Co*, 430 US 564, 571; 97 S Ct 1349; 51 L Ed 2d 642 (1977) (characterizing this statement as "[p]erhaps the most fundamental rule in the history of double jeopardy jurisprudence").

[16] *People v Nutt*, 469 Mich 565, 574-575; 677 NW2d 1 (2004).

[17] In *Torres*, 452 Mich at 64, and *Dawson*, 431 Mich at 251, this Court quoted the oft-cited rationale behind double-jeopardy protections from *Green v United States*, 355 US 184, 187-188; 78 S Ct 221; 2 L Ed 2d 199 (1957), which stated:

> [T]he 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.

dard for what constitutes an acquittal for the purposes of double jeopardy in *United States v Martin Linen Supply Co* 430 US 564, 571; 97 S Ct 1349; 51 L Ed 2d 642 (1977). The Court considered the effect of a verdict of acquittal entered pursuant to Rule 29(c) of the Federal Rules of Criminal Procedure once the jury had been discharged after being unable to reach a verdict.[18] It held that "what constitutes an 'acquittal' is not to be controlled by the form of the judge's action."[19] Rather, an acquittal for the purposes of double jeopardy is defined as a "ruling of the judge, whatever its label, [that] actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged."[20] Applying this definition, the Court concluded that the trial court's ruling constituted an acquittal for the purposes of double jeopardy because the trial court had evaluated all of the prosecution's evidence and determined that it was insufficient to sustain a conviction.[21]

Further, an acquittal, defined in *Martin Linen* as a resolution of the elements of the charged offense, "remains a bar to retrial even if it is 'based upon an egregiously erroneous foundation.' "[22] Consistently with the idea that an acquittal can occur in some

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[18] *Martin Linen*, 430 US at 565-567. The standard for granting a motion for acquittal is set forth in the subrule governing acquittal motions made before a case is submitted to a jury, FR Crim P 29(a), which authorized a judgment of acquittal "if the evidence is insufficient to sustain a conviction of such offense or offenses."

[19] *Martin Linen*, 430 US at 571.

[20] *Id*.

[21] The Court pointed out that "[i]n entering the judgments of acquittal, the [trial] court also recorded its view that 'the Government has failed to prove the material allegations beyond a reasonable doubt' and that 'defendant should be found not guilty.' " *Id*. at 572 (citation and quotation marks omitted).

[22] *Szalma*, 487 Mich at 717, quoting *Fong Foo v United States*, 369 US 141, 143; 82 S Ct 671; 7 L Ed 2d 629 (1962).

circumstances when the trial court errs, the United States Supreme Court has determined "that an acquittal is final even if it is based on an erroneous evidentiary ruling that precluded the prosecution from introducing evidence that would have been sufficient to convict the defendant."[23]

As noted in *People v Szalma*, the United States Supreme Court has not directly considered the related question at issue here regarding whether a trial court's acquittal on a criminal charge based on insufficient evidence bars retrial if the trial court erroneously added an extraneous element to the charge.[24] In reaching the conclusion that the United States Supreme Court has not directly addressed this issue, we believe that *Szalma* persuasively distinguished the relevant decisions from that Court: *Arizona v Rumsey*, 467 US 203; 104 S Ct 2305; 81 L Ed 2d 164 (1984), *Smalis v Pennsylvania*, 476 US 140; 106 S Ct 1745; 90 L Ed 2d 116 (1986), and *Smith v Massachusetts*, 543 US 462; 125 S Ct 1129; 160 L Ed 2d 914 (2005).[25]

In *Rumsey*, the trial court considered whether there was evidence of the statutory aggravating factors that permit a jury to decide whether the death penalty is warranted. The aggravating factor at issue was whether a murder occurred " 'as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value.' "[26] As *Szalma* explained, the trial court had "erroneously ruled that this aggravating circumstance only involved murders for hire, rather than *any* murder occurring during the course of a robbery, as the Arizona

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[23] *Szalma*, 487 Mich at 717-718, citing *Sanabria v United States*, 437 US 54, 68-69; 98 S Ct 2170; 57 L Ed 2d 43 (1978) (emphasis omitted).

[24] *Szalma*, 487 Mich at 718.

[25] *Id*. at 718 n 21.

[26] *Id*. at 205, quoting Ariz Rev Stat Ann 13-703(F)(5).

Supreme Court had interpreted the statute."[27] The United States Supreme Court concluded "that the trial court's decision operated as a verdict on whether defendant was eligible for the death penalty, and that therefore, defendant could not subsequently be placed in jeopardy of death for the same offense, notwithstanding the trial court's 'misconstruction of the statute defining the pecuniary gain aggravating circumstance.' "[28]

Szalma also addressed *Smalis*, in which the United States Supreme Court considered "whether a trial court's granting of a 'demurrer' within the commonwealth of Pennsylvania's rules of criminal procedure involved an acquittal for double jeopardy purposes."[29] The Pennsylvania Supreme Court had held that it was not, reasoning that in deciding whether to grant a demurrer, the trial court was not required to determine a defendant's guilt, but only "whether the evidence, if credited by the jury, [was] legally sufficient to warrant the conclusion that the defendant is guilty beyond a reasonable doubt."[30] The United States Supreme Court reversed, holding that such a ruling constituted an acquittal for double-jeopardy purposes despite "an alleged error that the trial court committed in interpreting the 'recklessness' element of Pennsylvania's third-degree murder statute."[31]

In *Smith*, the trial court granted an acquittal on a firearm charge on the basis of its determination that there was no evidence for the element included in the statute governing unlawful possession of a firearm that the barrel

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[27] *Szalma*, 487 Mich at 719 n 21.

[28] *Id*., quoting *Rumsey*, 467 US at 211.

[29] *Szalma*, 487 Mich at 719 n 21, citing *Smalis*, 476 US 140.

[30] *Smalis*, 476 US at 143 (citation omitted).

[31] *Szalma*, 487 Mich at 719 n 21, citing *Smalis*, 476 US at 144 n 7.

length of the gun possessed was less than 16 inches.[32] After trial continued on the remaining charges, the trial court reversed its ruling when the prosecutor identified precedent under which the victim's testimony about the kind of gun sufficed to establish that the barrel was shorter than 16 inches.[33] Despite the trial court's initial error regarding what evidence could prove the barrel-length element, the United States Supreme Court held that this initial ruling "meets the definition of acquittal that our double-jeopardy cases have consistently used: It 'actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged.' "[34]

Reviewing *Rumsey*, *Smalis*, and *Smith*, we agree with the reasoning in *Szalma* that each of these cases involves evidentiary errors regarding the proof needed to establish a factual element of the respective crimes at issue.[35] Specifically, in *Rumsey*, the trial court's error concerned "not *whether* a particular aggravating circumstance [i.e., element] existed to allow a jury to impose a death penalty for first-degree murder, but *how the prosecutor must prove the occurrence of that circumstance in a particular case*."[36] Similarly, in *Smalis*, the trial court's alleged error concerned *how* to prove the recklessness element, not *whether* the recklessness element existed.[37] Additionally, in *Smith*, the trial court's error regarded "not *whether* a particular element to the crime" of unlawful possession of a firearm "existed, but rather *what evidence could prove that element*."[38]

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[32] *Smith*, 543 US at 464-465.

[33] *Id*. at 465.

[34] *Id*. at 468, quoting *Martin Linen*, 430 US at 571.

[35] *Szalma*, 487 Mich at 718 n 21.

[36] *Id*. at 719 n 21.

[37] See *id*.

[38] *Id*. at 718 n 21.

Following *Martin Linen*, these decisions establish that when a trial court makes an error regarding the sufficiency of the evidence to satisfy a factual element or elements of the charged offense, that resolution nonetheless constitutes an acquittal for the purposes of double jeopardy. As we discuss, the principles behind the prohibition against double jeopardy and the definition of acquittal set forth in *Martin Linen* support the proposition that a constitutionally meaningful difference exists between this case, in which the trial court identified an extraneous element and dismissed the case solely on that basis, and *Rumsey*, *Smalis*, and *Smith*, in which the trial courts made evidentiary errors regarding how to prove the governing law. Accordingly, these decisions do not implicate the case at hand because the trial court's error here resulted in a dismissal without a resolution regarding the sufficiency of the factual elements of the charged offense.[39]

Although the United States Supreme Court has not directly considered the question presented here, this Court has dealt with this issue before in *Nix* and *Szalma*.[40] *Nix* considered, for the purposes of double jeopardy, the effect of the trial court's ruling that the defendant "could not be convicted of either [first-degree premeditated murder or first-degree felony-murder] as a matter of law" because the defendant " 'owed no legal

[39] We admit that, as in this case, the "acquittals" in *Rumsey*, *Smalis*, and *Smith* were based on the prosecution's failure to prove something that the law did not actually require it to prove. Acknowledging this similarity does not change the analysis, however, because the key distinction between those cases and the instant appeal remains: the trial courts in *Rumsey*, *Smalis*, and *Smith* resolved one of the factual elements of the crime charged, while the trial court in this case added an element and then found it unsupported by evidence in the record.

[40] See *Szalma*, 487 Mich at 718.

duty to the victim . . . .' "[41] In responding to the dissent, *Nix* stated:

> The dissent appears to read the *Martin Linen* standard as if the phrase "correct or not" refers to the factual truth of the prosecution's evidence, a determination completely outside the trial court's purview in a jury trial when considering a defendant's motion for directed verdict. When ruling on a motion for directed verdict, a trial court must, as this trial court did, view the prosecution's evidence in the light most favorable to the prosecution. Accordingly, the trial court cannot make an erroneous factual resolution. The phrase "correct or not" refers to all aspects of the trial court's ultimate legal decision, including even cases where the trial court is factually wrong with respect to whether a particular factor is an element of the charged offense. As discussed below, however, it is not clear that this situation even exists in the case at bar.[42]

These statements do not control the outcome here because they are nonbinding obiter dicta.[43] The quotation from *Nix* explicitly stated that it was "not clear that this situation"—i.e., one in which "the trial court [was] factually wrong with respect to whether a particular factor is an element of the charged offense"—had even occurred."[44] Rather, *Nix* reflected the conclusion that the trial court had not erred on its view of

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[41] *Nix*, 453 Mich at 622. The victim in *Nix* died after the defendant's boyfriend kidnapped the victim and locked her in her own trunk. *Id*. at 621. Specifically, "[t]he victim died six days later of dehydration and methanol poisoning, before which time, the prosecution alleged, the defendant was told of the victim's screams coming from the trunk." *Szalma*, 487 Mich at 720 n 23, citing *Nix*, 453 Mich at 630.

[42] *Nix*, 453 Mich at 628.

[43] "Obiter dicta are not binding precedent. Instead, they are statements that are unnecessary to determine the case at hand and, thus, lack the force of an adjudication." *People v Peltola*, 489 Mich 174, 190 n 32; 803 NW2d 140 (2011) (citation and quotation marks omitted).

[44] *Nix*, 453 Mich at 628.

what made up the essential elements.[45] Consequently, the quoted observations regarding the definition of acquittal were unnecessary to determine the outcome in *Nix* and do not compel a result in this case.

Further, *Szalma* does not compel treating the pertinent statements in *Nix* as controlling. *Szalma* discussed *Nix* when considering whether a trial court's erroneous legal analysis regarding the sufficiency of the evidence to support a conviction of first-degree criminal sexual conduct constituted an acquittal for the purposes of double jeopardy.[46] Specifically, the trial court in *Szalma* granted the defendant's motion for a directed verdict after erroneously ruling that the fact-finder had to conclude that the defendant committed the assault for a sexual purpose.[47]

We pointed out in *Szalma* that *Nix* barred a retrial of the defendant because, under *Nix*, "an acquittal retains its finality for double jeopardy purposes even when 'the trial court is factually wrong with respect to whether a particular factor is an element of the charged offense.' "[48] We refused to address the prosecution's argu-

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[45] *Id*. at 631. Specifically, the majority asserted that "the dissent's focus on the fact that 'duty' is not a specifically enumerated element of kidnapping is not significant and, under the actual facts presented here, a distinction without a difference." *Id*. In the majority's view, the prosecution's case was entirely predicated on the theory that the defendant, after allegedly learning that the victim was in the trunk, "became complicit in the criminal endeavor when she failed to act to free or otherwise aid the victim." *Id*. This theory necessarily included the idea that the defendant "had a duty to act in some way[.]" *Id*. Thus, the majority took the view that the trial court had not erred in its view regarding the defendant's duty because proving the defendant's duty was necessary to show the *actus reus*, which is an essential element of every crime.

[46] See *Szalma*, 487 Mich at 709-710, 720, 722, 725-726.

[47] *Id*. at 722-723.

[48] *Id*. at 726, quoting *Nix*, 453 Mich at 628.

ment regarding whether *Nix* was correctly decided because the prosecutor at trial had conceded the underlying erroneous statement of the elements.[49] As a result, we reversed the Court of Appeals' judgment and reinstated the trial court's directed verdict of acquittal.[50]

Szalma does not control the instant case because, here, the prosecutor did not concede the underlying legal error at trial. Rather, the prosecutor argued that the charged offense did not include the element that the building was not a dwelling. Accordingly, the prosecution's argument is properly before us. In addition, because we refused in *Szalma* to permit the prosecutor to harbor error at trial and then use that error as an appellate parachute, we could not properly reach the application of *Nix*. In fully considering *Nix* now, we will not ignore the *Nix* majority's conclusion that it was not clear that the situation bringing about its double-jeopardy discussion had even occurred.

In making its ruling in the instant case, the trial court acted under MCR 6.419(A),[51] granting defendant's motion for a directed verdict because the prosecution had failed to provide evidence that the burned house was not a dwelling. The trial court undisputedly misapprehended CJI2d 31.3[52] in its legally erroneous

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[49] *Szalma*, 487 Mich at 725.

[50] *Id*. at 727.

[51] Pursuant to MCR 6.419(A), after the close of the prosecution's case-in-chief, the court "may . . . direct a verdict of acquittal on any charged offense as to which the evidence is insufficient to support conviction."

[52] CJI2d 31.3, Burning Other Real Property, provided before its amendment in September 2009:

> (1) [The defendant is charged with the crime of / You may also consider the lesser charge of] burning a building or any of its contents. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

analysis that added an extraneous element to the charged offense.[53] The trial court's confusion apparently stemmed from its reliance on a jury instruction read when the crime of burning other real property is charged as a lesser included offense of the crime of burning a dwelling.[54] The panel in *People v Antonelli*

> (2) First, that the defendant burned *[describe property alleged]*. The term "burn" in this case means setting fire to or doing anything that results in the starting of a fire, or helping or persuading someone else to set a fire. If any part of the [*describe property*] is burned, [no matter how small,] that is all that is necessary to count as a burning; the property does not have to be completely destroyed. [The *(describe property)* is not burned if it is merely blackened by smoke, but it is burned if it is charred so that any part of it is destroyed.]
>
> (3) Second, that the property that was burned was a building or any of its contents. [It does not matter whether the defendant owned or used the building.]
>
> (4) Third, that when the defendant burned the building or its contents, [he / she] intended to burn the building or contents or intentionally committed an act that created a very high risk of burning the building or contents and that, while committing the act, the defendant knew of that risk and disregarded it.
>
> [(5) Fourth, that the building was not a dwelling house. A dwelling house is a structure that is actually being lived in or that could reasonably be presumed to be capable of being lived in at the time of the fire. (A business that is located very close to and used in connection with a dwelling may be considered to be a dwelling.)]

A use note indicated that ¶ (5) "should be used when instructing on the crime as a lesser included offense of burning a building." An amendment to the instruction in September 2009 removed ¶ (5) and the use note.

[53] The elements of burning of other real property, MCL 750.73, are "(1) the burning of any building or other real property, or the contents thereof, and (2) that the fire was willfully or maliciously set." *People v Greenwood*, 87 Mich App 509, 514 n 1; 274 NW2d 832 (1978).

[54] MCL 750.72, which prohibits the burning of a dwelling, provides:

> Any person who wilfully or maliciously burns any dwelling house, either occupied or unoccupied, or the contents thereof, whether owned by himself or another, or any building within the

(*On Rehearing*) rightly stated, however, that "[t]he necessary elements to prove either offense are the same, except to prove the greater it must be shown that the building is a dwelling; to prove the lesser it is not necessary to prove that the building is not a dwelling."[55] Thus, the trial court wrongly determined that showing that the burned building was not a dwelling is an element of burning other real property.

We agree with the Court of Appeals that defendant's retrial is not barred because the trial court's ruling dismissing the case did not constitute an acquittal for the purposes of double jeopardy. "[T]he trial court's characterization of its ruling is not dispositive, and what constitutes an 'acquittal' is not controlled by the form of the action."[56] Consequently, the trial court's actions pursuant to MCR 6.419(A) and its entry of an order of acquittal do not control. Although these actions take the form of an acquittal, we are concerned with the substance of the trial court's ruling.

Again, an acquittal for double-jeopardy purposes is a "ruling of the judge, whatever its label, [that] actually represents a resolution, correct or not, of some or all of the *factual elements* of the offense charged."[57] The trial court's legal error resulted in its adding an element to the charged offense and requiring the prosecution to provide proof of that extraneous element. As the Court of Appeals concluded, the trial court did not resolve or even address any factual element necessary to establish

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curtilage of such dwelling house, or the contents thereof, shall be guilty of a felony, punishable by imprisonment in the state prison not more than 20 years.

[55] *People v Antonelli (On Rehearing)*, 66 Mich App 138, 140; 238 NW2d 551 (1975).

[56] *People v Mehall*, 454 Mich 1, 5; 557 NW2d 110 (1997).

[57] *Martin Linen*, 430 US at 571 (emphasis added).

a conviction for burning other real property. Rather, the substance of the trial court's ruling was entirely focused on the extraneous element. Consequently, the trial court's decision was based on an error of law unrelated to defendant's guilt or innocence on the elements of the charged offense, and thus the trial court's dismissal of the charge did not constitute an acquittal.[58]

Nix misconstrued the definition of acquittal in *Martin Linen*, stating that "on a motion for directed verdict, a trial court must, as this trial court did, view the prosecution's evidence in the light most favorable to the prosecution. Accordingly, the trial court cannot make an erroneous factual resolution."[59] As the prosecution argues, however, a trial court certainly can make an erroneous factual resolution in ruling on a motion for a directed verdict. The trial court can do so, for instance, when it forgets about evidence or does not realize that certain evidence can satisfy a factual element. This is what took place in *Smith v Massachusetts*, discussed earlier, when the trial court failed to realize that testimony that the defendant appeared to have a .32 or .38 caliber revolver was sufficient to establish that the factual element that the barrel of the gun was shorter than 16 inches.[60] This incorrect resolution of a factual element in *Smith* constituted an acquittal for the purposes of double jeopardy.

From this faulty presumption that a trial court cannot make an erroneous factual resolution, *Nix* wrongly observed that the phrase "correct or not" from

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[58] Accord *United States v Maker*, 751 F2d 614, 622 (CA 3, 1984) (holding that a judicial ruling is an acquittal "only when, in terminating the proceeding, the trial court actually resolves in favor of the defendant a factual element necessary for a criminal conviction").

[59] *Nix*, 453 Mich at 628.

[60] *Smith*, 543 US at 465.

Martin Linen's definition of acquittal "refers to all aspects of the trial court's ultimate legal decision, including even cases where the trial court is factually wrong with respect to whether a particular factor is an element of the charged offense."[61] A court cannot, however, be factually wrong regarding what makes up the elements of the crime because an erroneous determination of what constitutes the elements of an offense is a legal error, not a factual one.[62]

Instead, the definition of acquittal in *Martin Linen* and the phrase "correct or not" means that it is of no consequence for the purposes of double jeopardy whether the trial court's resolution of the *factual elements* is correct. Nonetheless, this resolution must be based on at least some of the factual elements of the charged crime. By adding an extraneous element—that the prosecution needed to prove that the burned building was not a dwelling—the trial court's legal error did not involve a resolution of any of the factual elements of the charged offense, and thus its ruling does not fall within the definition of acquittal for the purposes of double jeopardy.

We further conclude that the distinction we have drawn from the relevant United States Supreme Court decisions is reasonable and constitutionally grounded. Rather than uniformly determine that any instance in which a trial court enters an order of acquittal definitively bars retrial, the United States Supreme Court

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[61] *Nix*, 453 Mich at 628.

[62] See *United States v Boyle*, 469 US 241, 249 n 8; 105 S Ct 687, 83 L Ed 2d 622 (1985) ("Whether the elements that constitute "reasonable cause" are *present* in a given situation is a question of fact, but what elements *must* be present to constitute "reasonable cause" is a question of law."); *People v Holtschlag*, 471 Mich 1, 4; 684 NW2d 730 (2004) ("Determining the elements of common-law involuntary manslaughter is a question of law.").

has opted to consistently apply the definition of acquittal from *Martin Linen*.[63] By doing so the Court has determined that the labels the trial court used are not controlling and that a resolution must be on the factual elements to constitute an acquittal. But the line, once crossed, triggers double-jeopardy protections regardless of the correctness of the trial court's decision.[64]

We believe that the application of the definition of acquittal reflects a balancing of the public's interest in having one full and fair opportunity to prosecute a

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[63] See *Smith*, 543 US at 467-468.

[64] We recognize that the United States Supreme Court has stated that " '[t]he fact that the acquittal may result from erroneous evidentiary rulings or erroneous interpretations of governing legal principles . . . affects the accuracy of that determination but it does not alter its essential character,' " *Smalis*, 476 US at 144 n 7, quoting *United States v Scott*, 437 US 82, 98; 98 S Ct 2187; 57 L Ed 2d 65 (1978), and that "any contention that the Double Jeopardy Clause must itself . . . leave open a way of correcting legal errors is at odds with the well-established rule that the bar will attach to a preverdict acquittal that is patently wrong in law," *Smith*, 543 US at 473. But we disagree with Justice CAVANAGH that our position "diminishes" or "minimizes" these statements because they have no effect on our distinction between an evidentiary error regarding the proof necessary to establish a factual element and the effect of a legal error in which an extraneous element is added to the charged offense. *Post* at 26, 32. Furthermore, these statements are not inconsistent with our view of the case at hand because they are necessarily made within the framework of the definition of acquittal established in *Martin Linen* and the United States Supreme Court has not cast doubt on the viability of that definition. Additionally, it is clear that this case does not involve an erroneous evidentiary ruling or an erroneous interpretation of governing legal principles. The trial court, rather than rightly or wrongly interpreting the governing legal principles, opted to invent a governing principle, terminating the trial on a ground unrelated to defendant's factual guilt or innocence. The statement from *Smith* is similarly inapplicable because it was made after the Court had already concluded that an acquittal had occurred. We do not assert that the Double Jeopardy Clause is the avenue for correcting the trial court's error. Instead, because an "acquittal" did not occur, the prohibition against double jeopardy is not implicated.

criminal case[65] and the interest in protecting a criminal defendant from being subjected "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."[66] When considering the application of this definition and the weighing of these interests, it is reasonable to treat differently cases in which the resolution was based on the prosecution's failure to prove something that the law, properly understood, did not require it to prove. Doing so depends on whether the trial court actually considered the factual elements of the charged offense. A resolution of the factual elements, even if erroneous, crosses the established bright line. But a court's adding an extraneous element and resolving the case solely on the basis of that added element prevents any evaluation of the charged crime on the merits and thus completely thwarts society's interest in allowing the prosecution one full and fair opportunity to present its case.[67]

Therefore, barring retrial is inappropriate in a case such as this. Because of the trial court's legal error, no

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[65] See *Scott*, 437 US at 100.

[66] *Green*, 355 US at 187-188.

[67] See *Maker*, 751 F2d at 624, which stated:

> Our conclusion that an appeal is not barred in this case is consistent with the policies underlying the double jeopardy clause. This is not a case in which a second trial is permitted "for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding." *Burks v. United States*, 437 U.S. 1, 11, 98 S.Ct. 2141, 2149, 57 L.Ed.2d 1 (1978). Instead, this is a case in which the district court, as the result of a legal error, determined that the government could not prove a fact that is not necessary to support a conviction. To preclude an appeal in this case would deprive the public "of its valued right to 'one complete opportunity to convict those who have violated its laws.' " *Scott*, 437 U.S. at 100, 98 S.Ct. at 2198 (quoting *Arizona v. Washington*, 434 U.S. 497, 509, 98 S.Ct. 824, 832, 54 L.Ed.2d 717 (1975)).

factual elements of the charged offense were considered, and as a result the people have not been afforded the opportunity to have their case reviewed for the sufficiency of the evidence on the factual elements even once. Permitting retrial to allow such an opportunity hardly depicts "an all-powerful state relentlessly pursuing a defendant who had either been found not guilty or who had at least insisted on having the issue of guilt submitted to the first trier of fact."[68] Rather, because the trial court's actions fell outside the definition of acquittal, permitting defendant's retrial does not frustrate the prohibition against double jeopardy.

IV. CONCLUSION

We hold that when a trial court grants a defendant's motion for a directed verdict on the basis of an error of law that did not resolve any factual element of the charged offense, the trial court's ruling does not constitute an acquittal for the purposes of double jeopardy and retrial is therefore not barred. Accordingly, because the trial court's actions here did not constitute an acquittal for the purposes of double jeopardy, we affirm the judgment of the Court of Appeals and remand the case for further proceedings not inconsistent with this opinion.

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

CAVANAGH, J. (*dissenting*). The issue presented in this case was decided more than a decade ago in *People v Nix*, 453 Mich 619; 556 NW2d 866 (1996). In that case,

[68] *Scott*, 437 US at 96; see also *id*. at 98-99 (holding that that retrial is permitted when the defendant elects to terminate the trial on a procedural basis unrelated to the defendant's factual guilt or innocence).

this Court held that an acquittal for purposes of the Double Jeopardy Clauses of the Michigan and United States Constitutions occurs when a trial court evaluates the government's evidence and determines that it is legally insufficient to sustain a conviction, regardless of whether the acquittal was based on an " 'egregiously erroneous foundation,' " *id*. at 630-631 (citation omitted), and including those cases in which the trial court was incorrect regarding whether a particular factor is actually an element of the charged offense, *id.* at 628. Although *Nix* was based on an application of United States Supreme Court precedent and precedent from this Court, today the majority effectively overrules *Nix* and, in doing so, diminishes the United States Supreme Court's directive that "*any contention* that the Double Jeopardy Clause must itself . . . leave open a way of correcting legal errors is at odds with the well-established rule that the bar will attach" even "to a preverdict acquittal that is patently wrong in law." *Smith v Massachusetts*, 543 US 462, 473; 125 S Ct 1129; 160 L Ed 2d 914 (2005) (emphasis added). Because *Nix* is harmonious with established United States Supreme Court precedent, I respectfully dissent from the majority's decision to summarily disregard *Nix*.

I. DOUBLE-JEOPARDY JURISPRUDENCE

It is axiomatic that under both the state and federal constitutions, a defendant may not be twice put in jeopardy for the same offense. US Const, Am V; Const 1963, art 1, § 15. The underlying focus of the Double Jeopardy Clause is on a defendant's exposure to the personal strain, embarrassment, and expense of a criminal trial more than once for the same offense. See *United States v Scott*, 437 US 82, 87; 98 S Ct 2187; 57 L Ed 2d 65 (1978), citing *Green v United States*, 355 US

184, 187-188; 78 S Ct 221; 2 L Ed 2d 199 (1957); *Smalis v Pennsylvania*, 476 US 140, 143 n 4; 106 S Ct 1745; 90 L Ed 2d 116 (1986). Accordingly, the guarantee against double jeopardy " 'protects against a second prosecution for the same offense after acquittal.' " *United States v DiFrancesco*, 449 US 117, 129; 101 S Ct 426; 66 L Ed 2d 328 (1980) (citation omitted). Notably, the United States Supreme Court has explained that " 'the most fundamental rule in the history of double jeopardy jurisprudence' " is that an acquittal " 'may not be reviewed,' " on error or otherwise, " 'without putting the defendant twice in jeopardy . . . .' " *Sanabria v United States*, 437 US 54, 64; 98 S Ct 2170; 57 L Ed 2d 43 (1978), quoting *United States v Martin Linen Supply Co*, 430 US 564, 571; 97 S Ct 1349; 51 L Ed 2d 642 (1977) (citation and quotation marks omitted). Consistent with this notion, an acquittal is "absolute," *People v Anderson*, 409 Mich 474, 483; 295 NW2d 482 (1980), regardless of whether the acquittal is "based on a jury verdict of not guilty or on a ruling by the [trial] court that the evidence is insufficient to convict . . . ." *Scott*, 437 US at 91.[1] The threshold question in these types of

[1] The United States Supreme Court has further elaborated that it has "long held that the Double Jeopardy Clause of the Fifth Amendment prohibits reexamination of a court-decreed acquittal *to the same extent* it prohibits reexamination of an acquittal by jury verdict," regardless of whether the judge's ruling of acquittal comes in a bench trial or a jury trial. *Smith*, 543 US at 467 (emphasis added). The Court also explained that there is a "single exception to the principle that acquittal by judge precludes reexamination of guilt no less than acquittal by jury": the prosecution can appeal to reinstate a jury's verdict of guilty after a "trial judge (or an appellate court) sets aside that verdict and enters a judgment of acquittal . . . ." *Id*. That exception, however, is not applicable in this case. See, also, *DiFrancesco*, 449 US at 130 (stating that the Court "necessarily afford[s] absolute finality to a jury's *verdict* of acquittal—no matter how erroneous its decision") (citation and quotation marks omitted); *Sanabria*, 437 US at 64 n 18 (stating that "[i]t is without constitutional significance that the court entered a judgment of acquittal

cases, then, is whether a trial court's ruling on a defendant's motion for a directed verdict was, in fact, an acquittal. *Smith*, 543 US at 467.

To determine whether an acquittal actually occurred for purposes of a double-jeopardy analysis, a reviewing court must "determine whether the ruling of the judge, whatever its label, actually represents a resolution, *correct or not*, of some or all of the factual elements of the offense charged." *Martin Linen*, 430 US at 571 (emphasis added). As the United States Supreme Court has explained, "what matters is that . . . the [trial] judge 'evaluated the . . . evidence and determined that it was legally insufficient to sustain a conviction.' " *Smith*, 543 US at 469, quoting *Martin Linen*, 430 US at 572. Accordingly, an order entering a finding that the evidence was insufficient to sustain a conviction "meets the definition of acquittal that [the] double-jeopardy cases have consistently used . . . ." *Smith*, 543 US at 468; see, also, *Anderson*, 409 Mich at 486; *Nix*, 453 Mich at 625-627; 630-631.

Notably, the United States Supreme Court has stated that the "fundamental nature" of the rule barring review of a verdict of acquittal is "manifested by its *explicit extension*" to situations in which an acquittal was based on an incorrect foundation. *Sanabria*, 437 US at 64 (emphasis added). On the basis of this extension, when a defendant is acquitted because of a determination that the evidence was insufficient to support a conviction, "there is no exception permitting retrial," *id.* at 75, "even if the legal rulings underlying the acquittal were erroneous," *id.* at 64, and "no matter how 'egregiously erroneous' . . . the legal rulings lead-

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rather than directing the jury to bring in a verdict of acquittal or giving it erroneous instructions that resulted in an acquittal"); cf. *People v Ellis*, 468 Mich 25; 658 NW2d 142 (2003).

ing to that judgment might be," *id*. at 75, quoting *Fong Foo v United States*, 369 US 141, 143; 82 S Ct 671; 7 L Ed 2d 629 (1962); see, also, *Arizona v Rumsey*, 467 US 203, 211; 104 S Ct 2305; 81 L Ed 2d 164 (1984) (explaining that United States Supreme Court precedent establishes that an "acquittal on the merits bars retrial even if based on legal error"). Thus, "[t]he status of the trial court's judgment as an acquittal is not affected" by a trial court's legal error in interpreting governing legal principles: " '[T]he fact that the acquittal may result from erroneous evidentiary rulings *or* erroneous interpretations of governing legal principles . . . affects the accuracy of that determination but it does not alter its essential character.' " *Smalis*, 476 US at 144 n 7 (emphasis added; citation and quotation marks omitted), quoting *Scott*, 437 US at 98, and citing *Sanabria*, 437 US 54, and *Rumsey*, 467 US 203.

In summary, the United States Supreme Court has repeatedly stated that a trial court's "ruling that as a matter of law the State's evidence is insufficient to establish [the defendant's] factual guilt" is a " 'resolution, correct or not, of some or all of the factual elements of the offense charged' " and, therefore, constitutes an acquittal for purposes of the Double Jeopardy Clause. *Smalis*, 476 US at 144 & n 6. Further, that an acquittal was founded on an erroneous legal ruling is irrelevant: the trial court's judgment of acquittal based on a finding of insufficient evidence, however erroneous, bars retrial. See *id.* at 145 n 7; *Rumsey*, 467 US at 211. Although I welcome the majority's decision to embrace policy considerations for the purpose of this appeal, as the United States Supreme Court has explained, "[w]hat may seem superficially to be a disparity in the rules governing a defendant's liability to be tried again is explainable by reference to the underlying purposes of the Double Jeopardy Clause." *Scott*, 437 US

at 91. Specifically, the rule barring retrial after an acquittal is "justified on the ground that, *however mistaken the acquittal may have been*, there would be an unacceptably high risk that the Government, with it superior resources, would wear down a defendant, thereby 'enhancing the possibility that even though innocent he may be found guilty.' " *DiFrancesco*, 449 US at 130 (emphasis added), quoting *Green*, 355 US at 188.

II. *NIX* IS HARMONIOUS WITH ESTABLISHED PRECEDENT

As the foregoing summary illustrates, the principles articulated in *Nix* are both founded on and harmonious with longstanding United States Supreme Court caselaw. See *Nix*, 453 Mich at 624-632; see, also, *People v Szalma*, 487 Mich 708, 727-729; 790 NW2d 662 (2010) (CAVANAGH, J., concurring). Thus, *Nix* was not, as the majority asserts, based on faulty presumptions or misconstructions of United States Supreme Court precedent. Indeed, contrary to the majority's position, it bears repeating that the United States Supreme Court "has never held that a trial court's preverdict acquittal on the merits may be reversed because of a legal error." *Szalma*, 487 Mich at 728 n 1 (CAVANAGH, J., concurring). Instead, as I have noted, the Court has repeatedly stated the opposite, without crafting the distinction that the majority creates today. In fact, the United States Supreme Court recently reaffirmed the principle that the Double Jeopardy Clause does not provide an exception for legal errors, even if the preverdict acquittal was "patently wrong in law." *Smith*, 543 US at 473.

Accordingly, as explained in *Nix*, it is irrelevant for purposes of the Double Jeopardy Clause that an acquittal was founded on an erroneous interpretation of a governing legal principle. *Nix*, 453 Mich at 626-628,

630-631; see, also, *Smalis*, 476 US at 144 n 7. This is so regardless of whether the erroneous interpretation of the governing legal principle is based on an error in interpreting a statutory requirement or, as in this case, an error in determining the actual elements necessary to commit an offense. *Szalma*, 487 Mich at 728 n 2 (CAVANAGH, J., concurring), citing *Rumsey*, 467 US at 211.

Further, it elevates form over substance to make such a distinction, as the majority does today. In my view, *Rumsey* illustrates this point. In that case, a trial court misconstrued a statute defining an aggravating circumstance used for determining whether the death penalty was appropriate. Specifically, the trial court erroneously agreed with the defendant that the statute required the prosecution to prove beyond a reasonable doubt that the murder was a "contract-type" killing, rather than a murder committed during the course of a theft. *Rumsey*, 467 US at 205-207. Because the trial judge found that this aggravating circumstance was not present, the defendant's life was spared. *Id.* at 206. Despite the trial court's error in interpreting the statute, the United States Supreme Court affirmed the Arizona Supreme Court's ruling that the defendant "had effectively been 'acquitted' of death at his initial sentencing," *id.* at 208, holding that, although the trial court had relied on a misconstruction of the statute defining the aggravating circumstance, that error of law was of no avail to the prosecution for purposes of the Double Jeopardy Clause. *Id.* at 211.[2] Although *Rumsey* addressed the

[2] As I have stated before, the error in *Rumsey* was clearly related to the proper interpretation of the statute's requirements, rather than a mere evidentiary error as the majority purports. *Szalma*, 487 Mich at 728 n 2 (CAVANAGH, J., concurring). See, also, *Smalis*, 476 US at 145 n 8 (explaining that *Rumsey* involved "an erroneous construction of the [governing] law"). Further, it bears repeating that "the majority's

proper interpretation of the statute's requirements, as even the majority here concedes, the trial court in *Rumsey* required the prosecution to prove something that it was not otherwise required to prove: that the murder was a contract-type killing.

In my view, creating a distinction between improperly adding an element to an offense and misconstruing an actual element of a statute to require the prosecution to prove something extraneous—both situations in which the trial court, because of a legal error, technically determined that the government could not prove a fact that was not necessary to support a conviction—elevates form over substance. In addition, the majority's distinction minimizes the United States Supreme Court's general directive that the Double Jeopardy Clause does not provide an exception for legal errors, even if the acquittal is "patently wrong in law," *Smith*, 543 US at 473, and "no matter how 'egregiously erroneous' . . . the legal rulings leading to that judgment might be," *Sanabria*, 437 US at 75 (citations omitted).[3]

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discussion of whether the errors in certain cases should be characterized as evidentiary errors is irrelevant because . . . the United States Supreme Court has repeatedly stated" that the Double Jeopardy Clause precludes retrial when there has been an acquittal on the merits "regardless of *either* evidentiary errors *or* erroneous interpretations of governing legal principles." *Szalma*, 487 Mich at 728 n 2 (CAVANAGH, J., concurring).

[3] In light of the United States Supreme Court's broad assertion that "*any contention* that the Double Jeopardy Clause must itself . . . leave open a way of correcting legal errors is at odds with the well-established rule that *the bar will attach to a preverdict acquittal that is patently wrong in law*," *Smith*, 543 US at 473 (emphasis added), I disagree with the majority's assertion that the Court's statement in *Smith* does not apply in this case. See, also, *Sanabria*, 437 US at 64 (stating that the "fundamental nature" of the rule barring review of a verdict of acquittal is "manifested by its *explicit extension to situations where an acquittal is 'based upon an egregiously erroneous foundation*' ") (emphasis added), quoting *Fong Foo*, 369 US at 143. Accord-

Therefore, I disagree with the majority's conclusion that an error in interpreting a statutory requirement should be treated differently from an error in interpreting the elements necessary for an offense: both errors constitute an erroneous interpretation of a governing legal principle, and both errors may involve a situation in which the trial court's decision was "based on the prosecution's failure to prove something that the law, properly understood, did not require it to prove." *Ante* at 24; see, also, *ante* at 24 n 64.[4]

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ingly, the United States Supreme Court has clearly and emphatically stated that the bar to retrial attaches even when the acquittal itself is legally wrong or based on an incorrect foundation, notwithstanding the majority's assertions to the contrary in this case. See *ante* at 23 n 64 (stating that *Smith* does not apply because the Court had already concluded that an acquittal had occurred and asserting that this case does not involve an erroneous interpretation of a governing legal principle because the trial court opted to "invent a governing principle"); see, also, *Smith*, 543 US at 467-468 (stating that an order entering a finding that the evidence was insufficient to sustain a conviction "meets the definition of acquittal that [the] double-jeopardy cases have consistently used: It 'actually represents a resolution, *correct or not*, of some or all of the factual elements of the offense charged.' "), quoting *Martin Linen*, 430 US at 571 (emphasis added); *Smalis*, 476 US at 144 (stating that a "ruling that as a matter of law the State's evidence is insufficient to establish [a defendant's] factual guilt" is an acquittal under the Double Jeopardy Clause); *Anderson*, 409 Mich at 486 (same).

[4] The *Nix* Court is not the only court to hold that it makes no difference for double- jeopardy purposes whether the trial court ruled that there was insufficient evidence related to a required element of the offense or whether there was insufficient evidence related to an erroneously added element. See *Carter v State (On Remand)*, 365 Ark 224, 228-229; 227 SW3d 895 (2006) (holding that, under *Smith*, regardless of a trial court's legal error, the trial court's determination that there was a lack of evidence on the charged offense resulted in an acquittal for double jeopardy purposes and, in so holding, rejecting the state's argument that *Smith* was "distinguishable" because, "unlike in *Smith*, where the trial judge ruled that proof of a *required* element of the charged offense was lacking," in *Carter* "the State was required to prove an *additional* element that the statute [did] not require").

III. *NIX* IS CONTROLLING PRECEDENT

Except for the composition of this Court, little has changed since the aforementioned principles were articulated in *Nix* well over a decade ago. Yet today the majority effectively overrules *Nix* without persuasively explaining why *Nix* and the United States Supreme Court decisions on which *Nix* was based should no longer control.[5] It is therefore clear that the current majority's rationale is simply based on its unstated, yet apparent, preference for the approach advanced by the *Nix* dissent and *United States v Maker*, 751 F2d 614 (CA 3, 1984)—approaches that the *Nix* majority properly rejected as unpersuasive.[6]

Further, I disagree with the majority's implicit conclusion that *Nix*, when viewed in its totality, does not control the outcome of this case. Rather, notwithstanding the majority's apparent conclusion to the contrary, *Nix* addressed the situation presented in this case when it stated that a trial court's determination that the evidence is insufficient to sustain a conviction constitutes an acquittal for double-jeopardy purposes and "precludes appellate inquiry into [the ruling's] legal correctness," *Nix*, 453 Mich at 627, regardless of

[5] This is not the first time that this Court has been asked to reconsider *Nix*. See, e.g., *People v Limmer*, 461 Mich 974 (2000); *People v Robinson*, 470 Mich 874 (2004) (granting leave to appeal to consider whether *Nix* was "properly decided"), vacated 473 Mich 878 (2005). Thus, this Court has had the opportunity to review the aforementioned precedents on at least two other occasions, yet decided not to overrule *Nix*. I would continue this practice of adhering to *Nix* because, as noted, *Nix* is consistent with United States Supreme Court precedent.

[6] Although it is apparent that the majority's opinion is influenced by *Maker*, the majority fails to explain why *Maker* should now govern despite *Nix*'s rejection of it more than a decade ago. Notably, it does not appear that *Maker* even addressed United States Supreme Court precedent, such as *Sanabria*, regarding the effect of legal errors leading to a judgment of acquittal.

"whether 'the acquittal was based upon an egregiously erroneous foundation' . . . or not," *id*. at 631 (citation omitted); see, also, *id.* at 624-627; *Anderson*, 409 Mich at 483, 486. Thus, in my view, the majority errs by failing to consider *Nix* in its totality and, in selectively quoting *Nix*, conveniently turns a blind eye to the doctrine of stare decisis.

Even assuming arguendo that the majority is correct in classifying selected portions of *Nix* as dicta, the majority's sudden decision to classify those portions of *Nix* as such stands in stark contrast to the majority's treatment of *Nix* as "controlling" precedent and "compelling reversal" just two terms ago in a case that considered the exact issue raised in this appeal. Specifically, in *Szalma*, the majority explained that "this Court's decision in *Nix* provides that a trial court's erroneously added element of a crime does not negate the finality of its directed verdict," *Szalma*, 487 Mich at 725, because a trial court's "acquittal on the merits of the charged offense is final under the holding of *Nix*;" *id*. at 722; see, also, *id.* at 726 (stating that "[t]his Court held in . . . *Nix* that an acquittal retains its finality . . . even when 'the trial court is factually wrong with respect to whether a particular factor is an element of the charged offense' " and the "Court of Appeals erred by ruling otherwise"), quoting *Nix*, 453 Mich at 628; *Szalma*, 487 Mich at 727 (stating that the "trial court's decision . . . , though premised on an erroneous understanding of the legal elements of the charged offense, nonetheless constituted . . . a decision on the sufficiency of the evidence under *Nix*"). In so stating, the *Szalma* majority accurately explained that "*Nix* holds that such legal error precludes retrial," *id*. at 710, that "*Nix* squarely compels a reversal," *id*., and that "this Court's decision in *Nix* clearly controls the outcome of this case," *id.* at 720 n 21. In light of the *Szalma* majority's

treatment of *Nix* as controlling precedent, I find the majority's newfound conclusion that *Nix* is not binding precedent, and its attempts to distinguish *Szalma*'s treatment of *Nix* as such, both contradictory and disingenuous.

IV. CONCLUSION

The new standard that the majority opinion adopts today effectively overrules *Nix* without a persuasive explanation of why *Nix* and the United States Supreme Court precedent on which it was founded should no longer control. In obfuscating these precedents and creating distinctions that simply do not appear to exist, the majority dismisses the fact that whether a trial court erred in its interpretation of the elements of the crime is irrelevant: the essential character of an acquittal is not altered, even if the acquittal results from "erroneous interpretations of governing legal principles . . . ." *Smalis*, 476 US at 144 n 7 (citations and quotation marks omitted). Because the United States Supreme Court has rejected "*any contention* that the Double Jeopardy Clause must itself . . . leave open a way of correcting legal errors," *Smith*, 543 US at 473 (emphasis added), I dissent from the majority's decision to summarily disregard *Nix* and the controlling precedent on which *Nix* is based. Accordingly, I would reverse the judgment of the Court of Appeals.

MARILYN KELLY, J., concurred with CAVANAGH, J.

HATHAWAY, J. (*dissenting*). I dissent from the majority's decision because I disagree with the distinction that the majority draws between a trial court's erroneous ruling related to a required element of an offense and a trial court's erroneous ruling related to a mistak-

enly added element of an offense. The United States Supreme Court has explained that, for purposes of double jeopardy, a reviewing court must "determine whether the ruling of the judge, whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged."[1] Further, I believe that *People v Nix*, 453 Mich 619; 556 NW2d 866 (1996), controls this case. Accordingly, I would reverse the judgment of the Court of Appeals.

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[1] *United States v Martin Linen Supply Co*, 430 US 564, 571; 97 S Ct 1349; 51 L Ed 2d 642 (1977).

PEOPLE v MORENO

Docket No. 141837. Argued October 4, 2011 (Calendar No. 5). Decided April 20, 2012.

Angel Moreno, Jr., was charged with resisting and obstructing a police officer, MCL 750.81d(1), and resisting and obstructing a police officer causing injury, MCL 750.81d(2), after physically struggling with two police officers who sought to enter his home without a warrant. The 58th District Court, Bradley S. Knoll, J., bound defendant over for trial on both charges, ruling that the common-law right to resist an unlawful arrest had been abolished by *People v Ventura*, 262 Mich App 370 (2004). The Ottawa Circuit Court, Edward R. Post, J., denied defendant's motion to quash the information, ruling that although the officers' warrantless entry was illegal, MCL 750.81d could be violated regardless of whether the officers' actions were lawful. The Court of Appeals, OWENS, P.J., and O'CONNELL and TALBOT, JJ., affirmed in an unpublished opinion per curiam, issued June 10, 2010 (Docket No. 294840). The Supreme Court granted defendant's application for leave to appeal. 488 Mich 1010 (2010).

In an opinion by Justice HATHAWAY, joined by Justices CAVANAGH, MARILYN KELLY, MARY BETH KELLY, and ZAHRA, the Supreme Court *held*:

MCL 750.81d did not abrogate the common-law right to resist illegal police conduct, including unlawful arrests and unlawful entries into constitutionally protected areas. *Ventura* is overruled, and the charges against defendant must be quashed.

1. The right to resist unlawful arrests and other unlawful invasions of private rights is well established in Michigan's common law, which remains in force unless it is modified. While the Legislature has the authority to modify the common law, it must do so by speaking in no uncertain terms. Nowhere in MCL 750.81d did the Legislature state that the right to resist unlawful conduct by an officer no longer exists. The prior resisting-arrest statute, MCL 750.479, as enacted by 1931 PA 328, prohibited obstructing or resisting any persons authorized by law to maintain and preserve the peace in their lawful acts. The current resisting-arrest statute, MCL 750.81d, as added by 2002 PA 266, prohibits

obstructing or resisting an individual who is performing his or her duties. The fact that the Legislature did not include the word "lawful" in the phrase "performing his or her duties" did not support the conclusion that the common-law right to resist an unlawful act by an officer ceased to exist when MCL 750.81d was enacted. The Legislature's failure to expressly provide a common-law defense in a criminal statute does not prevent a defendant from relying on that defense absent some clear indication that the Legislature abrogated or modified it. Moreover, the Court of Appeals' holding that MCL 750.81d prohibits a person from resisting an officer's unlawful conduct conflicted with the definition of "obstruct" in MCL 750.81d(7)(a) as a knowing failure to comply with a lawful command.

2. The legislative histories of MCL 750.81d and MCL 750.479 also indicated that the Legislature did not intend to abrogate the right to resist an unlawful act by an officer. The pre-2002 version of MCL 750.479 governed the offense of resisting and obstructing, and it generally prohibited resisting an officer discharging his or her duties and had been interpreted as including the Michigan common-law principle that one may use such reasonable force as is necessary to prevent an illegal attachment and resist an illegal arrest. In 2002, the Legislature amended MCL 750.479 and simultaneously enacted MCL 750.81d. The language of these two statutes made clear that the Legislature intended to change some, but not all, aspects of the common law governing the offenses of resisting and obstructing a peace officer. Although the Legislature omitted the phrase "in their lawful acts" from MCL 750.81d, it retained the requirement that the officer's actions be lawful by indicating that the offense occurs while a protected person is performing his or her duties. Because the Legislature did not abrogate in no uncertain terms the common-law right to resist unlawful invasions of private rights, *Ventura* is overruled to the extent that it held to the contrary with respect to MCL 750.81d.

3. Defendant's refusal to allow the officers into his home without a warrant was not conclusive of whether he had reasonable cause to know that the officers were engaged in the performance of their official duties. Under the common-law rule, the prosecution must establish that the officers' actions were lawful. Because the circuit court ruled that the officers' actions were illegal, the information must be quashed.

Reversed; case remanded to the circuit court to grant defendant's motion to quash.

Justice MARKMAN, joined by Chief Justice YOUNG, dissenting, would have affirmed the Court of Appeals and upheld *Ventura*.

Before 2002, MCL 750.479 made it unlawful to resist a police officer, but only if that officer was performing what was later determined to constitute a lawful act. By omitting a lawful-act requirement when it amended MCL 750.479 and enacted MCL 750.81d in 2002, the Legislature clearly and in no uncertain terms excluded consideration of the lawfulness of the police officer's conduct as a relevant element in forcibly resisting an officer as long as the police officer was performing his or her duties. The Legislature does not have to expressly state that it is abrogating a common-law right in order for it to abrogate a common-law right.

CRIMINAL LAW — RESISTING AND OBSTRUCTING PERSONS PERFORMING A DUTY — COMMON-LAW DEFENSES — RESISTING ILLEGAL POLICE CONDUCT.

MCL 750.81d, which prohibits an individual from assaulting, battering, wounding, resisting, obstructing, opposing, or endangering a person who the individual knows or has reason to know is performing his or her duties, did not abrogate the common-law right to resist illegal police conduct, including unlawful arrests and unlawful entries into constitutionally protected areas.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Ronald J. Frantz*, Prosecuting Attorney, and *Gregory J. Babbitt*, Assistant Prosecuting Attorney, for the people.

Haehnel & Phelan (by *Craig W. Haehnel*) for defendant.

Amici Curiae:

Ron Schafer, *Kym L. Worthy*, and *Timothy A. Baughman* for the Prosecuting Attorneys Association of Michigan.

Racine M. Miller for the Michigan Association for Justice.

HATHAWAY, J. In this case, we review whether defendant was properly charged with resisting and obstructing a police officer under MCL 750.81d after defendant struggled with officers who had entered his home

unlawfully. To resolve this issue, we must address whether MCL 750.81d abrogates the common-law right to resist illegal police conduct, including unlawful arrests and unlawful entries into constitutionally protected areas. We conclude that the statute did not abrogate this right.

While the Legislature has the authority to modify the common law, it must do so by speaking in "no uncertain terms."[1] Neither the language of MCL 750.81d nor the legislative history of this statute indicates with certainty that the Legislature intended to abrogate the common-law right to resist unlawful arrests or other invasions of private rights. We cannot presume that the Legislature intended to abrogate this right. Therefore, we overrule *People v Ventura*, 262 Mich App 370; 686 NW2d 748 (2004), to the extent that it held that the Legislature affirmatively chose to modify the traditional common-law rule that a person may resist an unlawful arrest. Because the Court of Appeals in this case relied on *Ventura* and extended its holding to the context of illegal entries of the home, we reverse the judgment of the Court of Appeals and remand this matter to the trial court. On remand, we instruct the trial court to grant defendant's motion to quash the charges on the basis of its ruling that the officers' conduct was unlawful.

I. FACTS AND PROCEDURAL HISTORY

This case arises from a physical struggle that occurred between defendant and two Holland police officers when the officers sought to enter defendant's home without a warrant. As a result of the struggle, defen-

[1] *Hoerstman Gen Contracting, Inc v Hahn*, 474 Mich 66, 74; 711 NW2d 340 (2006).

dant was charged with resisting and obstructing a police officer and resisting and obstructing a police officer causing injury in violation of MCL 750.81d (1) and (2).

On the morning of the incident, Officer Troy DeWys and Officer Matthew Hamberg were searching for Shane Adams. Adams had several outstanding warrants. Defendant's house was in the immediate vicinity of where Adams's vehicle was parked, so the officers knocked on defendant's front and back doors to inquire about Adams. While outside the house, Officer DeWys heard voices and people running inside the house. He identified himself as a police officer and stated that he wanted to ascertain the identities of the people inside the house. Officer Hamberg looked through a basement window and could see empty bottles of alcohol and people trying to hide.

Approximately 15 minutes after the officers had knocked on the doors, Mandy McCarry opened the front door. Officer DeWys smelled "intoxicants and burnt marijuana." McCarry admitted that underage persons were consuming alcohol inside the house, but Officer DeWys told her that he was not interested in writing "a bunch of minor in possession tickets." Officer DeWys told McCarry that he just wanted to identify who was inside the house. Officer DeWys asked McCarry if she knew the owner of the vehicle parked in the street. McCarry asked the officers if they were looking for Adams and stated that he was not inside the house. McCarry told the officers that they could not come inside the house without a warrant.

Officer DeWys then informed McCarry that the officers were entering the house to "secure it" while they waited for a warrant. At that time, defendant came to the front door and demanded that the officers obtain a

warrant before entering his house. Defendant then attempted to close the door, but Officer Hamberg put his shoulder against the door to prevent defendant from closing it. A struggle ensued between defendant and the officers. Ultimately, the officers pulled defendant from his doorway, physically subdued him, and arrested him. Officer DeWys suffered a torn hamstring and bruised elbow in the struggle.

Defendant was charged with assaulting, resisting, or obstructing a police officer, MCL 750.81d(1), and assaulting, resisting, or obstructing a police officer causing injury, MCL 750.81d(2). Defendant was bound over for trial. He moved to quash the charges, arguing that the officers' entry into his home was unlawful. The trial court concluded that the officers had unlawfully entered defendant's home, specifically ruling that there were no exigent circumstances that would have provided an exception to the warrant requirement. Nevertheless, the trial court concluded that a "lawful" action by an officer is not a requirement of MCL 750.81d and, therefore, denied defendant's motion to quash the charges.

Defendant appealed as of right. The Court of Appeals affirmed the trial court's decision in an unpublished opinion per curiam.[2] The Court of Appeals relied on *Ventura* for the proposition that the lawfulness of police conduct is no longer an element of the offenses of resisting and obstructing because MCL 750.81d abrogated the common-law right to resist an unlawful arrest.[3] Therefore, the Court of Appeals concluded that the officers' conduct in forcibly entering defendant's home did not have to be lawful in order for defendant to

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[2] *People v Moreno*, unpublished opinion per curiam of the Court of Appeals, issued June 10, 2010 (Docket No. 294840).

[3] *Id*. at 7-8.

be charged under MCL 750.81d.[4] This Court granted defendant's application for leave to appeal.[5]

II. STANDARD OF REVIEW

This case involves the interpretation and application of a statute, which is a question of law that this Court reviews de novo.[6]

III. ANALYSIS

A. THE LANGUAGE OF MCL 750.81d DOES NOT SUPPORT ABROGATION

The issue before this Court is whether a person present in his or her own home can resist a police officer who unlawfully and forcibly enters the home or whether MCL 750.81d prohibits resisting unlawful actions by a police officer. Specifically, we must decide whether the Legislature intended to abrogate the common-law right to resist an unlawful arrest with its 2002 enactment of MCL 750.81d.

MCL 750.81d states in pertinent part:

> (1) Except as provided in subsections (2), (3), and (4), an individual who assaults, batters, wounds, resists, obstructs, opposes, or endangers a person who the individual knows or has reason to know is performing his or her duties is guilty of a felony punishable by imprisonment for not more than 2 years or a fine of not more than $2,000.00, or both.
>
> (2) An individual who assaults, batters, wounds, resists, obstructs, opposes, or endangers a person who the individual knows or has reason to know is performing his or

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[4] *Id*. at 7.

[5] *People v Moreno*, 488 Mich 1010 (2010).

[6] *People v Lee*, 489 Mich 289, 295; 803 NW2d 165 (2011); *Miller-Davis Co v Ahrens Constr, Inc*, 489 Mich 355, 361; 802 NW2d 33 (2011).

her duties causing a bodily injury requiring medical attention or medical care to that person is guilty of a felony punishable by imprisonment for not more than 4 years or a fine of not more than $5,000.00, or both.

(3) An individual who assaults, batters, wounds, resists, obstructs, opposes, or endangers a person who the individual knows or has reason to know is performing his or her duties causing a serious impairment of a body function of that person is guilty of a felony punishable by imprisonment for not more than 15 years or a fine of not more than $10,000.00, or both.

(4) An individual who assaults, batters, wounds, resists, obstructs, opposes, or endangers a person who the individual knows or has reason to know is performing his or her duties causing the death of that person is guilty of a felony punishable by imprisonment for not more than 20 years or a fine of not more than $20,000.00, or both.

* * *

(7) As used in this section:

(a) "Obstruct" includes the use or threatened use of physical interference or force or a knowing failure to comply with a lawful command.

When interpreting statutes, this Court must "ascertain and give effect to the intent of the Legislature."[7] The words used in the statute are the most reliable indicator of the Legislature's intent and should be interpreted on the basis of their ordinary meaning and the context within which they are used in the statute.[8] In interpreting a statute, this Court avoids constructions that would render any part of the statute surplusage or nugatory.[9]

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

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

[9] *People v McGraw*, 484 Mich 120, 126; 771 NW2d 655 (2009), citing *Baker v Gen Motors Corp*, 409 Mich 639, 665; 297 NW2d 387 (1980).

In addition to these basic rules of statutory interpretation, this Court must also adhere to the traditional rules concerning abrogation of the common law. The common law remains in force unless it is modified.[10] We must presume that the Legislature "know[s] of the existence of the common law when it acts."[11] Accordingly, this Court has explained that "[t]he abrogative effect of a statutory scheme is a question of legislative intent"[12] and that "legislative amendment of the common law is not lightly presumed."[13] While the Legislature has the authority to modify the common law, it must do so by speaking in " 'no uncertain terms.' "[14] Moreover, this Court has held that "statutes in derogation of the common law must be strictly construed" and shall "not be extended by implication to abrogate established rules of common law."[15] In this case, we must be mindful of the rules regarding abrogation of the common law when determining whether the Legislature, in enacting MCL 750.81d, intended to abrogate the common-law right to resist unlawful police conduct.

Defendant was charged with resisting and obstructing a police officer in violation of MCL 750.81d. In Michigan, obstructing a police officer has been recognized as a common-law crime, as well as an offense governed by statute.[16] In addition, the right to resist *unlawful* arrests, and other *unlawful* invasions of pri-

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[10] *Wold Architects & Engineers v Strat*, 474 Mich 223, 233; 713 NW2d 750 (2006).

[11] *Id*. at 234; see also *Dawe v Dr Reuven Bar-Levav & Assoc, PC*, 485 Mich 20, 28; 780 NW2d 272 (2010) (quoting *Wold Architects*).

[12] *Dawe*, 485 Mich at 28.

[13] *Wold Architects*, 474 Mich at 233.

[14] *Dawe*, 485 Mich at 28, quoting *Hoerstman*, 474 Mich at 74.

[15] *Rusinek v Schultz, Snyder & Steele Lumber Co*, 411 Mich 502, 508; 309 NW2d 163 (1981) (citation omitted).

[16] *People v Krum*, 374 Mich 356, 361-362; 132 NW2d 69 (1965).

vate rights, is well established in our state's common law.[17] In explaining the common-law right to resist an unlawful arrest, this Court has stated that "one may use such reasonable force as is necessary to prevent an illegal attachment and to resist an illegal arrest" and that "the basis for such preventive or resistive action is the illegality of an officer's action, to which [a] defendant immediately reacts."[18]

In *Ventura*, the Court of Appeals compared the prior version of the resisting-arrest statute, MCL 750.479, to the current version, MCL 750.81d. The prior version stated in pertinent part:

> Any person who shall knowingly and willfully . . . obstruct, resist, oppose, assault, beat or wound . . . any . . . person or persons authorized by law to maintain and preserve the peace, in their lawful acts, attempts and efforts to maintain, preserve and keep the peace, shall be guilty of a misdemeanor . . . . [MCL 750.479, as enacted by 1931 PA 328.]

Noting that the prior version, MCL 750.479, included a reference to the lawfulness of an officer's actions, the Court of Appeals in *Ventura* then turned to the language of MCL 750.81d.[19] The Court stated that it could not find any similar reference to lawfulness in MCL 750.81d.[20] The Court also noted that other jurisdictions have found the right to resist an unlawful arrest to be

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[17] *Id*.; *People v Clements*, 68 Mich 655, 658; 36 NW 792 (1888) (recognizing the right to reasonably resist an attempted illegal seizure of property by the sheriff and noting that "[n]o officer can be legally authorized to invade private rights in any such manner"); *People v MacLeod*, 254 Mich App 222, 226; 656 NW2d 844 (2002) (holding that the lawfulness of the arrest was an element of the prior resisting-and-obstructing statute).

[18] *Krum*, 374 Mich at 361.

[19] *Ventura*, 262 Mich App at 374-375.

[20] *Id*. at 375.

"outmoded in our contemporary society."[21] The Court concluded that the Legislature had made an "obvious affirmative choice to modify the traditional common-law rule that a person may resist an unlawful arrest."[22] We disagree. We hold that MCL 750.81d did not abrogate the right to resist unlawful police conduct and that *Ventura* was wrongly decided.

A fundamental principle of statutory construction is that common-law meanings apply unless the Legislature has directed otherwise.[23] If the Legislature intended to abrogate the common-law right to resist unlawful conduct by an officer, it had to do so by speaking in " 'no uncertain terms.' "[24] Significantly, nowhere in MCL 750.81d does the Legislature state that the right to resist unlawful conduct by an officer no longer exists.[25]

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[21] *Id.* at 376 (citation and quotation marks omitted).

[22] *Id.* at 376-377.

[23] *People v Young*, 418 Mich 1, 15; 340 NW2d 805 (1983); see also Const 1963, art 3, § 7 ("The common law and the statute laws now in force, not repugnant to this constitution, shall remain in force until they expire by their own limitations, or are changed, amended or repealed.").

[24] *Dawe*, 485 Mich at 28, quoting *Hoerstman*, 474 Mich at 74.

[25] The Legislature is aware of how to draft statutes when it is abrogating common-law principles. For example, in the context of self-defense, the Legislature changed the common-law duty to retreat by enacting MCL 780.972, which specifically explains that there is no longer a duty to retreat under certain enumerated circumstances. The Legislature also enacted MCL 780.973 and MCL 780.974, which explicitly clarify that certain other aspects of the common law relating to self-defense were not abrogated. In enacting MCL 750.81d, the Legislature could have easily abrogated the right to resist an unlawful act by an officer by simply stating that the provision could be violated regardless of whether an officer's actions are lawful. The Legislature chose not to include such language.

Nevertheless, the dissent reasons that because MCL 750.81d does not include a " 'lawful acts' proviso," the Legislature "clearly" and "in no uncertain terms" abrogated the common law and excluded the lawfulness

The prior resisting-arrest statute, MCL 750.479 as enacted by 1931 PA 328, prohibited obstructing or resisting a person "authorized by law to maintain and preserve the peace, in their lawful acts . . . ."[26] The current resisting-arrest statute, MCL 750.81d, prohibits obstructing or resisting an "individual" who is "performing his or her duties." We cannot conclude that the common-law right to resist an unlawful act by an officer ceased to exist merely because the Legislature did not include the word "lawful" in this phrase from MCL 750.81d. In fact, this Court has recently clarified that the Legislature's failure to expressly provide for a common-law defense in a criminal statute does not prevent a defendant from relying on that defense.[27]

In *People v Dupree*, this Court addressed whether a defendant could properly raise the common-law affirmative defense of self-defense when charged under the felon-in-possession statute, MCL 750.224f.[28] The felon-in-possession statute does not explicitly indicate that self-defense is an available defense to this charge. Nevertheless, this Court clarified that "[t]he Legislature's failure to provide explicitly for the common law affirmative defense of self-defense does not foreclose

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of a police officer's conduct as an element of resisting an officer. The dissent relies on a footnote in *Reed v Breton*, 475 Mich 531, 539 n 8; 718 NW2d 770 (2006), explaining that the mere absence of language specifically abrogating the common law does not necessarily mean that no abrogation occurred. However, nothing in *Reed* changes the longstanding rule that the Legislature must speak in no uncertain terms when it intends to abrogate the common law, and *Reed* does not support the dissent's position that the mere *absence* of language is somehow the same as the *presence* of "no uncertain terms."

[26] We note that while MCL 750.479 was amended by 2002 PA 270, it has not been repealed and remains an alternative statute under which resisting and obstructing may be charged.

[27] *People v Dupree*, 486 Mich 693, 705; 788 NW2d 399 (2010).

[28] *Dupree*, 486 Mich at 705.

defendants from relying on it to justify a violation of MCL 750.224f."[29] Specifically, this Court explained that "[h]istorically, in cases in which the statutory provision did not squarely resolve the issue before this Court, we have applied the common law, presuming that the Legislature enacted statutes mindful of those aspects of common law that have become 'firmly embedded in our jurisprudence . . . .' "[30] This Court went on to explain that "[m]ore recently, the United States Supreme Court recognized the interrelated nature of criminal statutes and the common law, stating that legislative bodies enact criminal statutes 'against a background of Anglo-Saxon common law . . . .' "[31] Finding this rationale instructive, this Court concluded that

> [a]bsent some clear indication that the Legislature abrogated or modified the traditional common law affirmative defense of self-defense for the felon-in-possession charge in MCL 750.224f or elsewhere in the Michigan Penal Code, we presume that the affirmative defense of self-defense remains available to defendants if supported by sufficient evidence.[32]

In the context of resisting or obstructing an officer, there must be some clear indication in MCL 750.81d that the Legislature abrogated the common-law right to resist an officer's unlawful conduct if this Court is to so hold. This Court has recognized that " '[t]he obstruction of or resistance to a public officer in the *performance of his duties* is an offense at common law, and by statute in all jurisdictions.' "[33] MCL 750.81d expressly

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[29] *Id*.

[30] *Id*., quoting *Garwols v Bankers Trust Co*, 251 Mich 420, 424; 232 NW 239 (1930).

[31] *Dupree*, 486 Mich at 705, quoting *United States v Bailey*, 444 US 394, 415 n 11; 100 S Ct 624; 62 L Ed 2d 575 (1980).

[32] *Dupree*, 486 Mich at 706.

[33] *Krum*, 374 Mich at 361 (emphasis added; citation omitted).

defines "obstruct" as a "knowing failure to comply with a *lawful command*."[34] However, the decision of the Court of Appeals in this case conflicts with the statutory language. The Court held that MCL 750.81d *prohibits* a person from resisting an officer's unlawful conduct, yet the statute *allows* a person to obstruct an officer's unlawful command. This conflict casts substantial doubt on the argument that the Legislature intended, let alone "clearly intended," to abrogate the common-law right to resist an unlawful arrest by not including the phrase "in their lawful acts" in MCL 750.81d.

Based on the plain language of MCL 750.81d, and without any certain indication otherwise by the Legislature, we cannot simply assume that the Legislature intended to abrogate the common-law right to resist an unlawful arrest with its enactment of MCL 750.81d. Such an interpretation of the statute would be inconsistent with this Court's rules of statutory construction when abrogation of the common law is at issue.

In this case, the Court of Appeals held that "[t]he fact that defendant refused entry to the officers unless they obtained a search warrant is indicative of defendant's knowledge of their status as police officers and that they were engaged in the performance of their official duties."[35] There is no question that defendant knew that the men at his door were police officers. However, the officers wanted to enter defendant's home without a warrant, and one of the officers physically prevented defendant from closing the door to his home. Accordingly, defendant's refusal to allow the officers into his home is not conclusive of whether defendant had reasonable cause to know that the officers were "engaged in the performance of their official duties." Consistently

[34] MCL 750.81d(7)(a) (emphasis added).

[35] *Moreno*, unpub op at 5.

with the common-law rule, we conclude that the prosecution must establish that the officers' actions were lawful.

B. THE LEGISLATIVE HISTORY OF MCL 750.81d DOES NOT SUPPORT ABROGATION

The legislative history of MCL 750.81d is also helpful in demonstrating that that the Legislature did not intend to abrogate the right to resist an unlawful act by an officer. However, this history must be reviewed in conjunction with the history of the corresponding statute, MCL 750.479. Before 2002, it was clear that a person had the right to resist unlawful police conduct. The pre-2002 version of MCL 750.479 governed the offense of resisting and obstructing and generally prohibited resisting an officer discharging his or her duties.[36] This Court interpreted the former version of MCL 750.479 as including the Michigan common-law principle that "one may use such reasonable force as is

[36] The former version of MCL 750.479 provided:

> Any person who shall knowingly and wilfully obstruct, resist or oppose any sheriff, coroner, township treasurer, constable or other officer or person duly authorized, in serving, or attempting to serve or execute any process, rule or order made or issued by lawful authority, or who shall resist any officer in the execution of any ordinance, by law, or any rule, order or resolution made, issued, or passed by the common council of any city board of trustees, or common council or village council of any incorporated village, or township board of any township or who shall assault, beat or wound any sheriff, coroner, township treasurer, constable or other officer duly authorized, while serving, or attempting to serve or execute any such process, rule or order, or for having served, or atempted [sic] to serve or execute the same, or who shall so obstruct, resist, oppose, assault, beat or wound any of the above named officers, or any other person or persons authorized by law to maintain and preserve the peace, in their lawful acts, attempts and efforts to maintain, preserve and keep the peace, shall be guilty of a misdemeanor, punishable by imprisonment in the state prison not more than 2 years, or by a fine of not more than 1,000 dollars.

necessary to prevent an illegal attachment and to resist an illegal arrest . . . ."[37] Thus, the former version of MCL 750.479 included the right to resist unlawful police conduct.

In 2002, the Legislature passed House Bill 5442, amending the prior version of MCL 750.479.[38] Simultaneously, the Legislature enacted House Bill 5440 as 2002 PA 266, which added MCL 750.81d. Both bills contained reciprocal language providing that each would not take effect unless both were enacted into law.[39] The amended version of MCL 750.479 no longer prohibits a person from resisting "persons authorized by law to maintain and preserve the peace," but is

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[37] *Krum*, 374 Mich at 361.

[38] MCL 750.479 now provides in pertinent part:

> (1) A person shall not knowingly and willfully do any of the following:
>
> (a) Assault, batter, wound, obstruct, or endanger a medical examiner, township treasurer, judge, magistrate, probation officer, parole officer, prosecutor, city attorney, court employee, court officer, or other officer or duly authorized person serving or attempting to serve or execute any process, rule, or order made or issued by lawful authority or otherwise acting in the performance of his or her duties.
>
> (b) Assault, batter, wound, obstruct, or endanger an officer enforcing an ordinance, law, rule, order, or resolution of the common council of a city board of trustees, the common council or village council of an incorporated village, or a township board of a township.

[39] The arguments offered for passing these bills were to protect persons in all professions connected to law enforcement instead of only peace officers and to establish a tiered penalty structure based on the seriousness of the injury actually inflicted. The bills were to provide uniformity of punishment and consolidate all provisions relating to attacks on law enforcement personnel, firefighters, and emergency medical personnel into one section of the law. House Legislative Analysis, HB 5440 through 5443 and 5601, August 29, 2002, p 5.

instead targeted at prohibiting threatening and dangerous conduct toward a list of enumerated persons connected with law enforcement.[40] The statute provides a tiered penalty structure for various degrees of danger posed and harm caused to a person protected by the statute,[41] clarifies that a person can be charged with and convicted of an underlying offense, and provides courts with discretion to impose a sentence for violating this statute that must be served consecutively to any sentence for an offense arising out of the same transaction.[42] Further, the statute defines the term "obstruct" as including "the use or threatened use of physical interference or force or a knowing failure to comply with a lawful command."[43]

Meanwhile, MCL 750.81d focuses on prohibiting dangerous and threatening conduct toward a "person" protected by the statute.[44] This includes resisting an officer's actions. The statute expressly enumerates the law enforcement officials and other emergency responders who are protected and requires that an individual have reason to know that his or her conduct is directed toward a person "performing his or her duties."[45] Like MCL 750.479, MCL 750.81d provides a tiered penalty structure for various degrees of danger posed and harm caused to a person protected by the statute,[46] clarifies that a person can be charged with and convicted of an underlying offense, and provides courts with discretion

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[40] MCL 750.479(1)(b) retains the prohibition in the former version of the statute against threatening and dangerous conduct toward officers enforcing municipal law.

[41] MCL 750.479(2) through (5).

[42] MCL 750.479(6) and (7).

[43] MCL 750.479(8)(a).

[44] MCL 750.81d(7)(b).

[45] MCL 750.81d(1) through (4).

[46] *Id*.

to impose a sentence for violating the statute that must be served consecutively to any sentence for an offense arising out of the same transaction.[47] Further, just like MCL 750.479, MCL 750.81d defines the term "obstruct" as including "the use or threatened use of physical interference or force or a knowing failure to comply with a lawful command."[48] As evidenced by the language of these two statutes, it is clear that the Legislature changed some, but not *all*, aspects of the common law governing the offenses of resisting and obstructing a peace officer.[49] The Legislature made these changes using language that clearly set forth the changes it intended to make.

In contrast, the Legislature expressed no intent to do away with the common-law right to resist an unlawful arrest.[50] The most that could be said in favor of finding

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[47] MCL 750.81d(5) and (6).

[48] MCL 750.81d(7)(a).

[49] MCL 750.479 and MCL 750.81d together now prohibit certain conduct against peace officers *and* additional persons connected to law enforcement, and they include tiered penalty structures for the various degrees of danger posed and harm caused to these persons. In these statutes, the Legislature clarified that a person can be charged with an underlying crime. The Legislature also abrogated the common-law rule of presumed concurrent sentencing by expressly providing for consecutive sentencing for all offenses arising out of the same transaction.

[50] When legislatures from other states intended to do away with this common-law right, they found clear and unequivocal language to accomplish their task. For example, a Delaware statute makes it abundantly clear that "[t]he use of force is not justifiable under this section to resist an arrest which the defendant knows or should know is being made by a peace officer, *whether or not the arrest is lawful*." Del Code Ann, tit 11, § 464(d) (emphasis added). A Texas statute clearly provides that "[i]t is no defense to prosecution under this section that the arrest or search was unlawful." Tex Penal Code Ann 38.03(b). An Oregon statute, Or Rev Stat 161.260, which is similar to MCL 750.81d, expressly provides, "A person may not use physical force to resist an arrest by a peace officer who is known or reasonably appears to be a peace officer, whether the arrest is lawful or unlawful." Similarly, an analogous Colorado statute expressly

an abrogation of that right is the omission of the phrase "in their lawful acts" from MCL 750.81d. However, similar language regarding lawful acts was included in both MCL 750.81d and the amended version of MCL 750.479. Both statutes now include language that this Court has used in the past to explain that the common-law offense of obstructing or resisting an officer occurs while the protected person is "performing his or her duties." The term "duty" generally means "something that one is expected or required to do by moral or legal obligation"[51] and legally implies "an obligation one has by law or by contract."[52] MCL 750.479 and MCL 750.81d both imply that the charged person "knows or has reason to know" that a protected individual is "performing his or her duties" when engaging in conduct authorized by law or required by legal obligation.[53] Thus, the Legislature retained the concept that the offense of resisting and obstructing requires that an officer's actions are lawful.

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provides: "It is no defense to a prosecution under this section that the peace officer was attempting to make an arrest which in fact was unlawful . . . ." Colo Rev Stat 18-8-103(2).

[51] *Random House Webster's College Dictionary* (2000).

[52] Black's Law Dictionary (6th ed).

[53] The meaning of this added phrase is not inconsistent with the omitted phrase "in their lawful acts." This concept was illustrated at oral argument when Justice CAVANAGH questioned the prosecutor as follows:

> *Justice Cavanagh*: Can I pose this hypothetical to you? What if you have a situation where you have a male officer performing his duties undertakes a search of a female prisoner and puts his hand inside her pants and commits a CSC [criminal sexual conduct]? Under your just stated interpretation of [MCL 750.]81d and under *Ventura*'s holding, and assuming she resists—she fights him off, tries to fight him off—she could be charged could she not?
>
> *Prosecuting Attorney*: No.
>
> *Justice Cavanagh*: Why?
>
> *Prosecuting Attorney*: What—what duty is he performing?
>
> *Justice Cavanagh*: Doing a search.

This Court has explained that if there is doubt about whether a statute abrogates established common-law rules, the statute shall be " 'given the effect which makes the least rather than the most change in the common law.' "[54] Nevertheless, without any certain indication of the Legislature's intent to abrogate the common-law right to resist an unlawful arrest, the Court of Appeals in *Ventura* pronounced that it was "adopt[ing] the modern rule that a person may not use force to resist an arrest made by one he knows or has reason to know is performing his duties regardless of whether the arrest is illegal under the circumstances of the occasion."[55] However, we find nothing in the language or legislative history of this statute to support this conclusion. Therefore, we simply cannot conclude that the Legislature abrogated the common-law right to resist unlawful invasions of private rights in "no uncertain terms."

Accordingly, we overrule *Ventura* to the extent that it concluded that the common-law right to resist an unlawful arrest was abrogated by MCL 750.81d.

IV. CONCLUSION

While the Legislature has the authority to modify the common law, it must do so by speaking in "no uncertain

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This exchange illustrates that there is no relevant distinction between the meaning of an officer "performing his or her duties" and an officer engaging in "lawful acts." Just as an officer acts outside his or her legal duty to perform a search by committing an assault, the officers in this case acted outside their legal duties by unlawfully entering defendant's home without a warrant.

[54] *Nation v W D E Electric Co*, 454 Mich 489, 494; 563 NW2d 233 (1997), quoting *Energetics, Ltd v Whitmill*, 442 Mich 38, 51; 497 NW2d 497 (1993).

[55] *Ventura*, 262 Mich App at 377.

terms."[56] Neither the language of MCL 750.81d nor the legislative history of this statute indicates with certainty that the Legislature intended to abrogate the common-law right to resist unlawful arrests or other unlawful invasions of private rights. We cannot presume that the Legislature intended to abrogate this right. Therefore, we overrule *Ventura* to the extent that it held that the Legislature affirmatively chose to modify the traditional common-law rule that a person may resist an unlawful arrest.[57]

Because the Court of Appeals in this case relied on *Ventura* and extended its broader principle to the context of unlawful entry of the home, we reverse the judgment of the Court of Appeals and remand this matter to the trial court. On remand, we instruct the trial court to grant defendant's motion to quash the charges on the basis of its ruling that the officers' conduct was unlawful.

CAVANAGH, MARILYN KELLY, MARY BETH KELLY, and ZAHRA, JJ., concurred with HATHAWAY, J.

MARKMAN, J. (*dissenting*). I respectfully dissent from the majority's decision to reverse the judgment of the Court of Appeals and overrule *People v Ventura*, 262 Mich App 370; 686 NW2d 748 (2004). The only issue here is whether the Legislature abrogated the right to resist police conduct that is later determined to have been unlawful. Before 2002, the Legislature in MCL 750.479 made it unlawful to resist a police officer, but only if that officer was performing what was later determined to constitute a "lawful act." However, in 2002, the Legislature amended MCL 750.479 and also

[56] *Hoerstman*, 474 Mich at 74.

[57] *Ventura*, 262 Mich App at 376-377.

enacted a new statute addressing this subject, MCL 750.81d, neither of which contains the "lawful act" requirement. By doing this, the Legislature clearly excluded consideration of the lawfulness of the police officer's conduct as a relevant element in forcibly resisting an officer as long as the police officer was "performing his or her duties," and it did so "in no uncertain terms." Therefore, I would affirm the judgment of the Court of Appeals, which, in reliance on *Ventura*, held that defendant was properly charged with resisting and obstructing a police officer under MCL 750.81d after he physically struggled with officers who had entered his home.[1]

I. LEGISLATIVE ABROGATION

Before 2002, MCL 750.479 provided:

> Any person who shall knowingly and wilfully obstruct, resist or oppose any sheriff, coroner, township treasurer, constable or other officer or person duly authorized, in serving, or attempting to serve or execute any process, rule or order made or issued by lawful authority, or who shall resist any officer in the execution of any ordinance, by law, or any rule, order or resolution made, issued, or passed by the common council of any city board of trustees, or common council or village council of any incorporated village, or township board of any township or who shall assault, beat or wound any sheriff, coroner, township treasurer, constable or other officer duly authorized, while serving, or attempting to serve or execute any such process, rule or order, or for having served, or atempted [sic] to serve or execute the same, or who shall so obstruct, resist, oppose, assault, beat or wound any of the above named officers, or any other person or persons authorized by law

[1] The trial court ruled that the officers had unlawfully entered defendant's home, and the prosecutor did not appeal that ruling. Therefore, this opinion is written under the assumption that the officers' entry was unlawful.

> to maintain and preserve the peace, *in their lawful acts*, attempts and efforts to maintain, preserve and keep the peace, shall be guilty of a misdemeanor, punishable by imprisonment in the state prison not more than 2 years, or by a fine of not more than 1,000 dollars. [Emphasis added.]

In *People v Krum*, 374 Mich 356, 361; 132 NW2d 69 (1965), this Court held that "one may use such reasonable force as is necessary to prevent an illegal attachment and to resist an illegal arrest" without violating MCL 750.479. See also *People v Clements*, 68 Mich 655, 658; 36 NW 792 (1888) (holding that a debtor whose property was seized by a sheriff executing an invalid writ of attachment was not "compelled to submit to such trespass without reasonable resistance" in order to avoid violating 1882 How Stat 9257, a predecessor of MCL 750.479).

In 2002, the Legislature amended MCL 750.479 and enacted MCL 750.81d. MCL 750.479 now provides, in pertinent part:

> (1) A person shall not knowingly and willfully do any of the following:
>
> (a) Assault, batter, wound, obstruct, or endanger a medical examiner, township treasurer, judge, magistrate, probation officer, parole officer, prosecutor, city attorney, court employee, court officer, or other officer or duly authorized person serving or attempting to serve or execute any process, rule, or order made or issued by lawful authority or otherwise *acting in the performance of his or her duties*.
>
> (b) Assault, batter, wound, obstruct, or endanger an officer enforcing an ordinance, law, rule, order, or resolution of the common council of a city board of trustees, the common council or village council of an incorporated village, or a township board of a township.
>
> (2) Except as provided in subsections (3), (4), and (5), a person who violates this section is guilty of a felony

punishable by imprisonment for not more than 2 years or a fine of not more than $2,000.00, or both.

(3) A person who violates this section and by that violation causes a bodily injury requiring medical attention or medical care to an individual described in this section is guilty of a felony punishable by imprisonment for not more than 4 years or a fine of not more than $5,000.00, or both.

(4) A person who violates this section and by that violation causes serious impairment of a body function of an individual described in this section is guilty of a felony punishable by imprisonment for not more than 10 years or a fine of not more than $10,000.00, or both.

(5) A person who violates this section and by that violation causes the death of an individual described in this section is guilty of a felony punishable by imprisonment for not more than 20 years or a fine of not more than $20,000.00, or both.

* * *

(8) As used in this section:

(a) "*Obstruct*" includes the use or threatened use of physical interference or force or a *knowing failure to comply with a lawful command*. [Emphasis added.]

MCL 750.81d provides:

(1) Except as provided in subsections (2), (3), and (4), an individual who assaults, batters, wounds, resists, obstructs, opposes, or endangers a person who the individual knows or has reason to know is *performing his or her duties* is guilty of a felony punishable by imprisonment for not more than 2 years or a fine of not more than $2,000.00, or both.

(2) An individual who assaults, batters, wounds, resists, obstructs, opposes, or endangers a person who the individual knows or has reason to know is performing his or her duties causing a bodily injury requiring medical attention or medical care to that person is guilty of a felony

punishable by imprisonment for not more than 4 years or a fine of not more than $5,000.00, or both.

(3) An individual who assaults, batters, wounds, resists, obstructs, opposes, or endangers a person who the individual knows or has reason to know is performing his or her duties causing a serious impairment of a body function of that person is guilty of a felony punishable by imprisonment for not more than 15 years or a fine of not more than $10,000.00, or both.

(4) An individual who assaults, batters, wounds, resists, obstructs, opposes, or endangers a person who the individual knows or has reason to know is performing his or her duties causing the death of that person is guilty of a felony punishable by imprisonment for not more than 20 years or a fine of not more than $20,000.00, or both.

* * *

(7) As used in this section:

(a) "*Obstruct*" includes the use or threatened use of physical interference or force or a *knowing failure to comply with a lawful command*.

(b) "Person" means any of the following:

(*i*) A police officer of this state or of a political subdivision of this state including, but not limited to, a motor carrier officer or capitol security officer of the department of state police.

(*ii*) A police officer of a junior college, college, or university who is authorized by the governing board of that junior college, college, or university to enforce state law and the rules and ordinances of that junior college, college, or university.

(*iii*) A conservation officer of the department of natural resources or the department of environmental quality.

(*iv*) A conservation officer of the United States department of the interior.

(*v*) A sheriff or deputy sheriff.

(*vi*) A constable.

(*vii*) A peace officer of a duly authorized police agency of the United States, including, but not limited to, an agent of the secret service or department of justice.

(*viii*) A firefighter.

(*ix*) Any emergency medical service personnel described in section 20950 of the public health code, 1978 PA 368, MCL 333.20950.

(*x*) An individual engaged in a search and rescue operation as that term is defined in [MCL 750.50c]. [Emphasis added.]

MCL 750.81d applies to police officers, firefighters, and emergency medical service personnel, and MCL 750.479 applies to other persons involved with law enforcement, such as judges, prosecutors, and parole officers. Both statutes make it unlawful not only to assault or resist these individuals, but also to endanger them while they are performing their duties. Both statutes also have multitiered penalty structures based on the level of injury suffered.

The question before us concerns whether the rule announced in *Clements* and reaffirmed in *Krum*, 374 Mich at 361, that "one may use such reasonable force as is necessary to prevent an illegal attachment and to resist an illegal arrest" remains the rule of law in Michigan in light of the 2002 amendment of MCL 750.479 and the enactment of MCL 750.81d. More specifically, the issue concerns whether a person who forcibly resists a police officer who is unlawfully entering that person's home may be found guilty of violating MCL 750.81d. I believe that the answer to the latter question must be in the affirmative.

As mentioned earlier, in 2002 the Legislature enacted significant changes to this state's resisting-and-obstructing laws. Perhaps the most significant change

pertained to the elimination of the phrase "in their lawful acts" from MCL 750.479. This language was also notably left out of the newly enacted MCL 750.81d. This is significant because while the former version of MCL 750.479 clearly made it unlawful to resist police officers only if those officers were performing "lawful acts," the absence of this same language in MCL 750.81d equally clearly makes it unlawful to resist police officers regardless of whether those officers were performing "lawful acts."

At the outset, it must be observed that the majority states that the issue here is "whether the Legislature intended to abrogate the common-law right to resist an unlawful arrest with its 2002 enactment of MCL 750.81d," *ante* at 44, when it cites no case of any Michigan court in support of the underlying assumption that there was such a common-law right in Michigan. Instead, each case the majority cites supports only the proposition that the pre-2002 versions of MCL 750.479 made it illegal to resist a police officer only if the officer's actions were "lawful." See *Krum*, 374 Mich at 361 (interpreting 1948 CL 750.479), and *Clements*, 68 Mich at 658 (interpreting 1882 How Stat 9257). That is, in Michigan, pursuant to *Krum* and *Clements*, there was a *statutory* right to resist police officers in their unlawful acts. *Ventura*, 262 Mich App at 374 (stating that "under MCL 750.479, the right to resist an unlawful arrest was, in essence, a defense to the charge of resisting arrest, because the legality of the arrest was an element of the charged offense").[2] Therefore, con-

[2] I recognize, of course, that there was an English common-law right to resist unlawful arrests. Apparently, this right originated from the belief that an unlawful arrest "created adequate provocation for the victim, thus justifying the victim's resistance and reducing the charge from murder (an unprovoked killing) to manslaughter (a killing upon sufficient provocation)." Hemmens & Levin, *"Not a Law at All": A Call for a*

trary to the majority's contention, "the rules regarding abrogation of the common law," *ante* at 46, are not even clearly relevant here.

However, even assuming that as a legacy of the English common law there was a common-law right to resist unlawful police conduct in Michigan, and therefore that the rules regarding legislative abrogation must be invoked, the Legislature clearly abrogated this common-law right in 2002. "The common law and the statute laws now in force, not repugnant to this constitution, shall remain in force until they expire by their own limitations, or are changed, amended or repealed." Const 1963, art 3, § 7. "Whether a statutory scheme preempts, changes, or amends the common law is a question of legislative intent." *Wold Architects & Engineers v Strat*, 474 Mich 223, 233; 713 NW2d 750 (2006). However, "the Legislature 'should speak in no uncertain terms' when it exercises its authority to modify the common law.' " *Dawe v Dr Reuven Bar-Levav & Assoc, PC*, 485 Mich 20, 28; 780 NW2d 272 (2010), quoting *Hoerstman Gen Contracting, Inc v Hahn*, 474 Mich 66, 74; 711 NW2d 340 (2006).

Assuming that there was a common-law right in Michigan to forcibly resist a police officer's unlawful acts, I believe the Legislature "in no uncertain terms" abrogated this right when it amended MCL 750.479 and enacted MCL 750.81d. As discussed, before 2002, MCL 750.479 made it unlawful to resist a police officer only if that officer was performing a "lawful act." However, in

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Return to the Common Law Right to Resist Unlawful Arrest, 29 Sw U L R 1, 9 (1999), citing *Hopkin Huggett's Case*, 84 Eng Rep 1082 (KB, 1666). This right was later extended to excuse assaults against police officers. Hemmens & Levin, 29 Sw U L R at 11, citing *Rex v Thompson*, 168 Eng Rep 1193 (KB, 1825). However, the majority cites no authority for the proposition that this aspect of English common law was ever expressly adopted in Michigan.

2002, the Legislature removed the "lawful acts" proviso in MCL 750.479 and enacted MCL 750.81d, which similarly does not contain the "lawful acts" proviso. By doing so, the Legislature "in no uncertain terms" excluded the lawfulness of the police officer's conduct as an element of resisting an officer. That is, the Legislature clearly abrogated the right to resist unlawful police conduct. Therefore, in Michigan, as of 2002, it is unlawful to forcibly resist a police officer, regardless of the lawfulness of the police officer's actions. As the Court of Appeals explained in *Ventura*, 262 Mich App at 375-377:

> Examining the language of the [sic] MCL 750.81d, unlike in [the former version of] MCL 750.479, we find no reference to the lawfulness of the arrest or detaining act. The language of MCL 750.81d is abundantly clear and states only that an individual who resists a person the individual knows or has reason to know is performing his duties is guilty of a felony. MCL 750.81d. Because the language of the statute is clear and unambiguous, further construction is neither necessary nor permitted, and we decline to " 'expand what the Legislature clearly intended to cover' " and "read in" a lawfulness requirement.
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> * * *
>
> When the Legislature enacts statutes, it has knowledge of existing laws on the same subject, and it is not within our province to disturb our Legislature's obvious affirmative choice to modify the traditional common-law rule that a person may resist an unlawful arrest. [Citations omitted.]

The majority argues that the common-law right to resist unlawful police conduct was not abrogated because "nowhere in MCL 750.81d does the Legislature state that the right to resist unlawful conduct by an officer no longer exists." *Ante* at 48. However, this Court has already held that the Legislature does not have to expressly state that it is "abrogating a common-

law right" in order for it to abrogate a common-law right. As this Court explained in *Reed v Breton*, 475 Mich 531, 539 n 8; 718 NW2d 770 (2006):

> In *Wold Architects & Engineers v Strat*, 474 Mich 223, 234; 713 NW2d 750 (2006), we stated that nothing in the act at issue there showed an intent to abrogate the common law. We did not extend that analysis to conclude that the absence of language specifically abrogating the common law demonstrated that no abrogation occurred.

Here, the Legislature abrogated the common-law right to resist unlawful police conduct by *removing* this right from MCL 750.479 and by enacting the related statute, MCL 750.81d, without including this right. The Legislature's intent to abrogate the common-law right to resist unlawful police conduct is sufficiently clear without its having to specifically state that this was its intent. A legislative body need not provide a blow-by-blow analysis concerning the effect of its actions on the common law when its actions will admit of only the most obvious interpretation.

Contrary to the majority's position, the Legislature's striking of the lawfulness requirement from the "resisting" portions of the pertinent statutes was hardly inadvertent. This is evidenced by the fact that the lawfulness requirement was partially retained in the obstruction portions of the statutes. Both statutes define "obstruct" as "the use or threatened use of physical interference or force or a knowing failure to comply with a *lawful command*." MCL 750.479(8)(a); MCL 750.81d(7)(a) (emphasis added). Accordingly, while an individual who physically interferes with or forcibly resists an officer may be guilty of "resisting" or "obstructing," regardless of whether the officer's conduct was lawful, an individual who fails to comply with an officer's command may be guilty of "obstructing" only if

the officer's command was "lawful."[3] See *Brooks v Rothe*, 577 F3d 701, 707 (CA 6, 2009) ("[A] straightforward reading of the language of [MCL] 750.81d(7)(a) provides that the law can be violated in two ways: by physically resisting a command, whether lawful or unlawful, *or* by refusing to comply with a lawful command without using force.") (emphasis in the original). By expressly providing that failing to comply with an officer's command can constitute obstruction only if the officer's command was "lawful" and yet expressly removing this same lawfulness requirement from the physical interference and resistance portions of the statutes, the Legislature "in no uncertain terms" exercised its authority to modify the common law. That is, it modified the common-law rule—that one could be found guilty of resisting or obstructing an officer only if the officer's conduct was lawful—to allow one to be found guilty of resisting or obstructing an officer for failing to comply with an officer's lawful command or

[3] The majority holds that "the decision of the Court of Appeals in this case conflicts with the statutory language" because the Court "held that MCL 750.81d *prohibits* a person from resisting an officer's unlawful conduct, yet the statute *allows* a person to obstruct an officer's unlawful command." *Ante* at 51 (emphasis in the original). The decision of the Court of Appeals does not, in my judgment, conflict in any way with the statutory language; rather, the majority simply fails to recognize the distinction between physically interfering with or resisting an officer and simply failing to comply with an officer's command. Pursuant to MCL 750.81d, while an individual may be guilty of the former even if the officer's conduct is unlawful, an individual can be guilty of the latter only if the officer's command was lawful. For example, if a person responds to an officer's unlawful command to hand over his car keys by punching the officer, this person may be guilty of obstructing the officer; however, if the person does nothing other than refuse to hand over his keys, he would not be guilty of obstructing the officer. This distinction makes perfect sense. It is perfectly logical to punish people who physically interfere with an officer, even if the officer's conduct is unlawful, yet not punish those people who do nothing other than fail to comply with an officer's unlawful command.

for physically interfering with or resisting the officer regardless of whether the officer's conduct was lawful. The distinctions drawn are clear, reasonable, and fully within the judgment of the Legislature.

The majority further contends that the Legislature's removal of the language "in their lawful acts" is irrelevant because "this Court has recently clarified that the Legislature's failure to expressly provide for a common-law defense in a criminal statute does not prevent a defendant from relying on that defense." *Ante* at 49, citing *People v Dupree*, 486 Mich 693; 788 NW2d 399 (2010). As discussed earlier, it appears that the right to resist unlawful police conduct was a statutory right rather than a common-law right in Michigan. However, even assuming that it was a common-law right in Michigan, it was a common-law right that the Legislature codified when it enacted 1869 PA 24, which amended a predecessor of MCL 750.479, and rejected when it amended MCL 750.479 and enacted MCL 750.81d in 2002. This historical context makes this case altogether distinguishable from *Dupree* in which this Court held that an individual charged with being a felon in possession of a firearm can raise the common-law affirmative defense of self-defense even though the felon-in-possession statute is silent regarding self-defense, because the Legislature had never expressly included self-defense in the statute and then removed it. Unlike in *Dupree*, in which the Legislature simply remained silent about self-defense in the felon-in-possession statute, the Legislature has not remained silent about the right to resist unlawful police conduct. Instead, from 1869 until 2002, the Legislature clearly provided for such a right, and in 2002, the Legislature equally clearly removed it. By doing so, the Legislature "in no uncertain terms" abrogated the right to resist

unlawful police conduct,[4] and *Dupree* is hardly relevant in establishing the contrary.

Next, the majority argues that the removal of "in their lawful acts" is irrelevant because it was replaced with "similar language," namely, "performing his or her duties." *Ante* at 55-56. The majority fails to recognize the substantial distinction between "in their lawful acts" and "performing his or her duties." It is well established that the lawfulness of an individual's conduct is not necessarily determinative of whether that

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[4] Defendant argues that he should be able to claim "self-defense" because the Self-Defense Act, MCL 780.972(2), provides, in pertinent part:

> An individual who has not or is not engaged in the commission of a crime at the time he or she uses force other than deadly force may use force other than deadly force against another individual anywhere he or she has the legal right to be with no duty to retreat if he or she honestly and reasonably believes that the use of that force is necessary to defend himself or herself or another individual from the imminent *unlawful* use of force by another individual. [Emphasis added.]

First, defendant may very well have been engaged in the commission of a crime when he used force to resist the officers' entry into his house. Marijuana was found inside defendant's house, and defendant's girlfriend admitted that minors were drinking alcohol inside defendant's house. Even more significantly, it is well established that "the more specific provision prevails over the more general . . . ." *Manuel v Gill*, 481 Mich 637, 648-649; 753 NW2d 48 (2008). Clearly the resisting-and-obstructing statute more specifically pertains to the subject of resisting and obstructing a police officer than does the Self-Defense Act, and pursuant to the resisting-and-obstructing statute, an individual can only forcibly resist a police officer if he does not know or have reason to know that the officer is performing his duties. MCL 750.81d; see also *State v Hobson*, 218 Wis 2d 350, 365; 577 NW2d 825 (1998), in which a similar argument was rejected. Moreover, there is no evidence that defendant " 'reasonably believe[d] . . . that he [was] in immediate danger of unlawful bodily harm from his adversary . . . .' " *Dupree*, 486 Mich at 707, quoting 2 LaFave, Substantive Criminal Law (2d ed), § 10.4, p 142. At most, defendant could reasonably have believed that he was in immediate danger of an unlawful entry into his home by a police officer, which does not give rise to a right to forcefully resist.

individual is "performing his or her duties" because an individual can commit an unlawful act while "performing his or her duties." See *People v Corr*, 287 Mich App 499, 504; 788 NW2d 860 (2010), lv den 488 Mich 946; 794 NW2d 324 (2010) ("Under MCL 750.81d(1), it is illegal to assault, batter, resist, or obstruct an officer even if the officer is taking unlawful action, as long as the officer's actions are done in the performance of the officer's official duties."). This has been recognized time and time again in the context of the doctrine of respondeat superior. Pursuant to that doctrine, "[a]n employer is generally liable for the torts its employees commit within the scope of their employment." *Hamed v Wayne Co*, 490 Mich 1, 10-11; 803 NW2d 237 (2011). Indeed, " '[a] municipal corporation may . . . be liable for an *unlawful* and unauthorized act of one of its officers or agents if the act was done in the course of his official *duty* or employment, and within the general scope of his authority.' " *Ross v Consumers Power Co (On Rehearing)*, 420 Mich 567, 624; 363 NW2d 641 (1983), quoting 57 Am Jur 2d, Municipal, School, and State Tort Liability, § 88, pp 99-100 (emphasis added).[5] The fact

[5] See also *Anschutz v Liquor Control Comm*, 343 Mich 630, 637; 73 NW2d 533 (1955) ("[T]he instruction to the employee did not relieve defendant from responsibility for the illegal act on the ground that such employee placed himself outside the scope of his employment when he violated it."); *Barnes v Mitchell*, 341 Mich 7, 19-20; 67 NW2d 208 (1954) (" 'The application of the rule *respondeat superior* does not depend upon the obedience of the servant to his master's orders, nor upon the legality of the servant's conduct; where a servant is acting within the scope of his employment, and in so acting does something negligent or wrongful, the employer is liable, even though the acts done may be the very reverse of that which the servant was actually directed to do.' ") (citation omitted); *Randall v Chicago & Grand Trunk R Co*, 113 Mich 115, 119; 71 NW 450 (1897) (" '[T]he fact that the injury was occasioned by the negligent or unlawful acts of the appellant's employés would not make the appellant liable, unless it further appeared that the acts complained of occurred within the scope of the servants' employment.' ") (citation omitted).

that a municipality may be liable for an unlawful act of an officer if the act was done in the course of the officer's official duty or employment necessarily means that an officer can commit an unlawful act while "performing his or her duties." Therefore, contrary to the majority's suggestion, "in their lawful acts" and "performing his or her duties" are not even remotely synonymous.[6]

However, this is not to say that an officer who is "on the clock" is necessarily performing his duties or acting within the scope of his employment. Instead, an officer is performing his duties or acting within the scope of his employment when he is " ' "engaged in the service of his master, or while about his master's business." ' " *Hamed*, 490 Mich at 11 (citations omitted). "Although an act may be contrary to an employer's instructions"—or unlawful—it is within the employee's scope of employment "if the employee accomplished the act in furtherance, or the interest, of the employer's business." *Id.* On the other hand, "[i]ndependent action, intended solely to further the employee's individual interests, cannot be fairly characterized as falling within the scope of employment." *Id.* Therefore, contrary to the majority's assertion, the issue here is not whether the officers lawfully entered defendant's house, but rather whether the officers were acting to further their employer's or their own individual inter-

[6] Even the English common-law right to resist unlawful arrests did not apply to all unlawful arrests. Instead, "the cases in which the common law courts held that an illegal arrest created sufficient provocation to excuse resistance, generally involved police officers arresting individuals through truly outrageous conduct and 'arbitrary assertions of authority.' " Hemmens & Levin, 29 Sw U L R at 12, quoting Chevigny, *The Right to Resist an Unlawful Arrest*, 78 Yale L J 1128, 1131 (1969). In particular, individuals did not have a right to resist "good faith" arrests, i.e., arrests made by police officers who had a good-faith belief that the arrest was lawful. Hemmens & Levin, 29 Sw U L R at 12.

ests. In other words, were they going "about [their] master's business" or their own business when they entered defendant's house? *Id*.[7]

There is no question that the officers in this case were going about their master's business when they

[7] This interpretation is consistent with how other jurisdictions have interpreted similar statutes. For example, in *United States v Heliczer*, 373 F2d 241, 245 (CA 2, 1967), cert den, 388 US 917; 87 S Ct 2133; 18 L Ed 2d 1359 (1967), the United States Court of Appeals for the Second Circuit rejected the defendant's "claim that if the arrest was unlawful, the agents were not engaged in performing their official duties, and [the defendant] had a right to resist." *Heliczer* explained:

> "Engaged in * * * performance of official duties" is simply acting within the scope of what the agent is employed to do. The test is whether the agent is acting within that compass or is engaging in a personal frolic of his own. It cannot be said that an agent who has made an arrest loses his official capacity if the arrest is subsequently adjudged to be unlawful. [*Id.*, quoting 18 USC 111.]

See also *United States v Street*, 66 F3d 969, 978 (CA 8, 1995) ("The 'scope of what the agent is employed to do' is not defined by 'whether the officer is abiding by laws and regulations in effect at the time of the incident . . . .' ") (citation omitted); *United States v Jennings*, 991 F2d 725, 732 (CA 11, 1993) ("The test is not whether the officer is abiding by laws and regulations in effect at the time of the incident, but whether the officer is on some 'frolic of his own.' ") (citations omitted); *Barnes v State*, 946 NE2d 572, 578 (Ind, 2011) (holding that an officer "was engaged in the execution of his official duty" regardless of whether his entry into the defendant's apartment was lawful); *State v Valentine*, 132 Wash 2d 1; 935 P2d 1294 (1997) (holding that an officer "was engaged in performance of his official duties" regardless of whether his arrest of the defendant was lawful); *Commonwealth v Moreira*, 388 Mass 596, 601; 447 NE2d 1224 (1983) ("[A] person may not use force to resist an arrest by one who he knows or has good reason to believe is an authorized police officer, engaged in the performance of his duties, regardless of whether the arrest was unlawful in the circumstances."); *State v Austin*, 381 A2d 652, 654 (Me, 1978) (noting that a statute that "makes a person guilty of assaulting an officer if he 'knowingly assaults a law enforcement officer while the officer is engaged in the performance of his official duties' . . . 'discourage[s] people in custody from a violent response to what they see as an illegal arrest' ") (emphasis and citations omitted). The majority, on the other hand, does not cite a single case in support of its contrary position.

entered defendant's house. They knocked on defendant's door because a vehicle belonging to Shane Adams, who had several outstanding warrants, was parked near defendant's house and a person leaving defendant's house told one of the officers that several minors were consuming alcohol inside defendant's house and that Shane Adams "might be" inside. The officers saw empty bottles of alcohol and several people running and hiding inside the house. The officers were wearing their police uniforms, and they verbally identified themselves as police officers. Fifteen minutes after the officers knocked on the door, defendant's girlfriend, Mandy McCarry, opened the door and admitted that minors were drinking alcohol inside. When an officer asked her if she knew who owned the vehicle parked on the street, she asked if the officers were looking for Shane Adams and then denied that he was there. Both officers smelled intoxicants, and one of the officers also smelled burnt or burning marijuana. When an officer told McCarry that they were going to enter the house to secure it while they obtained a search warrant, defendant came to the door and, using obscene and vulgar language, told the officers that they could not enter. When defendant moved to close the door, an officer placed his shoulder to the door to prevent it from being closed. A struggle ensued between defendant and the officers, and defendant was removed from the house and arrested. One of the officers suffered a torn hamstring and injured elbow as the result of the struggle, for which he sought medical treatment. The officers entered the house and patted down the occupants for weapons. After a search warrant was obtained, the officers found marijuana inside the house.

Although the trial court ruled that the officers' entry into the house was unlawful because they did not yet have a warrant and there were no exigent circum-

stances to justify the warrantless entry into the house,[8] this does not mean that the officers were not "performing their duties" when they entered the house. Indeed, the officers were unquestionably acting in furtherance of their employer's interests and not in furtherance of their own personal interests. They were simply trying to do their job by locating a person who had multiple outstanding warrants while protecting minors who they had reason to believe might have been drinking alcohol and smoking marijuana. Given these circumstances, it cannot be reasonably disputed that the officers were performing their duties as law enforcement officers and, more importantly, that defendant knew or had reason to know that they were performing their duties.[9] Therefore, defendant had no right under law to resist or obstruct them.[10]

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[8] Again, because the prosecutor did not appeal that ruling, this opinion is premised on the assumption that there were no "exigent circumstances" to justify the warrantless entry into the house, and thus that the entry was unlawful. Nevertheless, it is worth noting that the "exigent circumstances" exception to the warrant requirement does allow the police to enter a home without a warrant to prevent the "imminent destruction of evidence," *In re Forfeiture of $176,598*, 443 Mich 261, 267-268; 505 NW2d 201 (1993), and when asked why the officers "wanted to 'secure' the residence," one officer testified, "[W]e wanted to prevent any destruction of evidence and so we were going to secure it so noone [sic] could flush marijuana or further eat it, or do whatever they could to destroy it," and the other officer testified that their entry "was based on probable cause that there was evidence that could be destroyed inside the residence." Accordingly, even assuming that the officers' entry was unlawful—and I undertake no effort to resolve that question in this case—the officers did not believe at the time that it was unlawful, and they certainly believed that they were performing their duties.

[9] Indeed, defendant himself has never argued that the officers were not performing their duties in the instant case.

[10] The majority refers to a hypothetical situation posed by Justice CAVANAGH at oral argument in which a male officer, while performing a search, sexually assaults a female prisoner. The majority contends that this scenario demonstrates why the language "performing his or her

II. CONSTITUTIONALITY

The next issue is whether MCL 750.81d, so interpreted, is unconstitutional, i.e., whether there is a constitutional right to resist unlawful police conduct. Defendant argues that there is such a right and specifically argues that it derives from the Fourth Amendment, which provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. [US Const, Am IV.]

Defendant cites *Payton v New York*, 445 US 573, 590; 100 S Ct 1371; 63 L Ed 2d 639 (1980), for the proposition that "the Fourth Amendment has drawn a firm line at the entrance to the house [and] [a]bsent exigent circumstances, that threshold may not reasonably be crossed without a warrant." Although this is certainly true, it says nothing about whether an individual has a right to physically resist a police officer. In other words, while the Fourth Amendment prohibits the police from entering an individual's house without a warrant absent exigent circumstances, the Fourth Amendment

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duties" and "in their lawful acts" must be interpreted as synonymous. Otherwise, the majority contends, this female prisoner would not be allowed to resist the officer without risking a resisting-and-obstructing charge. I respectfully disagree. The officer in Justice CAVANAGH's hypothetical situation simply cannot be said to have been performing his duties, not simply because his actions were unlawful, but because they were "independent action[s] accomplished solely in furtherance of [his] own criminal interests," i.e., outside the scope of his employment. *Hamed*, 490 Mich at 11. And because the female prisoner would have obvious reason to know that the officer was not performing his duties by sexually assaulting her, she could certainly resist the officer without risking being charged with resisting and obstructing.

says nothing about entitling an individual to physically resist the police when they do enter that individual's house. Defendant also cites *Wright v Georgia*, 373 US 284, 291-292; 83 S Ct 1240; 10 L Ed 2d 349 (1963), for the proposition that "one cannot be punished for failing to obey the command of an officer if that command is itself violative of the Constitution." However, *Wright* says nothing about whether an individual has a right to go *beyond* simply failing to obey an officer's unlawful command and actually physically resist the officer. As noted earlier, the Legislature recognized this distinction and expressly incorporated it into our resisting-and-obstructing statutes. MCL 750.479(8)(a); MCL 750.81d(7)(a). Only the "failure to comply" form of obstruction in these statutes is premised on the officer's command being lawful; the "physical interference" alternative says nothing about the lawfulness of the command. Our resisting-and-obstructing statutes are completely consistent with *Wright*'s prohibition on punishing a person for failing to obey an officer's unconstitutional command. *Wright*, 373 US at 291-292.[11] If the defendant in the instant case had simply refused to

[11] This was also recognized in *Bourgeois v Strawn*, 452 F Supp 2d 696, 710 (ED Mich, 2006), which explained:

> That argument, that police can manufacture grounds to arrest a person innocent of wrongdoing simple [sic] by telling him to leave his own home without any lawful authority to do so and then arresting him for violating that directive, is a disturbing proposition. The Court does not read the Michigan intermediate appellate court's decision in *Ventura* as sanctioning that argument, and the proposition is of questionable constitutional validity.

That is, *Bourgeois* recognized that *Ventura*, 262 Mich App at 377, which held that "a person may not use force to resist an arrest made by one he knows or has reason to know is performing his duties regardless of whether the arrest is illegal under the circumstances of the occasion," did not hold that a person may not refuse to comply with an unlawful command, and, thus, neither our resisting-and-obstructing statutes nor *Ventura*'s interpretation of them runs afoul of any constitutional protection.

allow the officers into his home, he could not have been charged with resisting and obstructing, but because he physically resisted the officers, he can be so charged.

In summary, defendant has not cited a single case that supports his proposition that a person has some *constitutional* right to physically resist a police officer who is engaging in unlawful conduct. Indeed, all the cases of which I am aware support the opposite proposition. See, for example, *People v Curtis*, 70 Cal 2d 347, 354; 74 Cal Rptr 713; 450 P2d 33 (1969) ("There is no constitutional impediment to the state's policy of removing controversies over the legality of an arrest from the streets to the courtroom."); Miller, *Retail Rebellion and the Second Amendment*, 86 Ind L J 939, 952-953 (2011) ("[N]o Supreme Court decision has ever held that the right to defend against an unlawful arrest is a constitutional as opposed to a mere common law right."). That there is no constitutional right to resist unlawful police conduct is also obviously supported by the fact that the Model Penal Code,[12] the Uniform Arrest Act,[13]

[12] "[T]he Model Penal Code, adopted by the American Law Institute in 1958, denies the right 'to resist an arrest which the actor knows is being made by a peace officer, although the arrest is unlawful.' " *Heliczer*, 373 F2d at 246 n 3 (citations omitted). "The Model Penal Code eliminated the right on two grounds: '(1) the development of alternate remedies for an aggrieved arrestee, and (2) the use of force by the arrestee was likely to result in greater injury to the person without preventing the arrest.' " *Barnes v State*, 946 NE2d 572, 575 (Ind, 2011), quoting Hemmens & Levin, 29 Sw U L R at 23.

[13] The Uniform Arrest Act was a model act "drafted by a committee comprised of police officers, prosecutors, defense attorneys, judges, attorneys general, and law professors." Hemmens & Levin, 29 Sw U L R at 18. It provided that " '[i]f a person has reasonable ground to believe that he is being arrested by a peace officer, it is his duty to refrain from using force or any weapon in resisting arrest regardless of whether or not there is a legal basis for the arrest' " and "it prevented an arrestee from using the illegality of the arrest as a defense to charges of assault, manslaughter, or murder." *Id*. at 18-19, quoting Warner, *The Uniform Arrest Act*, 28 Va L R 315, 345 (1942).

and "a majority of states"[14] have abolished the right. *Barnes v State*, 946 NE2d 572, 576 (Ind, 2011).[15]

III. CONCLUSION

I respectfully dissent from the majority's decision to reverse the judgment of the Court of Appeals and to overrule *Ventura*. Before 2002, the Legislature in MCL

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[14] As of 1999, 39 states had eliminated the common-law right, "twenty-three by statute and sixteen by judicial decision." Hemmens & Levin, 29 Sw U L R at 24. See also 2 LaFave, Substantive Criminal Law (2d ed), p 159 (noting that many modern state codes include a provision "outlawing the use of force against a known police officer, though the arrest is unlawful," and that "even in the absence of such an enactment some courts have abandoned the common law view").

[15] See 4 Torcia, Wharton's Criminal Law (15th ed), p 280:

> In some states, the traditional common-law rule has been changed. A person may not resist an arrest, lawful or unlawful, which he knows or believes is being made by a peace officer. The obvious purpose of this change is to avoid a dangerous confrontation and require the issue of an arrest's lawfulness to be resolved not in the street but in a court. See also Perkins, Criminal Law (3d ed), p 554:
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> [T]he problems involved are so complicated that it is easy for either the officer or the arrestee to be mistaken in regard to the lawfulness of the arrest and it seems wise to require such issues to be decided in court rather than by force and the present trend . . . is to provide that there is no privilege to resist an arrest which the arrestee knows is being made by a peace officer, even if the arrest is unlawful.

See, for example, *Commonwealth v Gomes*, 59 Mass App Ct 332, 342; 795 NE2d 1217 (2003):

> [T]he lawfulness of police entry into a residence often presents close and peculiarly fact-dependent questions as to which lawyers and even judges may disagree. Such questions, which are only resolved later with the benefit of dispassionate reflection, are particularly ill-suited to the split-second judgments required of police in their interactions with the citizenry. "Such a close question is more properly decided by a detached magistrate rather than by the participants in what may well be a highly volatile imbroglio." [Citations omitted.]

750.479 made it unlawful to resist a police officer, but only if that officer was performing what was later determined to constitute a "lawful act." However, in 2002, the Legislature amended MCL 750.479 and also enacted a new statute addressing this subject, MCL 750.81d, neither of which contains the "lawful act" requirement. By doing this, the Legislature clearly excluded consideration of the lawfulness of the police officer's conduct as a relevant element in forcibly resisting an officer as long as the police officer was "performing his or her duties," and it did so "in no uncertain terms." Therefore, I would affirm the judgment of the Court of Appeals, which, in reliance on *Ventura*, held that defendant was properly charged with resisting and obstructing a police officer under MCL 750.81d after he physically struggled with officers who had entered his home.

YOUNG, C.J., concurred with MARKMAN, J.

In re MORRIS

In re GORDON

Docket No. 142759, argued January 11, 2012 (Calendar No. 2). Docket No. 143673, argument on whether to grant leave to appeal held January 11, 2012. Decided May 4, 2012.

The Department of Human Services (DHS) filed a temporary-custody petition in the Family Division of the Wayne Circuit Court seeking jurisdiction over C. I. Morris, who was the daughter of N. Brumley and D. Morris, after the newborn tested positive for cocaine. At the preliminary hearing, both parents indicated that they had Indian heritage, but tribal notice of the action was not made in accordance with the notice provisions of the Indian Child Welfare Act (ICWA), 25 USC 1912(a). The court, Mark T. Slavens, J., assumed jurisdiction over the child and subsequently terminated both parents' parental rights. Brumley and D. Morris appealed. In the Court of Appeals, the DHS raised sua sponte the insufficiency of the tribal notice and urged the Court to conditionally affirm the termination but remand the matter so that proper notice could be provided to any interested tribe. The Court of Appeals, WHITBECK, P.J., and O'CONNELL and WILDER, JJ., affirmed the termination without addressing the admission of error in an unpublished opinion per curiam, issued February 17, 2011 (Docket Nos. 299470 and 299471). D. Morris applied for leave to appeal in the Supreme Court. In lieu of granting leave to appeal, the Supreme Court vacated that portion of the Court of Appeals' judgment resolving D. Morris's appeal and remanded the case to the Court of Appeals for resolution of the tribal-notice issue. The Supreme Court retained jurisdiction. 489 Mich 877 (2011). On remand, in an unpublished opinion per curiam, issued May 19, 2011 (Docket Nos. 299470 and 299471) the Court of Appeals readopted its previous opinion with regard to termination of D. Morris's parental rights, conditionally affirmed the termination of parental rights with regard to both parents, and remanded the case to the trial court for resolution of the notice issue. The Supreme Court granted D. Morris leave to appeal, limited to the issue whether conditional affirmance was an appropriate remedy. 489 Mich 957 (2011).

The DHS filed a temporary-custody petition in the Family Division of the Oakland Circuit Court seeking jurisdiction over J. L. Gordon, who was the son of C. Hinkle, when Hinkle failed to seek proper treatment for the child after he suffered second-degree burns to his hands. Hinkle pleaded no contest to the allegations and, following a dispositional hearing, the child was placed with Hinkle's maternal aunt, who was a member of the Saginaw Chippewa Indian Tribe. The issue of Hinkle's possible Indian heritage was raised at several hearings during the course of the proceedings. During the preliminary hearing, the referee indicated that the DHS would be ordered to investigate the matter and determine if a tribe was interested in intervening. At subsequent proceedings, the court inquired regarding the status of the tribal notification. The DHS and the assistant prosecutor indicated that notice had been sent to the Saginaw Chippewa Indian Tribe, but no response had been received. The court ordered the DHS to place a copy of the notice in the court file, but none was contained in the file. At a subsequent hearing, Hinkle and her mother indicated to the court that Hinkle's mother had received notice from the tribe that they were not eligible to receive tribal benefits. A later court order stated that the DHS "contacted ICWA again," but that no response had been received. The court, Lisa O. Gorcyca, J., subsequently terminated Hinkle's parental rights and Hinkle appealed. The Court of Appeals, CAVANAGH, P.J., and WILDER and OWENS, JJ., affirmed in an unpublished opinion per curiam, issued August 11, 2011 (Docket No. 301592), noting that Hinkle had not objected to the manner or sufficiency of the tribal notice under ICWA and concluding that the DHS had complied with ICWA in any event. Hinkle sought leave to appeal. The Supreme Court ordered and heard oral argument on whether to grant the application for leave to appeal or take other peremptory action. 490 Mich 917 (2011).

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

Sufficiently reliable information of virtually any criteria on which membership might be based is adequate to trigger the notice requirement of 25 USC 1912(a). A parent may not waive the rights granted by ICWA to an Indian child's tribe. The trial court must ensure that, at a minimum, the record includes (1) the original or a copy of each actual notice personally served or sent via registered mail pursuant to 25 USC 1912(a), and (2) the original or a legible copy of the return receipt or other proof of service showing delivery of the notice. The proper remedy for ICWA-notice violations is to conditionally reverse the trial court and remand for resolution of the notice issue.

1. Congress enacted ICWA in response to growing concerns over abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families and tribes through adoption or foster-care placement. ICWA established various substantive and procedural protections to address those concerns, including the right of a tribe to notice of child custody proceedings involving Indian children.

2. At the preliminary hearing in certain involuntary child custody proceedings, the court must inquire about Indian heritage. Notice of the proceeding must be given to the tribe if the court knows or has reason to know that the child is an Indian child. A court has reason to know that a child may be an Indian child when sufficiently reliable information of virtually any criteria on which tribal membership might be based is before the court. The standard for triggering the notice requirement of 25 USC 1912(a) is permissive given that the burden of complying with the notice requirement is minimal when compared to the potential costs of erroneously failing to send notice. Accordingly, courts should err on the side of requiring notice.

3. If sufficient indicia of Indian heritage are presented to the court to give the court a reason to believe that the child is or may be an Indian child, determination of the tribal status of the child, the parents of the child, or both, requires notice pursuant to 25 USC 1912(a). In both *Morris* and *Gordon*, the trial courts initially determined correctly that there existed sufficient indicia of Indian heritage to require tribal notice, but failed to fully comply with the requirements of 25 USC 1912(a).

4. A parent may not waive the rights granted by ICWA to an Indian child's tribe because Indian tribes have an interest in the child that is distinct from but on parity with the interest of the parents. Accordingly, the Court of Appeals clearly erred in *Gordon* by holding that Hinkle's indication that her family was not eligible for tribal benefits relieved the trial court from making further tribal-notification efforts.

5. The trial court must identify the child's tribe and ensure that the tribe receives notice of the proceedings. If the child's tribe cannot be determined, notice must be sent to the Bureau of Indian Affairs (BIA) pursuant to 25 CFR 23.11(b) and (c)(2). The court may discharge its duty by directing the petitioner to compose and send a notice containing as much information as is reasonably available to the child's tribe, or the BIA when applicable, with the information needed to make the determination of tribal member-

ship or eligibility for tribal membership. Notice must be made by personal service or sent by registered mail with return receipt requested.

6. Other than temporary placements pending the tribal or BIA notification, the trial court may not conduct any foster-care-placement or termination-of-parental-rights proceedings until (1) the expiration of the periods for response stated in 25 USC 1912(a), or (2) the properly noticed tribe or the BIA responds with information sufficient to allow the trial court to conclude that the child is not an Indian child within the meaning of ICWA. The possibility that the child is an Indian child, however, does not divest the trial court of jurisdiction to order temporary foster care pending tribal notice.

7. When the tribe does not have exclusive jurisdiction over the child under 25 USC 1911(a), if the child's tribe or the BIA responds with information sufficient for the trial court to conclude that the child is an Indian child within the meaning of ICWA and the child's tribe declines the transfer of jurisdiction or the trial court determines that there exists good cause to keep the matter in state court pursuant to 25 USC 1911(b), the substantive and procedural protections afforded by ICWA still apply to the proceedings. The application of ICWA to the state-court proceedings does not depend on whether the tribe chooses to intervene.

8. The trial court has a duty to ensure that the record includes, at a minimum, (1) the original or a copy of each actual notice personally served or sent via registered mail pursuant to 25 USC 1912(a), and (2) the original or a legible copy of the return receipt or other proof of service showing delivery of the notice. In addition, the record should include any additional correspondence between the petitioner, the court, and the Indian tribe or other person or entity entitled to notice under 25 USC 1912(a). Without the proper documentation, the court cannot determine whether notice was sent to the proper parties, whether the proper parties received the notice, whether the notice contained accurate and sufficient information, or the date on which the waiting period set forth in 25 USC 1912(a) began to run. The failure to properly document tribal notification efforts also prevents appellate courts from properly fulfilling their appellate function.

9. The proper remedy for tribal-notice errors is conditional reversal, requiring remand to correct the notice error with the ruling reversed unless ICWA does not apply. If the child is determined on remand to be an Indian child, then the foster-care or termination proceedings are invalidated and the proceedings begin anew under ICWA's standards. If no Indian child is involved

or the tribe given proper notice does not respond within the times allotted by 25 USC 1912(a), any notice violation is harmless. *In re IEM*, 233 Mich App 438 (1999), and its progeny, which adopted a conditional-affirmance remedy, were overruled.

In *Morris*, judgment of the Court of Appeals reversed with regard to the use of the conditional-affirmance remedy, trial court's termination of parental rights conditionally reversed, and case remanded to the trial court for resolution of the ICWA-notice issue.

In *Gordon*, judgment of the Court of Appeals reversed, trial court's termination of parental rights conditionally reversed, and case remanded to the trial court for resolution of the ICWA-notice issue.

1. CHILD CUSTODY — INDIAN CHILD WELFARE ACT — INDIAN CHILD.

At the preliminary hearing in involuntary child custody proceedings, the court must inquire about Indian heritage; notice of the proceeding must be given to the tribe if the court knows or has reason to know that the child is an Indian child; a court has reason to know that a child may be an Indian child when sufficiently reliable information of virtually any criteria on which tribal membership might be based is before the court (25 USC 1912[a]).

2. CHILD CUSTODY — INDIAN CHILD WELFARE ACT — INDIAN CHILD — TRIBAL DETERMINATION — NOTICE.

If sufficient indicia of Indian heritage are presented to the court in an involuntary child custody proceeding to give the court reason to believe that the child is or may be an Indian child, determination of the tribal status of the child, the parents of the child, or both, requires notice pursuant to the Indian Child Welfare Act (25 USC 1912[a]).

3. CHILD CUSTODY — INDIAN CHILD WELFARE ACT — TRIBAL RIGHTS MAY NOT BE WAIVED BY A PARENT.

A parent my not waive the rights granted by the Indian Child Welfare Act to an Indian child's tribe (25 USC 1901 *et seq*.).

4. CHILD CUSTODY — INDIAN CHILD WELFARE ACT — NOTICE.

When notice to the tribe is required in child custody proceedings under the Indian Child Welfare Act, the trial court must identify the child's tribe and ensure that the tribe receives notice of the proceedings; if the child's tribe cannot be determined, notice must be sent to the Bureau of Indian Affairs (BIA); the court may discharge its duty by directing the petitioner to compose and send

a notice containing as much information as is reasonably available to the child's tribe, or the BIA when applicable, with the information needed to make the determination of tribal membership or eligibility for tribal membership (25 USC 1912[a]; 25 CFR 23.11[b], [c][2]).

5. CHILD CUSTODY — INDIAN CHILD WELFARE ACT — NOTICE — REQUIREMENTS — DOCUMENTATION.

When notice to the tribe is required in child custody proceedings under the Indian Child Welfare Act, notice must be made by personal service or sent by registered mail with return receipt requested, and the trial court has a duty to ensure the record includes, at a minimum, (1) the original or a copy of each actual notice personally served or sent via registered mail and (2) the original or a legible copy of the return receipt or other proof of service showing delivery of the notice (25 USC 1912[a]).

6. CHILD CUSTODY — INDIAN CHILD WELFARE ACT — LIMITATION ON PROCEEDINGS.

When notice to the tribe is required in child custody proceedings under the Indian Child Welfare Act (ICWA), other than temporary placements pending the tribal or Bureau of Indian Affairs (BIA) notification, the trial court may not conduct any foster-care-placement or termination-of-parental-rights proceedings until (1) the expiration of the periods for response set forth in the act or (2) the properly noticed tribe or the BIA responds with information sufficient to allow the trial court to conclude that the child is not an Indian child within the meaning of ICWA; the possibility that the child is an Indian child, however, does not divest the trial court of jurisdiction to order temporary foster care pending tribal notice (25 USC 1912[a]).

7. CHILD CUSTODY — INDIAN CHILD WELFARE ACT — INDIAN CHILD — SUBSTANTIVE AND PROCEDURAL PROTECTIONS EFFECTIVE EVEN IF THE TRIBE DECLINES JURISDICTION.

When an Indian tribe does not have exclusive jurisdiction over the child under the Indian Child Welfare Act (ICWA), if the child's tribe or the Bureau of Indian Affairs responds with information sufficient for the trial court to conclude that the child is an Indian child within the meaning of ICWA and the child's tribe declines the transfer of jurisdiction or the trial court determines that there exists good cause to keep the matter in state court, the substantive and procedural protections afforded by ICWA still apply to the proceedings (25 USC 1911).

8. CHILD CUSTODY — INDIAN CHILD WELFARE ACT — NOTICE VIOLATIONS — REMEDY — CONDITIONAL REVERSAL.

When notice to the tribe is required in child custody proceedings under the Indian Child Welfare Act (ICWA), the proper remedy for tribal-notice errors is conditional reversal, requiring remand to correct the notice error with the ruling reversed unless ICWA does not apply; if the child is determined on remand to be an Indian child, then the foster-care or termination-of-parental-rights proceedings are invalidated and the proceedings begin anew under ICWA's standards; if no Indian child is involved or the tribe given proper notice does not respond within the times allotted by the act, any notice violation is harmless (25 USC 1912[a]).

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *B. Eric Restuccia*, Deputy Solicitor General, *Richard A. Bandstra*, Chief Legal Counsel, and *Jonathan E. Duckworth*, Assistant Attorney General, for the Department of Human Services in *Morris*.

Vivek S. Sankaran for D. Morris in *Morris*.

Juvenile Law Group (by *Arthur Bowman Jr.*) on behalf of C. I. Morris as guardian ad litem in *Morris*.

Jessica R. Cooper, Prosecuting Attorney, *Thomas R. Grden*, Chief of the Appellate Division, and *Danielle Walton*, Assistant Prosecuting Attorney, for the Department of Human Services in *Gordon*.

Karen Gullberg Cook for C. Hinkle in *Gordon*.

Amici Curiae:

Matthew L. M. Fletcher, *Kathryn E. Fort*, *Michigan Indian Legal Services, Inc.* (by *Cameron A. Fraser* and *James A. Keedy*), and *Melissa Pope* for the American Indian Law Section of the State Bar of Michigan in *Morris*.

Allie Greenleaf Maldonado for the Little Traverse Bay Bands of Odawa Indians in *Morris*.

Michigan Indian Legal Services, Inc. (by *Cameron A. Fraser*, *James A. Keedy*, and *Erin P. McCormick*), and *Melissa Pope* for the American Indian Law Section of the State Bar of Michigan and Michigan Indian Legal Services, Inc., in *Gordon*.

CAVANAGH, J. These combined cases require us to examine the Indian Child Welfare Act (ICWA), 25 USC 1901 through 1963. In particular, we must decide several issues relating to ICWA's notice provision, 25 USC 1912(a), which mandates that notice of certain involuntary child custody proceedings be sent to the appropriate Indian tribe or to the Secretary of the Interior "where the court knows or has reason to know that an Indian child is involved . . . ." Because the question whether notice violations occurred in the instant cases begins with determining whether the tribal-notice requirement of 25 USC 1912(a) was triggered, we must first consider the indicia of Indian heritage that will suffice to trigger the notice requirement. We must also consider whether a parent can waive the rights granted by ICWA to an Indian child's tribe and determine the appropriate recordkeeping requirements necessary to document the trial court's efforts to comply with ICWA's notice provision. Finally, we must determine the proper appellate remedy for violations of ICWA's notice provision.

While it is impossible to articulate a precise rule that will encompass every possible factual situation, in light of the interests protected by ICWA, the potentially high costs of erroneously concluding that notice need not be sent, and the relatively low burden of erring in favor of requiring notice, we think the standard for triggering the notice requirement of 25 USC 1912(a) must be a cautionary one. Therefore, we hold first that sufficiently reliable information of

virtually any criteria on which tribal membership might be based suffices to trigger the notice requirement. We hold also that a parent of an Indian child cannot waive the separate and independent ICWA rights of an Indian child's tribe and that the trial court must maintain a documentary record including, at minimum, (1) the original or a copy of each actual notice personally served or sent via registered mail pursuant to 25 USC 1912(a), and (2) the original or a legible copy of the return receipt or other proof of service showing delivery of the notice.[1] Finally, we hold that the proper remedy for an ICWA-notice violation is to conditionally reverse the trial court and remand for resolution of the ICWA-notice issue.

In both the instant cases there existed sufficient indicia of Indian heritage to trigger the notice requirement of 25 USC 1912(a), yet neither trial court determined whether tribal notice had been properly made. Thus, in neither case did the trial courts determine whether—in addition to state law—the substantive and procedural protections of ICWA applied to the child custody proceedings.

Therefore, in *In re Morris* we reverse the judgment of the Court of Appeals with regard to the use of the conditional-affirmance remedy, conditionally reverse the trial court's termination of parental rights, and remand to the trial court for resolution of the ICWA-notice issue. In *In re Gordon* we reverse the judgment of the Court of Appeals, conditionally reverse the trial court's termination of parental rights, and remand to the trial court for resolution of the ICWA-notice issue.

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[1] As noted in part IV(C), a complete record should also include any additional correspondence between the Department of Human Services, the trial court, and the Indian tribe or other person or entity entitled to notice.

I. FACTS AND PROCEDURAL HISTORY

In both cases, parental rights were terminated pursuant to Michigan law, even though the trial courts never conclusively determined whether ICWA applied to the proceedings.[2]

A. *In re MORRIS*

C. I. Morris is the daughter of N. Brumley and D. Morris. The Department of Human Services (DHS) became involved in December 2008 when the newborn child tested positive for cocaine. Brumley admitted using cocaine and engaging in prostitution while pregnant. D. Morris admitted that he knew about Brumley's cocaine use and prostitution. The DHS filed a temporary-custody petition for jurisdiction over the infant and to remove her from her mother's custody.

At the December 11, 2008 preliminary hearing, both parents indicated that they had Indian heritage. The father stated that his great-grandmother was Indian and that he believed she was a member of the Cherokee tribe. The mother stated that her heritage also included Cherokee Indian. Without further addressing the child's Indian heritage, the trial court ordered the child placed into foster care. The order entered after the preliminary hearing included a checked box for the following statement: "The child is a member of or eligible for membership in an American Indian tribe or

[2] Assuming ICWA does not apply to these child custody proceedings, we conclude that neither Court of Appeals panel in the instant cases clearly erred in holding that parental rights were properly terminated pursuant to Michigan law. See *In re Morris*, unpublished opinion per curiam of the Court of Appeals, issued May 19, 2011 (Docket Nos. 299470 and 299471) (readopting the court's February 17, 2011 opinion with regard to termination under state law); *In re Gordon*, unpublished opinion per curiam of the Court of Appeals, issued August 11, 2011 (Docket No. 301592).

band named CHEROKEE (complete and mail form JC48)." Immediately following that statement, the order provided, "The findings required by MCR 3.980 have been made on the record."[3] It appears, however, that tribal notice was never made.

At the April 7, 2009 adjudication trial, the referee found that one or more of the allegations in the petition were substantiated and that it was proper to exercise jurisdiction over the child. The referee further ordered both parents to comply with parent–agency agreements (PAA), with the goal being reunification. Approximately one year later, the trial court ordered the DHS to file a supplemental petition seeking termination of both parents' parental rights because they had failed to substantially comply with their PAAs and had failed to benefit from the services that were offered. On July 21, 2010, the referee found that the child could not safely be returned to the parents within the foreseeable future and the court terminated both parents' parental rights, finding that the cited statutory grounds were demonstrated by clear and convincing evidence and that termination was in the child's best interests.[4]

Brumley and D. Morris appealed, but did not raise the Indian-heritage issue in the Court of Appeals. Instead, the DHS raised sua sponte the insufficiency of notice to the Indian tribe under ICWA. In its response to the parents' consolidated appeals, the Attorney General admitted that the record did not disclose whether ICWA notification had been completed. Rather than reverse the trial court, the

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[3] At the time of these proceedings, MCR 3.980 was still in effect and required the trial court to ensure that notice of the proceedings was given to the child's tribe and the child's parents. As of May 1, 2010, MCR 3.980 has been replaced by MCR 3.905 and MCR 3.967.

[4] The statutory grounds for termination relied on by the trial court were MCL 712A.19b(3)(c)(*i*), (g), (j), and (m).

Attorney General urged the Court of Appeals to conditionally affirm the termination but remand so that proper notice could be provided to any interested tribe. The Court of Appeals affirmed the termination, however, without addressing the ICWA-notice issue or petitioner's admission of error. See *In re Morris*, unpublished opinion per curiam of the Court of Appeals, issued February 17, 2011 (Docket Nos. 299470 and 299471).

D. Morris alone applied for leave to appeal in this Court. In lieu of granting leave to appeal, we vacated that portion of the Court of Appeals judgment resolving the father's appeal and remanded to the Court of Appeals for resolution of the ICWA-notice issue. In doing so, we expressly retained jurisdiction. *In re Morris*, 489 Mich 877 (2011). On remand, the Court of Appeals readopted its February 17, 2011 opinion with regard to termination of D. Morris's parental rights, conditionally affirmed the termination of parental rights with regard to both parents, and remanded to the trial court for resolution of the ICWA-notice issue. *In re Morris*, unpublished opinion per curiam of the Court of Appeals, issued May 19, 2011 (Docket Nos. 299470 and 299471). We granted D. Morris's application for leave to appeal, "limited to the issue whether the Court of Appeals 'conditional affirmance' remedy is an appropriate method of resolving an ICWA violation." *In re Morris*, 489 Mich 957 (2011). We now reverse, but only with regard to the use of the conditional-affirmance remedy.

B. *In re GORDON*

C. Hinkle gave birth to J. L. Gordon in May 2007.[5] When JL was just a few months old, Shiawassee County Child Protective Services (CPS) received a referral for neglect and improper supervision. Hinkle and JL were

[5] The father's identity remains unknown.

living in a condemned house with no electricity or running water, and Hinkle admitted being in an abusive relationship with a gang member and her own involvement with the gang. Hinkle also admitted that she fed the baby adult table food, that she did not regularly bathe him or change his diapers, and that she sometimes shook him and threw him to other persons. Shiawassee County CPS referred Hinkle for services, but she failed to participate and eventually went missing with JL.

In November 2007, while Hinkle was in jail on an unrelated conviction, she placed JL in a guardianship with Hinkle's maternal aunt, a Saginaw Chippewa tribal member. But when Hinkle was released from jail, the guardianship was terminated and JL returned to Hinkle's care. In May 2008, Hinkle resurfaced in Oakland County, and CPS again became involved after receiving a referral alleging that JL had been treated for second-degree burns to his hands after falling into a fireplace and that Hinkle had failed to bring the child back to the hospital's burn unit for follow-up care. When CPS found Hinkle, the caseworker ordered Hinkle to take JL to the hospital for treatment of his burned hands. Hinkle apparently did not do so.

The child was taken into protective custody. Caseworker Nina Bailey filed a petition on behalf of the DHS, seeking temporary jurisdiction over JL, which was granted on May 22, 2008. On July 21, 2008, Hinkle pleaded no contest to the allegations in the petition, and the court ordered Hinkle to comply with a PAA. Following a dispositional hearing in September 2008, JL was placed back with Hinkle's maternal aunt, the Saginaw Chippewa tribal member who had previously served as JL's guardian.

By April 2010, Hinkle had made little progress toward reunification. Her compliance with the PAA was sporadic and incomplete, she had been arrested on an unrelated criminal charge, she was requesting shorter and less frequent visitations with JL, and she continued to maintain inappropriate living conditions. At an April 8, 2010 permanency planning hearing, the court recommended that the DHS file a supplemental petition seeking termination of Hinkle's parental rights. After a three-day bifurcated hearing concluding on November 1, 2010, the court terminated Hinkle's parental rights, finding that each of the statutory grounds alleged in the petition had been proven by clear and convincing evidence and that termination was in JL's best interests.[6]

The facts relevant to the ICWA-notice issue developed over the course of numerous hearings. At the May 21, 2008 hearing during which the DHS sought emergency custody of JL, Bailey indicated that neither Hinkle nor JL was a member of an Indian tribe and that they were not eligible for tribal membership. However, at the preliminary hearing on May 22, 2008, Hinkle stated that her family was part of the Saginaw Chippewa Indian Tribe in Mt. Pleasant. Hinkle seemed to indicate that she was not a member of the tribe, but the referee did not conclusively determine Hinkle's tribal status. Without further clarification from Hinkle, the referee stated: "That's okay, don't worry about it. So I will order DHS to do an investigation regarding that and notify the tribe for us and see if they want to respond to this case." The order issued after a June 3, 2008 hearing indicates "ICWA has been notified." At a hearing held on July 21, 2008, Bailey was asked about the status of the tribal notification. Bailey responded

[6] The statutory grounds for termination were MCL 712A.19b(3)(c)(*i*), (g), and (j).

that she had sent a certified letter to the Saginaw Chippewa Indian Tribe and was notified by return receipt that the letter had been received, but she had not heard back from the tribe regarding membership or eligibility for membership.

At a September 2008 dispositional review hearing, Hinkle clarified that her biological mother was not a member of the tribe, but her mother's siblings were. Hinkle's mother was present in the courtroom and confirmed that there was Indian heritage on her side of the family and that she was "waiting on that," which apparently meant that she was waiting to hear from the tribe about her own eligibility for membership. The assistant prosecutor reiterated that notice had been sent to the Saginaw Chippewa Indian Tribe, but no response had been received. The court directed the prosecutor to place a copy of the notice in the court file, and she agreed to do so, but the record does not include a copy of the notice.

At a hearing held on January 5, 2009, DHS caseworker Lisa Smith stated that an ICWA representative had requested more family history information from Hinkle, that the requested information had been provided, and that the DHS was awaiting a response. The court directed Smith to notify it when a response was received and place a copy in the court file. Smith agreed to do so, but again, the record includes no such ICWA documentation.

At an April 21, 2009 hearing, Smith told the court that Hinkle's mother had received direct notice from the tribe that the family was not eligible for tribal benefits. Hinkle's mother was present and stated that she had been notified that she and her descendents were not entitled to tribal benefits or money. Hinkle then attempted to clarify for her mother, stating, "My

son and I don't have enough heritage to get—to be part of the tribe in other words." The court stated that it was looking for "a letter" directly from the tribe. JL's foster mother stated that she is a tribal member and had tried to obtain information regarding JL's status from the tribe, but the tribe had refused to release the information to anyone but the DHS or the court. Smith reiterated that she had "sent papers to ICWA."[7] The court notified Smith that she needed to "contact them to see why they haven't responded because we need the response directly from ICWA. And they're not going to send it to anybody else, they're going to send it to the [DHS] because you're the one that's making the request." Smith agreed to contact the tribe.

On April 6, 2009, the court entered an order following a hearing, which noted, "Nothing received from ICWA—worker contacted ICWA again." This is the last reference to ICWA that appears in the record. The record includes no copies of the actual notices purportedly sent to either the Saginaw Chippewa Indian Tribe or the Secretary of the Interior. There are no postal return receipts indicating whether notice was received and, if so, by whom. Lastly, the record includes no documentation of any tribal response or other subsequent communications documenting the court's and the DHS's efforts to ensure compliance with ICWA.

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[7] A review of the transcripts reveals that the repeated references to notifying "ICWA" are apparently references to notifications sent directly to the Secretary of the Interior. We are unclear why notice would be sent to the Secretary of the Interior in this case. Section 1912(a) only requires that notice be sent to the secretary if "the identity or location of the parent or Indian custodian and the tribe cannot be determined . . . ." Hinkle specifically stated that some of her relatives were members of the Saginaw Chippewa Indian Tribe. Thus, the appropriate tribe had been determined.

Hinkle appealed the November 2010 termination decision, and the Court of Appeals affirmed. *In re Gordon*, unpublished opinion per curiam of the Court of Appeals, issued August 11, 2011 (Docket No. 301592). The Court of Appeals noted that Hinkle had objected to neither the manner nor the insufficiency of tribal notice pursuant to ICWA and concluded that, even in the absence of documentation, the record showed that the DHS had complied with ICWA. *Id*. at 4. Further, the Court of Appeals concluded that by stating that she and her son were not eligible for tribal membership, Hinkle had relieved the trial court from making further tribal-notification efforts. *Id*. Hinkle applied for leave to appeal in this Court, and pursuant to MCR 7.302(H)(1), we directed the clerk to schedule oral argument on whether to grant the application or take other action. *In re Gordon*, 490 Mich 917 (2011). Having heard oral arguments, we now reverse.

II. STANDARD OF REVIEW

Issues involving the application and interpretation of ICWA are questions of law that are reviewed de novo. *In re JL*, 483 Mich 300, 318; 770 NW2d 853 (2009). A court's factual findings underlying the application of legal issues are reviewed for clear error. *People v LoCicero (After Remand)*, 453 Mich 496, 500; 556 NW2d 498 (1996).

III. THE INDIAN CHILD WELFARE ACT

In 1978, Congress enacted ICWA in response to growing concerns over "abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families and tribes through adoption or foster care placement, usually in non-Indian homes." *Mississippi Band of Choctaw Indians v*

Holyfield, 490 US 30, 32; 109 S Ct 1597; 104 L Ed 2d 29 (1989). Senate hearings conducted between 1974 and 1978 considered the harm of these child welfare practices, not only to the Indian children and their parents, but also to the Indian tribes. *Id.* at 32-34. In its statement of findings, Congress expressed the importance of protecting and preserving Indian families, Indian tribes, and tribal culture, stating the following:

> (3) that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children . . . ;
>
> (4) that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions; and
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> (5) that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families. [25 USC 1901.]

In response to these findings, Congress declared that the policy of our nation is

> to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture . . . . [25 USC 1902.]

Thus, reflected in ICWA is a profound recognition of the separate and distinct rights of Indian tribes to their children, the most critical resource necessary to preserve not only tribal culture, but the tribes themselves.

To address the problems identified in the hearings, ICWA establishes various substantive and procedural protections intended to govern child custody proceedings involving Indian children.[8]

Two provisions define the exclusive or presumptive jurisdiction of the tribal courts over Indian children. First, if an Indian child "resides or is domiciled within the reservation of such tribe" or is a "ward of a tribal court," the child's tribe has exclusive jurisdiction "over any child custody proceeding." 25 USC 1911(a). Second, in state court foster care or termination of parental rights proceedings involving Indian children who are not wards of the tribal court and are not residents of or domiciled within a reservation, the parent, the Indian custodian of the child, or the Indian child's tribe may petition for the proceedings to be transferred to the tribal court. 25 USC 1911(b). In the absence of good cause to the contrary or declination by the tribal court, the state court "shall transfer" the proceedings to the tribal court. *Id.* Further, if the child is an Indian child and jurisdiction is not transferred to the tribal court, the child's tribe retains the right to intervene in any state court foster care placement or termination of parental rights proceeding. 25 USC 1911(c). Regardless of whether the tribe intervenes, if the child involved in the child custody proceeding is an Indian child, state courts must still conform to the heightened protections afforded by ICWA.[9] Therefore, before a state court can

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[8] Four types of proceedings are included in the definition of "child custody proceeding" found in 25 USC 1903(1)(i) through (iv): foster care placements, terminations of parental rights, preadoptive placements, and adoptive placements. See also MCR 3.002(1)(a) through (d). As discussed within this opinion, "Indian child" is defined by 25 USC 1903(4).

[9] The various protections afforded by ICWA in proceedings involving Indian children include the appointment of counsel, 25 USC 1912(b); the duty to show that "active efforts have been made to provide remedial

determine whether ICWA applies to the proceedings, the court must first make the critical determination whether the child is an "Indian child."

As defined by ICWA, an "Indian child" is "any unmarried person who is under age eighteen and is either (a) a *member* of an Indian tribe or (b) is *eligible for membership* in an Indian tribe and is the biological child of a *member* of an Indian tribe." 25 USC 1903(4) (emphasis added).[10] Aside from the age and marital-status components, both subparts (a) and (b) require a determination of tribal membership or eligibility for tribal membership, and it is well established that only the Indian tribe can determine its membership. *In re Shawboose*, 175 Mich App 637, 639; 438 NW2d 272 (1989). Therefore, when there are sufficient indications that the child may be an Indian child, the ultimate determination requires that the tribe receive notice of the child custody proceedings, so that the tribe may advise the court of the child's membership status. And thus, ICWA includes 25 USC 1912(a), the notice provision.

Before turning to the specifics of the notice provision, however, we must briefly discuss ICWA's enforcement

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services and rehabilitative programs designed to prevent the breakup of the Indian family" in foster care placement or termination of parental rights proceedings, 25 USC 1912(d); a "determination, supported by clear and convincing evidence, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child" in foster care placement proceedings, 25 USC 1912(e); a "determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child" in termination of parental rights proceedings, 25 USC 1912(f); and adoptive, preadoptive, and foster care placement preferences, 25 USC 1915.

[10] "Indian tribe" is defined as "any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary [of the Interior] because of their status as Indians . . . ." 25 USC 1903(8).

provision, 25 USC 1914, which provides a powerful collateral remedy for violations of ICWA's key provisions. That section provides:

> Any Indian child who is the subject of any action for foster care placement or termination of parental rights under State law, any parent or Indian custodian from whose custody such child was removed, *and the Indian child's tribe* may petition any court of competent jurisdiction to invalidate such action upon a showing that such action violated *any provision* of [25 USC 1911, 1912, or 1913]. [25 USC 1914 (emphasis added).]

Pursuant to this provision—and with no apparent time limitation on when the collateral action may be brought—the Indian child, a parent, an Indian custodian of the child, or the child's tribe may petition a court to invalidate foster care placements and terminations of parental rights if the state court violated *any* provision included in 25 USC 1911, 1912, or 1913. The import of this powerful remedy is that such an action to invalidate the proceedings could be brought even after the children had established permanency with a new family.[11] Accordingly, the availability of the 25 USC 1914 remedy for violations of ICWA's key provisions must inform our decision, compelling us to decide this case in a way that urges our trial courts to ensure compliance with ICWA, including compliance with the notice provision.[12]

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[11] For example, in *Holyfield*, the Indian tribe of twin children over which it had exclusive jurisdiction successfully used 25 USC 1914 to challenge a voluntary adoption two months after the entry of the final decree of adoption. *Holyfield*, 490 US at 38, 53. By the time the United States Supreme Court decided the case—holding that the chancery court had no jurisdiction to enter the adoption decree—the children had been with their adoptive parents for more than three years. *Id.* at 53.

[12] We point out why 25 USC 1914 is not an available remedy in either of the instant cases. That provision gives standing to the Indian child, the

IV. THE NOTICE PROVISION OF ICWA, 25 USC 1912(a)

The notice provision of ICWA provides:

> In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention. If the identity or location of the parent or Indian custodian and the tribe cannot be determined, such notice shall be given to the Secretary in like manner, who shall have fifteen days after receipt to provide the requisite notice to the parent or Indian custodian and the tribe. No foster care placement or termination of parental rights proceeding shall be held until at least ten days after receipt of notice by the parent or Indian custodian and the tribe or the Secretary: *Provided*, That the parent or Indian custodian or the tribe shall, upon request, be granted up to twenty additional days to prepare for such proceeding. [25 USC 1912(a).]

Several requirements can easily be extracted from the plain text of the statute. First, 25 USC 1912(a) applies only to *involuntary* foster care placements and *involun-*

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parents and the Indian custodians of the Indian child, and the Indian child's tribe. See also 25 USC 1903(9) (defining "parent"). Thus, while any one or more of the four parties may bring an action pursuant to 25 USC 1914, any such action is prefaced on the condition that the child meets the definition of an "Indian child" found in 25 USC 1903(4). Because only the Indian tribe can determine membership or eligibility for membership, an action brought under 25 USC 1914 must necessarily include a tribal determination of membership or eligibility for membership, even though the tribe itself need not intervene in the state-court proceedings. See *In re Kreft*, 148 Mich App 682, 684, 687-689; 384 NW2d 843 (1986) (holding that the respondent-mother in a termination action had standing to challenge the termination under 25 USC 1914, even though the Indian child's tribe, after intervening in the probate court, did not join the respondent in the appeal). In the instant cases, there have been no determinations that the children are Indian children, and thus, 25 USC 1914 is not available.

tary termination of parental rights proceedings occurring in state courts.[13] Second, if the "knows or has reason to know" notice condition is triggered, the party seeking foster care placement or termination of parental rights has a duty to send notice of the proceedings to (1) the parent or Indian custodian and (2) the Indian child's tribe. Third, the notice must be sent by registered mail with return receipt requested. Fourth, the contents of the notice must advise, at minimum, of both the pending proceedings and the right of the party receiving the notice to intervene. Fifth, if the party seeking termination cannot ascertain the identity of either (1) the parent or Indian custodian of the child or (2) the Indian child's tribe, then notice must be sent to the "Secretary," meaning the Secretary of the Interior.[14] Sixth, once the party seeking foster care placement or termination of parental rights receives the return receipt showing that delivery of notice has been made, a clock begins to run from the date of delivery shown on the return receipt. The tribe, parent, or Indian custodian has 10 days beginning on the date of receipt to respond to the notice, but may request up to an additional 20 days. Seventh, the trial court may hold no foster care placement or termination of parental rights proceedings until after the stated time periods have elapsed.[15] Thus, if the notice condition is triggered, the

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[13] Voluntary foster care placements, voluntary termination of parental rights proceedings, and voluntary adoptive placements are governed by 25 USC 1913.

[14] "Secretary" is defined as "the Secretary of the Interior." 25 USC 1903(11). Pursuant to 25 CFR 23.11(b) and (c)(2), when notice to the Secretary of the Interior is required under 25 USC 1912(a) for proceedings in Michigan, it is actually sent to the Minneapolis Area Director, Bureau of Indian Affairs.

[15] This does not mean that if the notice condition is triggered the children must automatically be returned to the home. As discussed in part V, until the ICWA-notice issue is resolved, the trial court need not

requisite notice must be sent and—other than necessary temporary orders pending resolution of the ICWA matter—the trial court may not hold any proceedings regarding either foster care placement or termination of parental rights until after passage of the requisite waiting periods: 10 days, or up to an additional 20 days if requested.

The application of the requirements of 25 USC 1912(a), however, is conditioned on whether the notice requirement is even triggered by indicia of Indian heritage sufficient to give the court actual knowledge or a "reason to know" that the child at issue is an Indian child.

A. THE MEANING OF "REASON TO KNOW"

As we have noted, the requirements of 25 USC 1912(a) apply only when "the court knows or has reason to know that an Indian child is involved . . . ." There is no difficulty in a situation where the court knows an Indian child is involved. In that case, the court would be privy to sufficient information to determine that the child satisfies the definition of "Indian child" set forth in 25 USC 1903(4) (i.e., the child is unmarried, under age 18, and either [a] a member of an Indian tribe or [b] eligible for membership and the biological child of a member of an Indian tribe). The difficulty arises when the court "has reason to know that an Indian child is involved . . . ." Specifically, how much information suggesting the child has or may have Indian heritage suffices to give the court "reason to know" that an Indian child is involved?

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change, and may order, temporary placements of the children because the mere triggering of 25 USC 1912(a) notice does not divest the court of jurisdiction.

We think the "reason to know" standard for purposes of the notice requirement in 25 USC 1912(a) should set a rather low bar. First, we find instructive the Bureau of Indian Affairs (BIA) guidelines, which suggest a permissive standard:

> Circumstances under which a state court has *reason to believe* a child involved in a child custody proceeding is an Indian include but are not limited to the following:
>
> (i) Any party to the case, Indian tribe Indian organization or public or private agency informs the court that the child is an Indian child.
>
> (ii) Any public or state-licensed agency involved in child protection services or family support has discovered *information which suggests that the child is an Indian child*.
>
> (iii) The child who is the subject of the proceeding gives the court *reason to believe* he or she is an Indian child.
>
> (iv) The residence or the domicile of the child, his or her biological parents, or the Indian custodian is known by the court to be or is shown to be a predominantly Indian community.
>
> (v) An officer of the court involved in the proceeding has knowledge that the child *may be an Indian child*. [Bureau of Indian Affairs, Guidelines for State Courts; Indian Child Custody Proceedings, B.1(c), 44 Fed Reg 67584, 67586 (November 26, 1979) (BIA Guidelines) (emphasis added).]

By using the terms "reason to believe," "suggests," and "may be an Indian child," this nonexhaustive list adopts a permissive standard we find consistent with the purposes animating ICWA. Further, our State Court Administrative Office recently adopted the BIA standards, with some slight variations, in its ICWA resource guide.[16]

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[16] See ICWA Special Committee, *Indian Child Welfare Act of 1978: A Court Resource Guide* (State Court Administrative Office, 2011), p 22 (hereinafter "SCAO ICWA Resource Guide"), available at

Second, we also find instructive *BH v People ex rel XH*, 138 P3d 299, 303 (Colo, 2006), in which the Colorado Supreme Court examined this same issue and noted:

> Precisely what constitutes "reason to know" or "reason to believe" in any particular set of circumstances will necessarily evade meaningful description. As in other contexts, reasonable grounds to believe must depend upon the totality of the circumstances and include consideration of not only the nature and specificity of available information but also the credibility of the source of that information and the basis of the source's knowledge. In light of the purpose of [ICWA], however, to permit tribal involvement in child-custody determinations whenever tribal members are involved, the threshold requirement for notice was clearly not intended to be high.

The court examined the BIA Guidelines and cases from other jurisdictions before concluding that "[b]ecause membership is peculiarly within the province of each Indian tribe, *sufficiently reliable information of virtually any criteria upon which membership might be based* must be considered adequate to trigger the notice provisions of the Act." *Id.* at 304 (emphasis added); see also *In re Antoinette S*, 104 Cal App 4th 1401, 1407; 129 Cal Rptr 2d 15 (2002) ("[T]he 'minimal showing' required to trigger notice under the ICWA is merely evidence '*suggest*[*ing*]' the minor 'may' be an Indian child . . . ."), quoting *Dwayne P v Superior Court*, 103 Cal App 4th 247, 258; 126 Cal Rptr 2d 639 (2002) (second alteration in original).

Third, we think the burden on the trial court and the DHS of complying with the notice requirement is minimal when compared to the potential costs of erroneously failing to send notice. At most, complying with 25

<http://courts.michigan.gov/scao/resources/publications/manuals/cws/ICWACtResourceGuide.pdf> (accessed April 27, 2012).

USC 1912(a) will extend the proceedings by some 30 days after the date the tribe or the Secretary of the Interior receives notice. If those entitled to notice do not respond within 10 days, the trial court may conduct the foster care placement or termination of parental rights proceedings. If the tribe replies to the notice, indicating that the child is not a member of the tribe and is not entitled to membership then, again, proceedings may resume. Finally, if those entitled to notice request an additional 20 days, then the court may have to wait a total of 30 days beyond the date the notice was received, as shown by the return receipt. An additional 30 days seems a comparatively low burden on the trial court and the DHS, especially when child custody cases generally take well over a year and the Indian heritage question will normally be raised at least by the time of the preliminary hearing. MCR 3.965(B)(2).[17] However, if the trial court errs by concluding that no notice is required and proceeds to place the child into foster care

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[17] MCR 3.965(B)(2) requires that the court inquire about Indian heritage at the preliminary hearing. We recognize that MCR 3.965(B)(2) is not entirely consistent with this opinion because the court rule incorporates the definition of "Indian child" into the trial court's initial determination of whether notice must be sent to the tribe:

> The court must inquire if the child or either parent is a member of an Indian tribe. If the child is a member, or if a parent is a member and the child is eligible for membership in the tribe, the court must determine the identity of the child's tribe, notify the tribe . . . . [MCR 3.965(B)(2).]

Only after the appropriate tribe responds can it be determined whether a parent, the child, or both are tribal members or are eligible for membership. And only with that information can the trial court determine whether the child meets the definition of "Indian child." Instead, the court rule should likely reflect a standard of "knows or has reason to know" or "knows or has reason to believe." This Court is considering opening an administrative file for the purpose of amending MCR 3.965(B)(2).

or terminate parental rights, the purposes of ICWA are frustrated and the Indian child, the parent or Indian custodian, or the Indian child's tribe may petition to have the proceedings invalidated pursuant to 25 USC 1914. Thus, the cost of making 25 USC 1912(a) notice is far less than the potential cost of incorrectly deciding that no notice is required.

For the foregoing reasons, we adopt the permissive standard articulated by the Colorado Supreme Court and hold that sufficiently reliable information of virtually any criteria on which membership might be based is adequate to trigger the notice requirement of 25 USC 1912(a).[18] Once sufficient indicia of Indian heritage are presented to give the court a reason to believe the child is or may be an Indian child, resolution of the child's and parent's tribal status requires notice to the tribe or, when the appropriate tribe cannot be determined, to the Secretary of the Interior. If there must be error in determining whether tribal notice is required, let it be on the side of caution.[19] See *In re MCP*, 153 Vt 275, 289;

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[18] A nonexhaustive list of indicia sufficient to trigger tribal notice includes situations in which (1) the trial court has information suggesting that the child, a parent of the child, or members of a parent's family are tribal members, (2) the trial court has information indicating that the child has Indian heritage, even though no particular Indian tribe can be identified, (3) the child's birth certificate or other official record indicates that the child or a parent of the child is of Indian descent, (4) the child, the child's parents, or the child's Indian custodian resides or is domiciled in a predominantly Indian community and (5) the child or the child's family has received services or benefits from a tribe or the federal government that are available to Indians. The state of California has codified a similarly permissive standard. See Cal Welf & Inst Code 224.3(b). While we recognize that California law is not binding on Michigan courts, we find California's codified standard an instructive template for this opinion's nonexhaustive list of sufficient indicia of Indian heritage. See also BIA Guideline B.1(c), quoted earlier.

[19] There exist numerous possible scenarios in which a child may not appear to meet the ICWA definition of "Indian child" early in the

571 A2d 627 (1989) ("To maintain stability in placements of children in juvenile proceedings, it is preferable to err on the side of giving notice and examining thoroughly whether the juvenile is an Indian child.").

In the instant cases, we agree with the trial courts' initial determinations that there existed sufficient indicia of Indian heritage to require tribal notice. In *Morris*, both parents informed the court at the December 11, 2008 preliminary hearing that they had Cherokee Indian heritage. And while the record does not reflect whether any attempt to provide notice was made at that time, the order entered after the preliminary hearing indicates that "[t]he child is a member of or eligible for membership in an American Indian tribe or band named CHEROKEE . . . ." Likewise in *Gordon*, Hinkle informed the court at the May 22, 2008 preliminary hearing that her family was part of the Saginaw Chippewa Indian Tribe, and the referee indicated that the DHS would be required to notify the Saginaw Chippewa tribe to conclusively resolve the issue. Thus, in both cases, we agree that the tribal-notice requirement of 25 USC 1912(a) was triggered because sufficient indicia of Indian heritage were presented to give the courts reason to believe that the children might be Indian children.

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proceeding, yet satisfy those conditions at some point during the pendency of the proceedings. For example, a tribe could determine that both a parent and the child are eligible for membership. In that case, if the parent accepts tribal membership, the child would meet ICWA's definition of "Indian child." It is likewise possible for a parent to be a tribal member since birth or early childhood, yet not be aware of her or his membership status until the tribe is contacted. See, e.g., *In re Termination of Parental Rights to Arianna RG*, 2003 WI 11, ¶ 17; 259 Wis 2d 563, 575; 657 NW2d 363 (2003) (noting that while many tribes require enrollment or registration, some automatically include descendents of members).

B. PARENTAL WAIVER OF THE TRIBAL RIGHT TO NOTICE

In *Gordon*, we asked the parties to address whether a parent can waive a minor child's status as an Indian child or waive compliance with ICWA. This issue is easily resolved in the negative: a parent cannot waive either a child's status as an Indian child or any of the tribe's separate and distinct rights, as guaranteed by ICWA—including the right to notice under 25 USC 1912(a). The act makes clear that Indian tribes have "an interest in the child which is distinct from but on a parity with the interest of the parents." *In re Adoption of Halloway*, 732 P2d 962, 969 (Utah, 1986), quoted in *Holyfield*, 490 US at 52. In *Holyfield*, the United States Supreme Court stated:

> The numerous prerogatives accorded the tribes through the ICWA's substantive provisions . . . must, accordingly, be seen as a means of protecting not only the interests of individual Indian children and families, but also of the tribes themselves. [*Holyfield*, 490 US at 49.]

In recognition of the tribe's protected interests in its children, the Court held that "[t]ribal jurisdiction under § 1911(a) was not meant to be defeated by the actions of individual members of the tribe," *id.* at 49, and allowing a parent to avoid the tribe's right to exclusive jurisdiction over reservation domiciliaries would "nullify the purpose the ICWA was intended to accomplish," *id.* at 52. While the *Holyfield* case is framed within the tribal right to exclusive jurisdiction, we conclude that the same principles hold true in the context of the tribal right to notice. Providing notice is a critical step to determining whether the separate and distinct tribal interests protected by ICWA are implicated. Tribes must be afforded the "opportunity to participate in determining whether the child is an

Indian and to be heard on the issue of ICWA applicability." *BH*, 138 P3d at 303 (citations omitted).

Therefore, we hold that a parent cannot waive a child's status as an Indian child or any right of the tribe that is guaranteed by ICWA. See *id.* at 304 ("Because the protection of a separate tribal interest is at the core of the ICWA, . . . otherwise sufficiently reliable information cannot be overcome by the statements, actions, or waiver of a parent . . . ."), citing *Holyfield*, 490 US at 49, 52; *In re Marinna J*, 90 Cal App 4th 731, 733; 109 Cal Rptr 2d 267 (2001) ("Because the notice requirement is intended, in part, to protect the interests of Indian tribes, it cannot be waived by the parents' failure to raise it."). The Court of Appeals in *Gordon* clearly erred by holding that Hinkle's clarification had relieved the trial court from making further tribal-notification efforts.[20]

C. 25 USC 1912(a) RECORDKEEPING REQUIREMENTS

In *Gordon*, 490 Mich 917, we asked the parties to address "whether the Department of Human Services and the family court are under a duty to make a complete record of their compliance with the notice requirements of the ICWA . . . ."[21] While the DHS per-

[20] We do not think that the purported communication from the tribe to Hinkle's mother about her eligibility for tribal benefits suffices for any purpose relevant to ICWA. First, the purported letter to Hinkle's mother had nothing to do with ICWA or the child custody proceedings. Second, it is not clear that ineligibility for tribal benefits equates with ineligibility for tribal membership. Lastly, the trial court was correct to conclude that the tribe's response to the notice of the child custody proceedings needed to be sent from the tribe or the Secretary of the Interior directly to the DHS or the trial court. A communication from a tribe to a relative of a respondent about eligibility for tribal benefits is insufficient to support any conclusion that ICWA does not apply to the child custody proceedings.

[21] This issue was not raised in *Morris* because, by all accounts, there were no efforts to comply with 25 USC 1912(a) after the December 11, 2008 preliminary hearing, during which the trial court found that 25

sonnel and the prosecutor made numerous assertions at various hearings that notice had been sent, the record in *Gordon* is devoid of any documentation of the DHS's efforts to notify either the Saginaw Chippewa Indian Tribe or the Secretary of the Interior. There are no copies of the actual notice purportedly sent. Nor does the record include any original or copy of a registered mail return receipt, which is necessary to show not only that notice was received, but also to determine when the 25 USC 1912(a) waiting period begins.[22] Lastly, while caseworker Smith stated to the trial court on January 5, 2009, that she had received and responded to a request for more family-history information, no documentation of that correspondence appears in the record. This is so even though the court repeatedly instructed both the prosecutor and Smith to ensure that copies of the ICWA-related documents were placed in the court file. It is thus impossible to discern from the record in *Gordon* whether notice was actually sent, to whom it was sent, and whether the notices were received by the appropriate recipients.

USC 1912(a) was triggered but apparently did not otherwise comply with its requirements. However, our ruling regarding recordkeeping requirements applies equally to *Morris* on remand.

[22] We are unable to determine from the record in *Gordon* whether the notice referred to was sent via registered or certified mail. However, the text of 25 USC 1912(a) specifically requires *registered mail*. See also MCR 3.920(C)(1) (requiring notice to parents and tribes "by personal service or by registered mail with return receipt requested"). We note that there *are* differences between certified and registered mail, the latter of which is more secure. Additionally, the BIA recommends that only personal service—which affords greater protections—may substitute for registered mail. BIA Guidelines B.5(e), 44 Fed Reg at 67588. Because the trial court did not determine whether tribal notice had been made, we need not opine at this time on whether actual notice achieved via certified mail instead of registered mail would be subject to harmless error review. See, e.g., *In re Alexis H*, 132 Cal App 4th 11, 16; 33 Cal Rptr 3d 242 (2005); *Nicole K v Superior Court*, 146 Cal App 4th 779, 784; 53 Cal Rptr 3d 251 (2007).

While ICWA is silent regarding the recordkeeping requirements of 25 USC 1912(a) notice compliance, we find it essential that certain documents be included in the record. First, our State Court Administrative Office recently adopted the BIA recommendation that "[t]he original or a copy of each notice sent pursuant to this section shall be filed with the court together with any return receipts or other proof of service." BIA Guidelines B.5(d), 44 Fed Reg at 67588.[23] Second, without being able to review the return receipt, the trial court cannot determine whether the proper party actually received the notice sent by registered mail. Third, the trial court cannot determine the date on which the 25 USC 1912(a) waiting period begins to run without knowing the date on which the tribe or the Secretary of the Interior received the notice, as shown by the registered-mail return receipt. Fourth, with no copy of the actual notice in the record, the trial court cannot determine if the contents of the notice provided sufficient, accurate information to enable the tribal authorities to determine tribal status of the child and the child's parents. Finally, appellate courts cannot fulfill their appellate function without documentation in the record sufficient to allow review of a trial court's efforts to comply with 25 USC 1912(a).

Indeed, *Gordon* illustrates the necessity for a documentary record of the attempts to comply with the notice requirements of 25 USC 1912(a). The lack of documentation in the record in *Gordon* prevents us from determining if the contents of the notice were sufficient to apprise the intended recipient of the pending child custody proceeding. We likewise are unable to determine to whom the

[23] See SCAO ICWA Resource Guide, p 25 ("The original or a copy of each notice along with return receipts or other proofs of service must be filed with the court.").

notices were sent, even though the transcript includes references to both the Saginaw Chippewa Indian Tribe and to "ICWA," the latter of which presumably means the Secretary of the Interior.[24] Further, there is an assertion in the January 5, 2009 hearing transcript that a notice recipient had requested additional family-background information, but we are unable to review either the purported request or any responses made to the request because the record includes neither. Lastly, we cannot determine when or if the notices were actually received by the Saginaw Chippewa Indian Tribe, which would allow us to determine when and if the 25 USC 1912(a) waiting period began to run.

Therefore, we hold that trial courts have a duty to ensure that the record includes, at minimum, (1) the original or a copy of each actual notice personally served or sent via registered mail pursuant to 25 USC 1912(a), and (2) the original or a legible copy of the return receipt or other proof of service showing delivery of the notice. In addition, it would be helpful—especially for appellate purposes—for the record to include any additional correspondence between the petitioner, the court, and the Indian tribe or other person or entity entitled to notice under 25 USC 1912(a).

Having determined that the notice requirement of 25 USC 1912(a) was triggered in both cases before us and that the trial courts did not fully comply with that statute, we are left to consider the proper remedy for ICWA-notice violations.

V. THE PROPER REMEDY: CONDITIONAL REVERSAL

Despite the best efforts of child-protection authorities and our trial courts, there will inevitably be the

[24] See n 7 of this opinion.

occasional, unintentional tribal-notice error. In neither of the instant cases did the trial courts conclusively resolve whether the children were Indian children, and therefore whether the act's substantive and procedural protections applied to the child custody proceedings was not determined. Although the trial court in *Morris* determined that tribal notice was required, it appears that notice was not made. And while there were apparently attempts in *Gordon* to comply with 25 USC 1912(a), the documentary record is insufficient to determine whether the Saginaw Chippewa Indian Tribe actually received the requisite notice.

Because ICWA and our court rules are silent regarding the proper remedy for 25 USC 1912(a) notice violations, we must choose the best of three remedies suggested by the parties and the amici curiae.[25] The first suggestion is to automatically reverse any proceedings occurring after the tribal-notice condition of 25 USC 1912(a) was triggered. The second proffered remedy is to conditionally reverse the trial court and remand for resolution of the ICWA-notice issue. The third possibility, which is substantively very similar to the second, is to conditionally affirm the trial court and remand for resolution of the ICWA-notice issue. In *In re IEM*, 233 Mich App 438, 449-450; 592 NW2d 751 (1999), our Court of Appeals adopted the conditional-affirmance remedy, and it has since been applied in more than 20 cases.[26]

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[25] Recent amendments of our court rules incorporate many ICWA standards. See, e.g., MCR 3.002; MCR 3.905; MCR 3.920(C); MCR 3.921; MCR 3.961(B)(5) and (6); MCR 3.965(B)(2) and (12)(b); MCR 3.967; MCR 3.977(A)(1). None of the relevant court rules, however, provides a remedy for ICWA-notice violations.

[26] See, e.g., *In re TM (After Remand)*, 245 Mich App 181, 187; 628 NW2d 570 (2001); *In re NEGP*, 245 Mich App 126, 133-134; 626 NW2d 921 (2001); *In re Amyx/Amyx-Holmes*, unpublished opinion per curiam of

We are guided in our assessment of these three possible remedies by the following considerations: (1) deference to tribal interests, as expressed by ICWA, (2) the best interests of the children, both Indian and non-Indian, in establishing and maintaining permanency, (3) the need to encourage compliance with ICWA, especially in light of the potential effects of the 25 USC 1914 remedy when errors occur, and (4) the conservation of judicial resources.

We must first reject the automatic-reversal remedy. The primary argument offered in support of automatic reversal is that once the 25 USC 1912(a) notice requirement is triggered, the court has no jurisdiction to enter any foster care or termination of parental rights orders pending resolution of the tribal-notice issue. Therefore, it is argued, any proceedings occurring after the notice requirement was triggered must be automatically reversed. The main case cited in support of this argument is *In re NAH*, 418 NW2d 310, 311 (SD, 1988), in which the South Dakota Supreme Court concluded that "inadequate notice to the tribes divests the trial court of jurisdiction to terminate parental rights to these Indian children; consequently, this court has no jurisdiction to address the merits of the case." The critical difference in *NAH*, however, was that the mother was a member of the Oglala Sioux Tribe and the court was able to positively conclude that the children were "Indian children entitled to the benefits and protections of [ICWA]." *Id.* Thus, because the court knew that ICWA applied to the proceedings, it was appropriate to auto-

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the Court of Appeals, issued July 21, 2011 (Docket No. 301648); *In re Toia*, unpublished opinion per curiam of the Court of Appeals, issued August 13, 2009 (Docket Nos. 289465 and 289469). As we will explain, we overrule all Michigan cases applying the conditional-affirmance remedy to ICWA-notice violations.

matically reverse the termination of parental rights.[27] The situation in *NAH* is not present in either of the instant cases, however, because it has yet to be determined whether the children involved are Indian children, whether ICWA applies, and whether the tribal court or the state court has jurisdiction.

Although the automatic-reversal remedy would be the most deferential to tribal interests and would be the most effective in stressing to courts the imperative need to comply with ICWA, we decline to adopt the argument that the mere triggering of notice pursuant to 25 USC 1912(a) strips the state court of jurisdiction over the matter and requires immediate return of the children to the home from which they were removed. Several ICWA provisions indicate that Congress did not intend for state courts to lose jurisdiction once the 25 USC 1912(a) notice requirement is triggered. For example, pursuant to 25 USC 1922, a state court may conduct an emergency removal and arrange temporary foster care placement of even a child over whom the tribal court has exclusive jurisdiction when an Indian child "who is a resident of or is domiciled on a reservation" is "temporarily located off the reservation . . . ." While ICWA does not address those children not explicitly covered by 25 USC 1922, it would make no sense for Congress to allow for emergency removal and temporary placement

[27] However, the *NAH* opinion does not include enough information for us to determine whether the Oglala Sioux Tribe had exclusive jurisdiction over the children pursuant to 25 USC 1911(a) or merely presumptive jurisdiction pursuant to 25 USC 1911(b). When a tribe has exclusive jurisdiction, then of course the state court has no jurisdiction to terminate parental rights. When a tribe merely has presumptive jurisdiction, however, we do not think that inadequate tribal notice automatically divests a state court of jurisdiction. Moreover, the merits of *NAH* have been questioned. See *In re Kerby*, 170 Or App 263, 268; 13 P3d 523 (2000) ("There is some question whether the South Dakota Supreme Court's jurisdictional ruling in [*NAH*] is correct.").

of Indian children over whom the Indian tribe has exclusive jurisdiction pursuant to 25 USC 1911(a), yet preclude those emergency and temporary measures for all others, especially when it has yet to be determined if the child qualifies as an Indian child and whether the tribal court has exclusive jurisdiction over, the right to intervene in, or no interest in the matter. See, e.g., *DED v State*, 704 P2d 774, 779 (Alas, 1985) (holding that the notice requirements of 25 USC 1912(a) do not apply to emergency custody proceedings held pursuant to 25 USC 1922); *In re SB*, 130 Cal App 4th 1148, 1162-1164; 30 Cal Rptr 3d 726 (2005) (recognizing the absurdity of applying various ICWA provisions to temporary detention proceedings and holding that Congress intended 25 USC 1922 "to apply to emergency removals and placements of *all* Indian children," not just those domiciled or residing within the reservation), citing HR Rep No. 95-1386, 2d Sess, p 25 (1978), reprinted in 1978 US Code Cong & Admin News, pp 7530, 7548.

Further, even when a petitioner has improperly removed an Indian child from the home or improperly retained custody, the child need not be returned to her or his parent or Indian custodian if doing so "would subject the child to a substantial and immediate danger or threat of such danger." 25 USC 1920. Finally, our conclusion is reinforced by the fact that 25 USC 1912(a) contains no reference to jurisdiction. It seems unlikely that Congress would have intended the triggering of tribal notice under 25 USC 1912(a) to divest a court of jurisdiction, yet would choose not to include the word "jurisdiction" within the provision. The conspicuous absence of any reference to jurisdiction in 25 USC 1912(a) becomes especially meaningful when one considers that other ICWA provisions provide detailed treatment of jurisdiction. See 25 USC 1911(a) (exclusive tribal jurisdiction); 25 USC 1911(b) (presumptive tribal

jurisdiction); 25 USC 1918 (tribal reassumption of jurisdiction); 25 USC 1919 (authorization for states and tribes to enter into jurisdictional agreements). We thus conclude that Congress was well aware of the jurisdictional issues central to ICWA, yet chose not to make the mere triggering of the notice requirement in 25 USC 1912(a) a jurisdictional issue. See *Antoinette S*, 104 Cal App 4th at 1410-1411 (holding that violations of the 25 USC 1912(a) waiting period are not jurisdictional and reasoning that "if [the] error were to strip a court of its jurisdiction . . . , then the juvenile court would lose all authority over the dependent child in its care, requiring immediate return of the child to parents who have demonstrated at least temporary unfitness"). Whether the tribal court has exclusive, presumptive, or no jurisdiction over the matter cannot even be determined in the absence of proper notice to the tribal authorities.

Therefore, we conclude that the mere triggering of the notice requirement does not strip the trial court of jurisdiction over the children and does not mandate automatic reversal of all proceedings occurring after the notice requirement was triggered. The requirement to provide tribal notice under 25 USC 1912(a) is the *means* by which a court determines its jurisdiction, but is not itself a divestiture of jurisdiction.

We also do not believe that automatic reversal would be in the best interests of the children. In the majority of cases involving ICWA-notice violations that were conditionally affirmed by the Michigan Court of Appeals, it was eventually determined that the children were not Indian children and thus that ICWA did not apply. An automatic-reversal rule would require new termination proceedings in even the cases not involving Indian children, and this would disrupt or delay the permanent placement of the child. It would be counter-

productive and nonsensical to disrupt the permanent placement of a child before it is determined whether the child is an Indian child. Additionally, an automatic-reversal rule would not conserve judicial resources because it would require the invalidation of all orders entered when there was an ICWA-notice violation, even if it is later determined that the child is not an Indian child.

Finally, the automatic-reversal remedy would be inconsistent with our longstanding disfavor of automatic reversals. See *In re Osborne*, 459 Mich 360, 369; 589 NW2d 763 (1999). Therefore, without a showing that ICWA even applies to the foster care or termination of parental rights proceedings, i.e., that the child is an Indian child, we decline to adopt a rule of automatic reversal.[28]

Our choices thus narrow to either the conditional-reversal or the conditional-affirmance remedy. Other jurisdictions have employed one or the other remedy to ICWA tribal-notice violations. See, e.g., *In re Elizabeth W*, 120 Cal App 4th 900, 908; 16 Cal Rptr 3d 514 (2004) (conditional reversal); *In re REKF*, 698 NW2d 147, 151 (Iowa, 2005) (conditional affirmance).

From a practical perspective, we realize there is little difference between the conditional remedies: both require a remand to remedy the notice violation. A conditional affirmance merely states that the lower court ruling is affirmed unless ICWA applies, whereas a conditional reversal states that the ruling is reversed unless ICWA does not apply. Under either remedy, if the child is determined to be an Indian child, then the foster care or termination proceedings are invalidated and the proceedings begin anew under ICWA's standards. If no

[28] However, when an appellate court can conclude from the record properly before it that a child *is* an Indian child entitled to the benefits and protections of ICWA, an outright reversal may be an appropriate remedy if the trial court failed to apply ICWA's standards.

Indian child is involved, however, or the tribe given proper notice does not respond within the times allotted by 25 USC 1912(a), any notice violation is harmless.

As far as the best interests of the children, there is again little difference between the conditional-affirmance and conditional-reversal remedies. Under either remedy, the children will likely stay in their current placements until the notice violation is resolved, and thus their permanency is not unduly affected in the interim. Additionally, there is no difference between these remedies as far as conserving judicial resources. Both require a remand to remedy the notice violation.

Nevertheless, in other ways, substantial differences exist between the two remedies. First, we think the use of a conditional reversal is more consistent with the text of 25 USC 1912(a), which mandates that "[n]o foster care placement or termination of parental rights proceeding shall be held until at least ten days after receipt of notice by the parent or Indian custodian and the tribe or the Secretary . . . ." Second, between the two remedies, conditional reversal is more deferential to tribal interests, as expressed by ICWA, and is more likely to ensure these interests are protected by the trial courts. The term "conditional reversal" sends a clearer signal to the lower courts and the DHS that they must pay closer attention when ICWA is implicated. In sum, we think that the conditional-reversal remedy is more emphatic, more consistent with the text and purposes animating ICWA, and more likely to encourage compliance with ICWA.

Therefore, we overrule *IEM* and its progeny and hold that conditional reversal is the proper remedy for violations of 25 USC 1912(a).[29]

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[29] We also clarify another aspect of *IEM*. The Court of Appeals quoted with approval a Vermont case for the proposition that after remanding to the trial court for proper notice to the Indian tribe, " '[i]f the tribe does

VI. CONCLUSION

We hold that the proper remedy for ICWA-notice violations is to conditionally reverse the trial court and remand for resolution of the ICWA-notice issue. In addition, we hold that virtually any criteria on which tribal membership might be based suffices to trigger the 25 USC 1912(a) notice requirement. We hold also that a parent of an Indian child cannot waive the separate and independent rights of an Indian child's tribe, as guaranteed by ICWA. Lastly, we hold that the trial court must maintain a documentary record including, at minimum, (1) the original or a copy of each actual notice personally served or sent via registered mail pursuant to 25 USC 1912(a), and (2) the original or a legible copy of the return receipt or other proof of service showing delivery of the notice.

In *In re Morris* we reverse the judgment of the Court of Appeals with regard to the use of the conditional-affirmance remedy, conditionally reverse the trial court's termination of parental rights, and remand to the trial court for resolution of the ICWA-notice issue. In *In re Gordon* we reverse the judgment of the Court of

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not seek to intervene, or after intervention the trial court still concludes that the ICWA does not apply, the original orders will stand.' " *IEM*, 233 Mich App at 450, quoting *In re MCP*, 153 Vt 275, 289; 571 A2d 627 (1989). This language has since been repeated in ICWA-notice cases. See, e.g., *In re BJ & GH*, unpublished opinion per curiam of the Court of Appeals, issued June 10, 2003 (Docket No. 242892); *In re Burgett*, unpublished opinion per curiam of the Court of Appeals, issued March 11, 2008 (Docket No. 280642). The above-quoted language erroneously implies that even if the child is determined to be an Indian child, it would be proper to affirm an involuntary foster care placement or termination of parental rights determination made under state law—in the absence of ICWA's protections—if the Indian tribe chose not to intervene. If the child meets the definition of Indian child, ICWA applies, regardless of whether the Indian tribe chooses to intervene in the state-court proceedings.

Appeals, conditionally reverse the trial court's termination of parental rights, and remand to the trial court for resolution of the ICWA-notice issue. On remand, the trial courts shall first ensure that notice is properly made to the appropriate entities. If the trial courts conclusively determine that ICWA does not apply to the involuntary child custody proceedings—because the children are not Indian children or because the properly noticed tribes do not respond within the allotted time—the trial courts' respective orders terminating parental rights are reinstated. If, however, the trial courts conclude that ICWA does apply to the child custody proceedings, the trial courts' orders terminating parental rights must be vacated and all proceedings must begin anew in accord with the procedural and substantive requirements of ICWA. We do not retain jurisdiction.

YOUNG, C.J., and MARILYN KELLY, MARKMAN, HATHAWAY, MARY BETH KELLY, and ZAHRA, JJ., concurred with CAVANAGH, J.

APPENDIX:

AN OVERVIEW OF THE 25 USC 1912(a) NOTICE PROCESS

To aid our lower courts in properly applying the notice requirement of 25 USC 1912(a), we offer the following cursory overview. While this overview begins at the preliminary hearing, we recognize that the Department of Human Services, pursuant to its own policies and procedures, will have previously begun the process of gathering the information necessary to determine the applicability of the Indian Child Welfare Act (ICWA). As noted in the opinion, for more comprehensive guidance, see ICWA Special Committee, *Indian*

Child Welfare Act of 1978: A Court Resource Guide (State Court Administrative Office, 2011) (SCAO ICWA Resource Guide).

1. At the preliminary hearing, the court must inquire about Indian heritage. While MCR 3.965(B)(2) frames the inquiry in terms of actual tribal membership, sufficiently reliable information of virtually any criteria on which membership might be based is adequate to trigger the notice requirement of 25 USC 1912(a). See part IV(A) of the opinion. As we have noted, not all tribes keep written rolls and it is possible for a parent to be unaware that she or he is a member of a tribe. See n 19 of the opinion and accompanying text.

2. If sufficient indicia of Indian heritage are presented to give the court a reason to believe the child is or may be an Indian child, determination of the tribal status of the child, the parents, or both requires notice pursuant to 25 USC 1912(a).

3. The trial court must identify the child's tribe[1] and ensure that the tribe receives notice of the proceedings. If the child's tribe cannot be determined, notice must be sent to the Bureau of Indian Affairs (BIA). See n 14 of the opinion and accompanying text. While MCR 3.965(B)(2) states that "the court must . . . notify the tribe," the court may discharge its duty by directing the petitioner to compose and send notice containing as much information as is reasonably available to provide the child's tribe, or the BIA when applicable, with the information needed to make the determination of tribal membership or eligibility for tribal membership. For a

[1] For information on determining the child's tribe, see Bureau of Indian Affairs, Guidelines for State Courts; Indian Child Custody Proceedings, B.2, 44 Fed Reg 67584, 67586-67587 (November 26, 1979); SCAO ICWA Resource Guide, pp 22-24.

suggested list of the notice contents, see Bureau of Indian Affairs, Guidelines for State Courts; Indian Child Custody Proceedings, B.5(b), 44 Fed Reg 67584, 67588 (November 26, 1979).

4. Notice must be made by personal service or sent by registered mail with return receipt requested. See n 22 of the opinion.

5. Other than temporary placements pending the tribal or BIA notification, the trial court may not conduct any foster care placement or termination of parental rights proceedings until (1) the expiration of the time periods stated in 25 USC 1912(a), or (2) the child's tribe or the BIA responds with information sufficient to allow the trial court to conclude that the child is not an Indian child within the meaning of ICWA. The possibility that the child is an Indian child does not divest the trial court of jurisdiction to order temporary foster care pending tribal notice. See part V of the opinion.

6. When the tribe does not have exclusive jurisdiction under 25 USC 1911(a), if the child's tribe or the BIA responds with information sufficient for the trial court to conclude that the child is an Indian child within the meaning of ICWA and the child's tribe declines the transfer of jurisdiction or the trial court determines that there exists good cause to keep the matter in state court pursuant to 25 USC 1911(b), the substantive and procedural protections afforded by ICWA still apply to the proceedings. The application of ICWA to the state-court proceedings does not depend on whether the tribe chooses to intervene. See n 29 of the opinion. If the child is an "Indian child," ICWA applies. See n 9 of the opinion and accompanying text.

7. The trial court has a duty to ensure the record includes, at minimum, (1) the original or a copy of each

actual notice personally served or sent via registered mail pursuant to 25 USC 1912(a), and (2) the original or a legible copy of the return receipt or other proof of service showing delivery of the notice. In addition, the record should include any additional correspondence between the petitioner, the court, and the Indian tribe or other person or entity entitled to notice under 25 USC 1912(a).

PEOPLE v REESE

Docket No. 142913. Argued January 11, 2012 (Calendar No. 7). Decided May 14, 2012.

Verdell Reese, III, was charged in the Wayne Circuit Court with second-degree murder, MCL 750.317, and, alternatively, voluntary manslaughter, MCL 750.321, for the shooting death of Leonardo Johnson. Defendant was also charged with being a felon in possession of a firearm, MCL 750.224f, and possessing a firearm while committing a felony, MCL 750.227b. After a bench trial, the court, Annette J. Berry, J., found that defendant, who had been shot by Johnson during the incident in question, had not acted in self-defense because he was the initial aggressor and did not retreat from the confrontation. However, the court concluded that defendant was guilty of manslaughter rather than murder under the doctrine of imperfect self-defense, which the court ruled was applicable to these circumstances. The court denied defendant's motions for a new trial, which were based on potential testimony from a witness to the event. The Court of Appeals, TALBOT, P.J., and METER and DONOFRIO, JJ., in an unpublished opinion per curiam issued September 16, 2010 (Docket No. 292153), affirmed defendant's felon-in-possession and felony-firearm convictions but vacated defendant's conviction for voluntary manslaughter and remanded for a new trial on the ground that the trial court's factual findings and legal conclusions were insufficient under the imperfect self-defense doctrine, particularly regarding whether defendant was the initial aggressor. The Supreme Court granted the prosecution's application for leave to appeal. 489 Mich 958 (2011).

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

The doctrine of imperfect self-defense does not exist in Michigan law as a freestanding defense that mitigates murder to voluntary manslaughter. To distinguish the two crimes, the finder of fact must determine whether the prosecution proved the element of malice, although factual circumstances that have been characterized as imperfect self-defense may negate the malice element of second-degree murder.

1. Michigan statutory law proscribes both murder and manslaughter, but does not define either term. Because both crimes

existed at common law, Michigan courts have defined the statutory terms in light of their common-law meanings. Second-degree murder is a death caused by an act of the defendant with malice and without justification or excuse. Manslaughter requires the same elements with the exception of malice. Voluntary manslaughter occurs when the defendant killed in the heat of passion, the passion was caused by adequate provocation, and there was no lapse of time during which a reasonable person could have controlled his or her passions. Provocation is not an element of voluntary manslaughter; it is the circumstance that negates the presence of malice.

2. At common law, self-defense could justify an otherwise unlawful homicide, but only if the use of force was necessary. While there is no duty to retreat in one's own home or from a sudden, violent attack, a voluntary participant in mutual combat has a duty to retreat to a safer place before resorting to deadly force.

3. Previous decisions of the Court of Appeals have applied the doctrine of imperfect self-defense to situations in which a defendant would have been entitled to claim self-defense had he or she not been the initial aggressor or at fault for provoking the danger. This doctrine was not developed until 1882, which postdated the Michigan Legislature's 1846 codification of the common-law crimes of murder and manslaughter and their attendant defenses. When Michigan codified murder and manslaughter, the circumstances that the common law recognized as negating the element of malice were the presence of provocation and heat of passion; the common law did not recognize the doctrine of imperfect self-defense. Once the Legislature had codified the common-law offenses of murder and manslaughter with their attendant defenses and mitigations, Michigan courts were foreclosed from altering what the Legislature adopted. Accordingly, there is no independent defense of imperfect self-defense in Michigan law.

4. The evidence that defendant had participated in a shootout with the victim from which he did not retreat was sufficient for a fact-finder to conclude that defendant was guilty of voluntary manslaughter and that defendant was not entitled to self-defense. Moreover, the trial court's factual findings regarding the elements of voluntary manslaughter and defendant's self-defense claim were not clearly erroneous. Accordingly, the trial court's verdict must be affirmed, and defendant is not entitled to a new trial on the ground that the evidence was insufficient.

Trial court's verdict affirmed; Court of Appeals' judgment reversed in part and vacated in part; case remanded to the Court of Appeals for consideration of remaining issue.

Justice MARILYN KELLY, joined by Justices CAVANAGH and HATHAWAY, concurring in part and dissenting in part, concurred in the decision to reinstate defendant's manslaughter conviction but dissented from the pronouncement that the doctrine of imperfect self-defense does not exist in Michigan law because it was unnecessary to reach that issue in this case. All that was needed to resolve the appeal was a holding that the Court of Appeals incorrectly applied the clear-error standard.

1. HOMICIDE — SECOND-DEGREE MURDER — MANSLAUGHTER — MALICE.

Second-degree murder is a death caused by an act of the defendant with malice and without justification or excuse; manslaughter requires the same elements with the exception of malice; voluntary manslaughter occurs when the defendant killed in the heat of passion, the passion was caused by adequate provocation, and there was no lapse of time during which a reasonable person could have controlled his or her passions; provocation is not an element of voluntary manslaughter but is instead a circumstance that negates the presence of malice (MCL 750.317; MCL 750.321).

2. HOMICIDE — SELF-DEFENSE — IMPERFECT RIGHT OF SELF-DEFENSE — MALICE.

The doctrine of imperfect self-defense does not exist in Michigan law as a freestanding defense that mitigates murder to voluntary manslaughter; to distinguish the two crimes, the finder of fact must determine whether the prosecution proved the presence of malice, which is an element of murder but not manslaughter; factual circumstances that have been characterized as imperfect self-defense, however, may negate the malice element of second-degree murder (MCL 750.317; MCL 750.321).

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Kym L. Worthy*, Prosecuting Attorney, and *Timothy A. Baughman*, Chief of Research, Training and Appeals, for the people.

State Appellate Defender (by *Valerie R. Newman*) for defendant.

YOUNG, C.J. We granted the prosecution's application for leave to appeal to resolve whether Michigan law recognizes the doctrine of "imperfect self-defense" as an independent theory that automatically mitigates crimi-

nal liability for a homicide from murder to voluntary manslaughter when a defendant acts as the initial aggressor and then claims that the victim's response necessitated the use of force. We hold that the doctrine of imperfect self-defense does not exist in Michigan law as a freestanding defense mitigating murder to voluntary manslaughter, although we recognize that factual circumstances that have been characterized as imperfect self-defense may negate the malice element of second-degree murder. When analyzing the elements of manslaughter in light of defendant's self-defense claim, we conclude that the Court of Appeals erred in its ruling on the sufficiency of the prosecution's evidence to sustain defendant's manslaughter conviction. Therefore, we reverse in part the Court of Appeals' judgment,[1] affirm the trial court's verdict of manslaughter, and remand this case to the Court of Appeals for further consideration of defendant's remaining issue on appeal.

I. FACTS AND PROCEDURAL HISTORY

Defendant, Verdell Reese, III, was charged with second-degree murder[2] and, alternatively, voluntary manslaughter[3] for the April 2008 death of Leonardo Johnson.[4] Defendant waived his right to a jury trial and proceeded to a bench trial in the Wayne Circuit Court.

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[1] The Court of Appeals affirmed defendant's convictions for being a felon in possession of a firearm, MCL 750.224f, and felony-firearm, MCL 750.227b. Because defendant does not cross-appeal those convictions in this Court, our opinion today does not disturb them.

[2] MCL 750.317.

[3] MCL 750.321.

[4] In addition to these charges, defendant was also charged with being a felon in possession of a firearm, carrying a concealed weapon, and felony-firearm.

According to testimony adduced at trial, defendant owed $2,000 to Johnson, who was so upset about the debt that he had not spoken to defendant for approximately six months. Johnson lived with his cousin, James Long, in Detroit. Defendant was Long's close friend; Long described his relationship with defendant as being "like brothers." Other testimony established that defendant visited the residence that Long and Johnson shared several times a week, even though Johnson did not like that defendant visited with such frequency.

Long testified that on the evening of April 17-18, 2008, defendant and a man named John Smith (also known as J.T.) arrived at the Johnson/Long residence. After they had been at the house for a couple of hours, defendant and another friend, D, drove to a nearby store to purchase liquor. While defendant and D were at the store, Lakeshia Williams, who was Johnson and Long's cousin, left the house with Smith and walked toward the east, where she lived.

Williams testified that, after she left the house, she saw Johnson approach from the east. Once Smith greeted Johnson, Williams heard two gunshots as defendant's car drove past them. She heard the first gunshot come from the driver's side of the car, but testified that she did not know the origin of the second gunshot. Smith placed himself between Williams and the street and, after the second gunshot, ran back to Johnson and Long's house. Johnson also continued on his way to his house, while Williams continued to her house and told her father about the gunshots she heard.[5]

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[5] Long also testified that he heard a gunshot from the east and that defendant and D were driving back from the store, also from the east, at about this time.

Although Williams did not see the ensuing encounter between Johnson and defendant, Long did. After parking his car on the street, defendant walked toward the house and began talking with Long. According to Long, Johnson then approached the house and asked, "[W]hat's up with that[?]" to which defendant replied, "[W]hat's up with what?" Long testified that he then saw both defendant and Johnson step back and flinch. Long then heard a shot and saw muzzle fire coming from Johnson's direction, followed by five more shots that came from both Johnson's and defendant's positions.

Once the shooting ended, Johnson ran across the street and through a vacant lot, while defendant remained in front of the house. A police officer responding to the shooting found Johnson's body facedown on the driveway of a house one block north of the shootings. Johnson's .40 caliber semiautomatic pistol was nearby and contained a live round that had jammed in the chamber. The medical examiner testified that Johnson had been shot twice and that the fatal bullet passed through his right arm into his chest.

Defendant had been shot in the right leg. Long and Smith drove defendant to the hospital in defendant's car, but not before Long put defendant's gun in the house. Another officer was dispatched to the hospital where defendant was admitted and took a brief statement from defendant.[6] Defendant "was very vague [and] did not want to give any information about what happened." However, defendant did say that "he was standing outside by the car, heard several shots and was struck by several shots" before being taken to the hospital. Defendant claimed to know neither the person who fired the shots nor where the shots had come from.

[6] At this point, officers considered defendant a gunshot victim.

He later changed his version of the events and told another officer that the shots came from a vacant lot across the street, although defendant again said that he could not provide a description of the shooter. In his third statement to police, defendant denied having seen who shot him and did not state the location of the shooter. However, he claimed that he did not think he was the intended target of the shooting.

At the bench trial, defense counsel did not call any witnesses and argued that defendant did not shoot Johnson or, alternatively, that defendant shot Johnson in self-defense. The trial court made its findings of fact and issued its ruling from the bench. First, the trial court rejected defense counsel's claim that defendant did not shoot and kill Johnson: "There's no question . . . [that] Mr. Johnson shot at Mr. Reese and Mr. Reese shot at Mr. Johnson, okay. So to suggest that Mr. Reese never shot Mr. Johnson is a mischaracterization of what was proffered by way of evidence here." The trial court theorized that the shootings occurred because defendant and Johnson "[couldn't] settle their scores in a diplomatic or a professional or responsible way."

Addressing the defendant's alternative claim of self-defense, the trial court explained that the general rule of self-defense in Michigan is that "one . . . may use deadly force in self-defense if he . . . honestly and reasonably believes that he is in imminent danger of death or great bodily harm and that deadly force is necessary to prevent such a death or great bodily harm." The trial court emphasized that "the touchstone of any claim of self-defense as justified for homicide is a necessity . . . ." Thus, the trial court determined that "whether or not the Defendant himself was the original aggressor . . . [is] key to the evaluation of the self-defense defense."

The trial court then explained that "Michigan courts have recognized the doctrine of imperfect self-defense . . . [as] a qualified defense that mitigates second degree murder to voluntary manslaughter . . . ." The trial court continued, emphasizing that "the doctrine only applies where the Defendant would [have] had the right of self-defense [and] . . . he acted as the initial aggressor." Finally, the trial court explained that an initial aggressor is entitled to the justification of self-defense when "he generally stopped fighting his assault and clearly let the other person know that he wanted to make peace."

The trial court acquitted defendant of second-degree murder, explaining:

> Is this homicide murder in the second degree? It is not. I don't think the People have proven [their] case beyond a reasonable doubt, but what the Court has found is that in this case there's no question that the victim shot at Mr. Reese.

The trial court then concluded that defendant was the initial aggressor in the confrontation:

> The fact of the matter is, is that Mr. Reese was the one that fired the first shot as Mr. Johnson is walking back to his house and I agree with the prosecutor. This is Mr. Johnson's house, not Mr. Reese's house and Mr. Reese knew that if he'd come to that house there would be trouble . . . .
>
> That being stated the evidence shows clearly the Defendant shot out of the car the first shot. That was verified by Miss Williams. She saw that. The Court can use circumstantial evidence and you [defendant] were in the car. This is verified by Mr. Long who says you got out of the car and as you're walking up, so, too, is Mr. Johnson and at that point this is where the evidence parts ways, who fired the first shot.

> This is where the imperfect self-defense comes in and that is clearly that you were the aggressor. The Court finds, Mr. Reese, that you were the aggressor in this case; that you fired the first shot prompting Mr. Johnson to be on guard, prompting Mr. Johnson to pull his weapon on you, prompting you then to pull your weapon on him and no question, this was a shoot-out.

After identifying this as a case involving imperfect self-defense, the trial court applied the elements of manslaughter to the evidence in this case:

> The Court finds the prosecution has proven, first, that the Defendant caused the death of Mr. Johnson; that is, that Mr. Johnson died as a result of multiple gunshot wounds.
>
> Second, the Defendant had one of these three states of mind; he either intended to kill Mr. Johnson or he intended to do great bodily harm to Mr. Johnson and pumping five rounds into somebody is pretty much evidence that you intended to at least, at the very least, do great bodily harm to Mr. Johnson or knowingly created a very high risk of death or great harm bodily harm knowing that death or such harm would be the likely result of your actions and, third, the Defendant caused the death without legal justification.
>
> The Court find[s] you to be the aggressor here. You're the one [who] shot the first shot. You're the one [who] scared Mr. Johnson into believing that now he had to defend himself. . . .
>
> Mr. Johnson . . . said, ["]what's up with that[?"] The Court infers from that statement that he's wondering, what the heck you doing shooting a gun off by his house, and the Court finds that you shot him . . . .
>
> * * *
>
> The Court finds that the Defendant did not act in lawful self-defense and the People have proven that he did not act in lawful self-defense because he was the initial aggressor.

> He didn't back off. He didn't say, okay, it didn't mean anything. Hey, Mr. Johnson[,] . . . I didn't mean anything . . . .
>
> * * *
>
> The Court's going to find the Defendant guilty of voluntary manslaughter, homicide manslaughter for the reasons stated on this record.[7]

The trial court subsequently sentenced defendant, as a third-offense habitual offender, to 8 to 30 years' imprisonment for the manslaughter conviction.[8] Immediately before sentencing, defense counsel moved for a new trial on the basis of potential testimony by Smith. Defendant renewed this request in a postsentence pro se motion for a new trial on the basis of counsel's failure to call Smith as a witness. The trial court denied both motions in a subsequent written opinion.

On appeal, defendant claimed that the prosecution had failed to prove that he was the initial aggressor and that, therefore, he had a valid self-defense claim. Second, defendant claimed that the trial court had abused its discretion by denying his posttrial motions for a new trial.

The Court of Appeals vacated defendant's conviction for voluntary manslaughter and remanded for a new trial on the basis of defendant's first claim of error.[9] The

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[7] The court also convicted defendant of being a felon in possession of a firearm and felony-firearm, but acquitted defendant of carrying a concealed weapon.

[8] Defendant received a sentence of 1 to 10 years' imprisonment for the felon-in-possession conviction and the 2-year mandatory consecutive sentence on the felony-firearm conviction, with 217 days of credit on the felony-firearm conviction.

[9] *People v Reese*, unpublished opinion per curiam of the Court of Appeals, issued September 16, 2010 (Docket No. 292153), p 1.

panel stated that it was "unable to reconcile the uncontroverted facts with what appears to be the trial court's inaccurate application of the doctrine of imperfect self-defense."[10] In particular, the panel questioned the trial court's conclusion that defendant was the initial aggressor:

> The evidence indicates the initial firing of two shots in an unknown direction and by an unknown individual before the face-to-face confrontation between Reese and Johnson. Only the first shot was attributed to Reese based on Williams indicating she heard the shot and assumed it was from his vehicle. Williams could not place whether the shooter was in the driver's seat or back seat of the vehicle. There is no testimony or evidence to identify who fired the second shot or where it originated. Based on Johnson's continued ambulation toward Reese and Long's house and engaging Reese in conversation, albeit very briefly, it seems reasonable to assume that Johnson did not feel threatened or intimidated by this random, preceding gunfire, which requires us to question the trial court's labeling of Reese as the initial aggressor to justify the use of imperfect self-defense to convict him of voluntary manslaughter.[11]

The Court of Appeals criticized the trial court's characterization of defendant's intent to harm Johnson as "problematic on a number of levels."[12] First, the panel claimed that there was a "lack of evidence that Reese personally fired five shots during the events involved" because "[t]he medical examiner identified only two wounds to Johnson."[13]

Second, the panel claimed that the trial court's ruling "would contraindicate the applicability of imperfect self-defense," given the trial court's conclusion that

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[10] *Id.*

[11] *Id.* at 3.

[12] *Id.*

[13] *Id.*

Smith interfered with Williams's ability to see the shots from the car "[be]cause he knows something is coming down . . . ."[14] If this observation could be attributed to defendant's state of mind, the panel reasoned, that "state of mind would preclude the use of imperfect self-defense."[15]

Third, the panel claimed that an "insurmountable" difficulty in the trial court's ruling was that the trial court had "failed to address Reese's intent at the crucial point in time—the initial provocation."[16] The panel then concluded that the evidence did not support the assumption that defendant acted with the required intent during the initial provocation because even if defendant fired the initial shots before the deadly confrontation, "there is no evidence that he aimed his weapon at Johnson" and the only evidence regarding defendant's intent was "some cryptic comments between Johnson and Reese before they exchanged fire . . . ."[17]

Finally, the panel criticized the trial court for failing to account for the "delay between the first shots and any further aggression," which the panel speculated was a sufficient length of time for defendant to "withdr[a]w from the conflict" and for Johnson to "initiate a new conflict."[18]

In the end, the Court of Appeals concluded that it could not "state with any confidence that either the factual findings or the conclusions of law by the trial court are sufficient to sustain Reese's conviction for voluntary man-

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[14] *Id.* at 4.

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *Id.* at 4-5.

slaughter."[19] Accordingly, the panel vacated defendant's manslaughter conviction and remanded this case to the trial court for a new trial, although it affirmed defendant's convictions and sentences for being a felon in possession of a firearm and possessing a firearm during a felony. Because it granted defendant a new trial, the panel did not address defendant's second claim of error, involving defendant's motion for a new trial based on Smith's potential testimony.

This Court granted the prosecution's application for leave to appeal and ordered the parties to address "whether the doctrine of imperfect self-defense can mitigate second-degree murder to voluntary manslaughter and, if so, whether the doctrine was appropriately applied to the facts of this case by the Wayne Circuit Court."[20]

II. STANDARD OF REVIEW

Whether the doctrine of imperfect self-defense exists under Michigan law is a question of law, which this Court reviews de novo.[21] In examining the sufficiency of the evidence, "this Court reviews the evidence in a light most favorable to the prosecutor to determine whether any trier of fact could find the essential elements of the crime were proven beyond a reasonable doubt."[22] A trial court's findings of fact may not be set aside unless they are clearly erroneous.[23] A ruling is clearly erroneous "if the reviewing court is left with a definite and firm conviction that the trial court made a mistake."[24]

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[19] *Id.* at 5.

[20] *People v Reese*, 489 Mich 958 (2011).

[21] *People v Riddle*, 467 Mich 116, 124; 649 NW2d 30 (2002).

[22] *People v Robinson*, 475 Mich 1, 5; 715 NW2d 44 (2006).

[23] MCR 2.613(C); *Robinson*, 475 Mich at 5.

[24] *People v Armstrong*, 490 Mich 281, 289; 806 NW2d 676 (2011).

III. ANALYSIS

Because the trial court concluded that the doctrine of imperfect self-defense applied to this case, and because the Court of Appeals reversed the trial court's verdict on the ground that the trial court had misapplied the doctrine to the facts of the case, this case presents this Court with the question whether the doctrine of imperfect self-defense exists under Michigan law. Although the Court of Appeals has adopted and applied the doctrine of imperfect self-defense,[25] this Court has neither adopted it nor defined its scope and applicability.

A. MICHIGAN LAW OF HOMICIDE

In analyzing the doctrine of imperfect self-defense to determine whether it can mitigate second-degree murder to voluntary manslaughter, we follow the foundational principles of interpretation that this Court has outlined regarding Michigan's law of homicide:

> Because Michigan's homicide statutes proscribe "murder" without providing a particularized definition of the elements of that offense or its recognized defenses,[16] we are required to look to the common law at the time of codification for guidance. See Const 1963, art 3, § 7;[17] *People v Couch*, 436 Mich 414, 418-421; 461 NW2d 683 (1990). Where a statute employs the general terms of the common law to describe an offense, courts will construe the statutory crime by looking to common-law definitions. See *Couch*, [436 Mich] at 419, quoting *Morissette v United States*, 342 US 246, 263; 72 S Ct 240; 96 L Ed 288 (1952):
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> " '[W]here [a legislature] borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the

[25] See, e.g., *People v Vicuna*, 141 Mich App 486, 493; 367 NW2d 887 (1985); *People v Amos*, 163 Mich App 50, 56-57; 414 NW2d 147 (1987); *People v Butler*, 193 Mich App 63, 67; 483 NW2d 430 (1992).

> body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them.' "
>
> The criminal law, as defined at common law and codified by legislation, "should not be tampered with except by legislation," and this rule applies with equal force to common-law terms encompassed in the defenses to common-law crimes. *In re Lamphere*, 61 Mich 105, 109; 27 NW 882 (1886).[26]

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[16] The Legislature has bifurcated all murder offenses into first-degree murder, MCL 750.316, and second-degree murder, MCL 750.317. The statutory description of these offenses has changed little since the first Penal Code was enacted in 1846. See *People v Couch*, 436 Mich 414, 418-421; 461 NW2d 683 (1990) (opinion by BOYLE, J.).

[17] "The common law and the statute laws now in force, not repugnant to this constitution, shall remain in force until they expire by their own limitations, or are changed, amended or repealed."

When the Legislature codifies a common law offense and thereby adopts the common law defenses to that offense, this Court is "proscribed from expanding or contracting the defense as it existed at common law."[27]

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[26] *Riddle*, 467 Mich at 125-126.

[27] *Id.* at 126; see also *People v Dupree*, 486 Mich 693, 706; 788 NW2d 399 (2010) ("Absent some clear indication that the Legislature abrogated or modified the traditional common law affirmative defense of self-defense for the felon-in-possession charge in MCL 750.224f or elsewhere in the Michigan Penal Code, we presume that the affirmative defense of self-defense remains available to defendants if supported by sufficient evidence."). In 2006, the Legislature enacted the Self-Defense Act, MCL 780.971 *et seq*. This Court has not interpreted the act beyond stating that it does not apply to crimes committed before the act's effective date, see *Dupree*, 486 Mich at 708. However, its provisions, and its relation to the common law of self-defense, are not at issue in the instant case because neither party claims that it applies here.

Riddle correctly observed that Michigan statutory law proscribes, but does not define, "murder."[28] The same can be said of "manslaughter."[29] Because both of these classes of homicides existed at common law, Michigan courts have defined the statutory terms in light of their common law meanings.

For example, as early as 1858, this Court defined "murder" as when "a person of sound memory and discretion unlawfully kills any reasonable creature in being, in the peace of the state, with malice prepense or aforethought, either express or implied" and stated that "[t]his, the common law definition, is still retained in our statute."[30] The malice enshrined in the common law understanding of murder "did not mean deliberate and calculating malice, but only malice existing at any time before the act so as to be its moving cause or concomitant."[31] Applying this traditional understanding of com-

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[28] See MCL 750.316 (first-degree murder); MCL 750.317 (second-degree murder). "Although first-degree murder is defined by statute, the statute is understood to include the common-law definition of murder." *People v Mendoza*, 468 Mich 527, 534 n 6; 664 NW2d 685 (2003).

[29] See MCL 750.321.

[30] *People v Potter*, 5 Mich 1, 6 (1858). Although he did not cite Coke's Institutes, Chief Justice MARTIN's opinion defined murder nearly identically to the definition of murder that Blackstone attributed to Coke: " '[W]hen a person of sound memory and discretion unlawfully killeth any reasonable creature in being, and under the king's peace, with malice aforethought, either express or implied.' " 4 Blackstone, Commentaries on the Law of England (2d Cooley ed), p *195, quoting 3 Coke, Institutes of the Laws of England, p 47. (This professed quotation of Coke was actually a close paraphrase; Coke defined murder as "when a man of sound memory, and of the age of discretion, unlawfully killeth within any county of the realm any reasonable creature *in rerum natura* under the king's peace, with malice fore-thought, either expressed by the party, or implied by law . . . ." 3 Coke, p 47.)

[31] *Nye v People*, 35 Mich 16, 19 (1876). The *Nye* Court generalized the statutory distinction between first- and second-degree murder in terms of the malice element: "In dividing murder into degrees, its common-law

mon law murder, this Court established the following elements of second-degree murder: "(1) a death, (2) caused by an act of the defendant, (3) with malice, and (4) without justification or excuse."[32]

The common law distinguished manslaughter from murder by the absence of malice. Blackstone defined manslaughter as "the unlawful killing of another without malice either express or implied" and further classified manslaughter as being committed "either voluntarily, upon a sudden heat; or involuntarily, but in the commission of some unlawful act."[33]

This Court explained the crime of voluntary manslaughter further:

> Manslaughter may in some cases be intentional. In such a case it differs from murder because it is provoked. It is not justifiable to take life under provocation, and yet the provocation may be serious enough to deprive the intentional killing of its malicious character, so that it is neither murder on the one hand nor justifiable or excusable on the other. It is a very serious crime, though not reckoned as done with malice.[34]

In *People v Mendoza*, this Court recently reiterated this common law distinction between murder and manslaughter:

> [T]o show voluntary manslaughter, one must show that the defendant killed in the heat of passion, the passion was caused by adequate provocation, and there was not a lapse of time during which a reasonable person could control his passions. See *People v Pouncey*, 437 Mich 382, 389; 471

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qualities are not changed, but (except in special cases) the division is chiefly between cases where the malice aforethought is deliberate and where it is not." *Id*.

[32] *People v Goecke*, 457 Mich 442, 464; 579 NW2d 868 (1998).

[33] 4 Blackstone, p *191.

[34] *Nye*, 35 Mich at 18-19.

> NW2d 346 (1991). Significantly, provocation is not an element of voluntary manslaughter. See *People v Moore*, 189 Mich App 315, 320; 472 NW2d 1 (1991). Rather, provocation is the circumstance that negates the presence of malice. [*People v*] *Scott*, [6 Mich 287, 295 (1859)].[35]

Accordingly, *Mendoza* concluded that "the elements of voluntary manslaughter are included in murder, with murder possessing the single additional element of malice."[36]

B. SELF-DEFENSE AND IMPERFECT SELF-DEFENSE

Traditionally, the common law of self-defense justifies an otherwise unlawful homicide by allowing "a man [to] protect himself from an assault, or the like, in the course of a sudden broil or quarrel, by killing him who assaults him."[37] However, Blackstone reiterated that "[t]his right of natural defence does not imply a right of attacking: for, instead of attacking one another for injuries past or impending, men need only have recourse to the proper tribunals of justice."[38]

This understanding of self-defense is consistent with the fact that this Court from a very early time characterized self-defense in terms of necessity: "Human life is not to be lightly disregarded, and the law will not permit it to be destroyed unless upon urgent occasion."[39] This Court's decision in *Riddle* reiterated that "the touchstone of *any* claim of self-defense, as a justification for homicide, is *necessity*."[40] *Riddle* also explained that while there is no duty to retreat from

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[35] *Mendoza*, 468 Mich at 535-536.

[36] *Id.* at 540.

[37] 4 Blackstone, p *184.

[38] *Id.*

[39] *Pond v People*, 8 Mich 150, 173 (1860).

[40] *Riddle*, 467 Mich at 127.

within one's "castle,"[41] or from a sudden, violent attack,[42] a "voluntary participant in mutual combat" has the duty to retreat to a safer place before resorting to deadly force.[43]

The Texas Court of Appeals appears to have been the first appellate court to define a separate doctrine of "imperfect self-defense" as it is constituted today, which it did in an 1882 decision.[44] In *Reed v State*, the defendant was convicted of second-degree murder for killing his paramour's husband, apparently while the defendant was *in flagrante delicto* with the victim's wife. The defendant claimed that he acted in self-defense because the husband drew his weapon upon discovering the defendant with his wife. Nevertheless, the trial court concluded that the defendant was not entitled to self-defense in light of the fact that the

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[41] *Id.* at 135 ("Where a person is in his 'castle,' there is simply *no safer place* to retreat.").

[42] *Id.* at 129-130 ("[O]ne is never obliged to *retreat* from a sudden, fierce, and violent attack, because under such circumstances a reasonable person would, as a rule, find it necessary to use force against force without retreating. The violent and sudden attack removes the ability to retreat.").

[43] *Id.* at 133.

[44] *Reed v State*, 11 Tex App 509 (1882). The phrase also appears, albeit in a different sense, in Bishop's criminal law treatise, published in 1868:

> There are two kinds of defence which a man may make of his person or his property. The one extends, when necessary to accomplish the object, to the taking of the life of the aggressor; and this we shall call, in the present chapter, perfect defence. The other permits not the person using it to take life; but it does permit him to resist trespasses on his person or property to an extent not involving the life of the trespasser; and this, in the present chapter, we shall call imperfect defence.

2 Bishop, Commentaries on the Criminal Law (3d ed), § 625, p 334. Thus, on Bishop's theory of "imperfect defense," a non-life-threatening "assault and battery, for instance, may be justified as inflicted in defence of one's property." *Id.*, § 642, p 343.

husband had a justification under Texas law to kill the defendant.[45] The appellate court acknowledged that the preservation of one's life was "the first great law of nature" but qualified that right's application: "[T]he right of self-defense, though inalienable, is and should to some extent be subordinated to rules of law . . . ."[46] Accordingly, the court divided self-defense into two separate classes:

> A perfect right of self-defense can only obtain and avail where the party pleading it acted from necessity, and was wholly free from wrong or blame in occasioning or producing the necessity which required his action. If, however, he was in the wrong,—if he was himself violating or in the act of violating the law,—and on account of his own wrong was placed in a situation wherein it became necessary for him to defend himself against an attack made upon himself which was superinduced or created by his own wrong, then the law justly limits his right of self-defense, and regulates it according to the magnitude of his own wrong.[47]

Thus, if someone is physically attacked when committing a felony, "and in resisting such attack he slay[s] his assailant, the law would impute the original wrong to the homicide and make it murder."[48] On the other hand, "if the original wrong was or would have been a misdemeanor, then the homicide growing out of or occasioned by it, though in self-defense from an assault made upon him, would be manslaughter under the

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[45] Texas law at the time considered a homicide justifiable when it was " 'committed by the husband upon the person of anyone taken in the act of adultery with the wife, provided the killing take place before the parties to the act of adultery have separated.' " *Reed*, 11 Tex App at 516, quoting article 567 of the Texas Penal Code.

[46] *Reed*, 11 Tex App at 517.

[47] *Id.* at 517-518.

[48] *Id.* at 518-519.

law."[49] After the Texas court adopted the doctrine of imperfect self-defense, several other states followed suit.[50]

In Michigan, the theory of imperfect self-defense first appeared in a footnote to a 1971 Court of Appeals opinion, although the term itself was not used in that opinion:

> In general, mitigating circumstances are the commission of the killing in a sudden heat of passion caused by adequate legal provocation. 1 Wharton's Criminal Law and Procedure, § 274, p 580 *et seq*.; Perkins on Criminal Law (2d ed), p 54. Wharton and Perkins say that even where such mitigating circumstances are not present the crime may be manslaughter, not murder, when the actor kills in self-defense but was not entitled to do so under the circumstances, either because he was not free from fault or his belief that he was in danger was not justified.[51]

Then Judge LEVIN's obiter dictum[52] remained just that for nine years, until the Court of Appeals' decision in *People v Springer* reversed a second-degree murder conviction on the basis of the defendant's "imperfect

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[49] *Id.* at 519.

[50] *State v Partlow*, 90 Mo 608; 4 SW 14 (1887); *State v Flory*, 40 Wyo 184; 276 P 458 (1929); *Shuck v State*, 29 Md App 33; 349 A2d 378 (1975); *State v Bush*, 307 NC 152; 297 SE2d 563 (1982).

[51] *People v Morrin*, 31 Mich App 301, 311 n 7; 187 NW2d 434 (1971).

[52] *Morrin* involved whether the prosecution had proved the elements of first-degree murder. The panel vacated the defendant's first-degree murder conviction for insufficient evidence to "support a reasonable inference that [the defendant] killed his victim with the requisite deliberation and premeditation" to sustain a first-degree murder conviction. *Id.* at 306. However, the panel concluded that the prosecution had presented sufficient evidence to sustain a second-degree murder conviction and that the jury's verdict "constituted an express finding" of the elements of second-degree murder. *Id.* at 307. Accordingly, the panel ordered entry of a judgment convicting the defendant of second-degree murder. *Id.*

right to self-defense."[53] The *Springer* panel explained that this "qualified right of self-defense has been adopted in several jurisdictions" and determined that a defendant "is guilty of manslaughter, not murder" when "the defendant would be entitled to claim self-defense except for the fact that he was at fault in provoking the danger to himself . . . ."[54]

After the Court of Appeals' decision in *Springer*, several other decisions of the Court of Appeals applied the doctrine of imperfect self-defense to situations in which the defendant was the initial aggressor.[55] However, the lead Court of Appeals opinion in *People v Kemp* warned that "the inquiry regarding the applicability of the doctrine of imperfect self-defense requires more than just a determination whether defendant was the initial aggressor."[56] Rather, the court must "focus . . . on '*the intent with which the accused brought on the quarrel or difficulty*' " giving rise to lethal force.[57] On

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[53] *People v Springer*, 100 Mich App 418, 421; 298 NW2d 750 (1980), remanded on other grounds 411 Mich 867 (1981), rev'd on other grounds 417 Mich 1060 (1983).

[54] *Springer*, 100 Mich App at 421.

[55] See, e.g., *Vicuna*, 141 Mich App at 493; *Amos*, 163 Mich App at 56-57; *Butler*, 193 Mich App at 67. The Court of Appeals has also noted that this Court had not recognized the doctrine and chose not to expand the doctrine beyond the scope of *Springer*. Thus, the panel in *People v Deason* stated that "Michigan courts . . . have not addressed [imperfect self-defense] where a defendant merely asserts that he maintained an unreasonable belief or reacted with an unreasonable amount of force" and declined to extend the doctrine in that manner, even though "such circumstances [were] alluded to by Judge, now Justice, LEVIN" in his *Morrin* dictum. *People v Deason*, 148 Mich App 27, 32; 384 NW2d 72 (1985). The panel noted that such an application "would be a significant extension of prior case law and is more appropriately a matter for legislation, court rule, or appeal to the Supreme Court." *Id.*

[56] *People v Kemp*, 202 Mich App 318, 324; 508 NW2d 184 (1993) (opinion by REILLY, J.).

[57] *Id.*, quoting *Partlow*, 90 Mo at 617.

this principle, a defendant who "initiate[s] the confrontation between himself and the victim with the intent to kill or do great bodily harm" is not entitled to have the crime be mitigated to manslaughter.[58]

Although Judge CONNOR agreed with the panel's decision to remand for further trial court proceedings regarding voluntary manslaughter, he criticized the lead opinion's emphasis on the doctrine of imperfect self-defense as "counterproductive" in light of the fact that the panel was "only following the longstanding law of voluntary manslaughter in Michigan."[59] Judge CONNOR explained:

> In Michigan, the crime of murder is reduced to manslaughter if committed "under the influence of passion or in the heat of blood produced by adequate provocation." CJI 16:4:02(1). If defendant's desire to kill his victim was actually born of the moment, if it was the result of such provocation that would cause a reasonable person to kill in the heat of passion, then his crime is manslaughter, not murder. See *People v Younger*, 380 Mich 678, 681-682; 158 NW2d 493 (1968).
>
> I do not believe that the theory of imperfect self-defense adds anything to Michigan's traditional notions of self-defense or voluntary manslaughter, and I would not require the trial court to apply the theory of imperfect self-defense in this case.[60]

Although Judge MICHAEL J. KELLY also concurred in the remand, he too criticized the doctrine of imperfect self-defense, calling it "slippery and undeveloped," and suggested that this Court take up the issue.[61] We do so today.

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[58] *Kemp*, 202 Mich App at 324.

[59] *Id.* at 327 (CONNOR, J., dissenting in part).

[60] *Id.*

[61] *Id.* at 325 (MICHAEL J. KELLY, J., concurring). Until today, this Court has not resolved the issue, although we have alluded to it in the past. This Court's decision in *People v Heflin*, 434 Mich 482, 509; 456 NW2d 10 (1990) (opinion by RILEY, C.J.), did not formally adopt the doctrine in the

C. IMPERFECT SELF-DEFENSE DOES NOT EXIST UNDER MICHIGAN LAW

Under Michigan law, the doctrine of imperfect self-defense does not exist as a freestanding defense that mitigates a murder to manslaughter because it was not recognized as such under the common law at the time the Legislature codified the crimes of murder and manslaughter.

As discussed, the doctrine first appeared in an 1882 Texas decision, postdating the Michigan Legislature's 1846 codification of the common law crimes of murder and manslaughter and their attendant defenses. It is significant that the doctrine of imperfect self-defense developed *after* the Legislature codified the common law crimes of murder and manslaughter, which means that the Legislature *could not have* codified the doctrine into the murder and manslaughter statutes. In further support of this conclusion, we note that when adopting the doctrine of imperfect self-defense, the *Springer* panel *acknowledged* that the doctrine was an innovation in the common law by stating that it "*has been adopted* in several jurisdictions . . . ."[62] Thus, the

context of voluntary manslaughter, but Chief Justice RILEY's lead opinion discussed the doctrine's incompatibility with involuntary manslaughter and stated that imperfect self-defense was "an unlawful act that does not fall within the definition of common-law involuntary manslaughter: *a lawful act* negligently performed." In *People v Posey*, 459 Mich 960 (1999), this Court acknowledged that it had not decided whether Michigan law recognizes the doctrine of imperfect self-defense by stating that "[o]ur resolution of this matter should not be construed as a ruling that 'imperfect self-defense' is recognized as a theory which would reduce murder to manslaughter."

[62] *Springer*, 100 Mich App at 421 (emphasis added). Other states have similarly refused to adopt the doctrine of imperfect self-defense and noted that the issue is now a matter of legislative prerogative. See *State v Shaw*, 168 Vt 412, 417; 721 A2d 486 (1998) ("The doctrine of imperfect self-defense has not been generally recognized at common law."); *State v*

Springer panel erred by purporting to change the common law of this state *after* the Legislature codified the common law crimes of murder and manslaughter in 1846. This Court has emphatically stated that once the Legislature codifies a common law crime and its attendant common law defenses, the criminal law of this state concerning that crime "should not be tampered with except by legislation . . . ."[63]

Although we reject the doctrine of imperfect self-defense, many circumstances that involve what the Court of Appeals labeled "imperfect self-defense" can nevertheless provide grounds for a fact-finder to conclude that the prosecution has not proved the malice element that distinguishes murder from manslaughter. However, we emphasize that the operative analysis for the fact-finder is not whether the circumstances involving "imperfect self-defense" exist. Rather, the operative analysis is whether the prosecution has proved the element of malice beyond a reasonable doubt. This focus rightly turns on the *actual elements* of murder and manslaughter, rather than any label of "imperfect self-defense" as a judicially created shorthand that risks becoming unmoored from the actual element distinguishing the two crimes.

"[T]he elements of voluntary manslaughter are included in murder, with murder possessing the single additional element of malice."[64] Malice itself "evolved from being merely an intent to kill to also evidencing

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Bowens, 108 NJ 622, 626-627; 532 A2d 215 (1987) ("[R]ecognition of an 'imperfect self-defense' would require us to create, as a matter of decisional law, new substantive elements not embraced by the [New Jersey] Code [of Criminal Justice].").

[63] *Riddle*, 467 Mich at 126, quoting *Lamphere*, 61 Mich at 109; see also Const 1963, art 3, § 7 ("The common law and the statute laws now in force, not repugnant to this constitution, shall remain in force until they expire by their own limitations, or are changed, amended or repealed.").

[64] *Mendoza*, 468 Mich at 540.

the absence of mitigating circumstances."[65] After describing several examples of malice, Blackstone explained:

> [The] general rule [is] that all homicide is malicious, and, of course, amounts to murder, unless where *justified* by the command or permission of the law; *excused* on the account of accident or self-preservation; or *alleviated* into manslaughter, by being either the involuntary consequence of some act, not strictly lawful, or (if voluntary), occasioned by some sudden and sufficiently violent provocation.[66]

This understanding of malice is consistent with this Court's 1859 determination that the element of malice is negated when the "direct intent to kill" was caused by "great provocations sufficient to excite the passions beyond the control of reason."[67]

This Court's *Mendoza* decision summarized the scope of the mitigating circumstances that the common law traditionally recognized:

> [B]oth murder and voluntary manslaughter require a death, caused by defendant, with either an intent to kill, an intent to commit great bodily harm, or an intent to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result. However, the element distinguishing murder from manslaughter—malice—is negated by the presence of provocation and heat of passion.[68]

Additional circumstances—including the label "imperfect self-defense"—were not themselves recognized at common law as negating the element of malice. Because the Legislature chose to codify the common law offenses of murder and manslaughter, thereby including the

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[65] *Id.*

[66] 4 Blackstone, p *201.

[67] *People v Scott*, 6 Mich 287, 295 (1859).

[68] *Mendoza*, 468 Mich at 540, citing *Scott*, 6 Mich at 295.

attendant defenses and mitigations, we are foreclosed from altering that which the Legislature adopted.[69] Accordingly, we reiterate the *Mendoza* Court's formulation of the distinction between murder and manslaughter and hold that there is no independent defense of imperfect self-defense in Michigan law.[70]

IV. APPLICATION

Both the trial court and the Court of Appeals analyzed defendant's claim within the context of imperfect self-defense. The Court of Appeals granted defendant relief in the form of a new trial on the manslaughter charge because it determined that the trial court had both misinterpreted the evidence of this case and misapplied the doctrine of imperfect self-defense to the evidence. In light of our holding that the doctrine of imperfect self-defense does not exist as an independent mitigation in Michigan law, we need not review the Court of Appeals' analysis of the doctrine except as it relates to the Court of Appeals' application of the facts of this case to the elements of manslaughter.[71]

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[69] *Riddle*, 467 Mich at 126.

[70] The partial dissent would not rule on the doctrine of imperfect self-defense and instead would leave to another day the question whether the doctrine exists in Michigan law. However, both the trial court and the Court of Appeals treated this case as one involving imperfect self-defense and analyzed the doctrine in detail in their rulings. As a result, the doctrine of imperfect self-defense is so intertwined with both the trial court's conviction on manslaughter and the Court of Appeals' reversal of that conviction that this Court has the responsibility to obviate the doctrinal confusion regarding imperfect self-defense before analyzing and correcting the other errors in those rulings. Thus, we are not "reach[ing] out to strike down the doctrine of imperfect self-defense," *post* at 163, but instead are correcting an error of law that already pervades both lower court decisions and that was essential to their rulings.

[71] The trial court concluded that the prosecution had not proved the elements of second-degree murder beyond a reasonable doubt. Accord-

Voluntary manslaughter requires "a death, caused by defendant, with either an intent to kill, an intent to commit great bodily harm, or an intent to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result."[72] The trial court concluded that the prosecution had proved the first two elements beyond a reasonable doubt, rejecting defendant's theory that he did not shoot Johnson. The court based its conclusion on Long's eyewitness testimony that defendant and Johnson engaged in a shooting match in front of Johnson and Long's house. This conclusion is not clearly erroneous and, along with the unrebutted testimony of the medical examiner, establishes the first two elements of voluntary manslaughter—that defendant caused Johnson's death by gunshot. The Court of Appeals rightly did not disturb this conclusion.

The trial court also concluded that the prosecution had proved the third element of manslaughter beyond a reasonable doubt—that defendant caused Johnson's death with the requisite intent. The Court of Appeals, however, rejected as "problematic on a number of levels" the trial court's claim that

> "pumping five rounds into somebody is pretty much evidence that you intended to at least, at the very least, do great bodily harm to Mr. Johnson or knowingly created a very high risk of death or great bodily harm knowing that death or such harm would be the likely result of your actions."[73]

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ingly, the prosecutor conceded at oral argument before this Court that defendant is no longer subject to the second-degree murder charge, and this Court need not speculate whether the evidence adduced at trial could sustain a second-degree murder conviction.

[72] *Mendoza*, 468 Mich at 540.

[73] *Reese*, unpub op at 3.

The panel explained that "there is no evidence that five shots were expended during these events" and that, at most, "only three gunshots can be attributed to Reese, not five as stated by the trial court."[74] Even if the Court of Appeals was correct regarding the number of shots defendant fired, the trial court's reasonable finding that "this was a shoot-out" between Johnson and defendant alone renders its conclusion regarding the intent element of manslaughter not clearly erroneous.[75] Because defendant participated in the shootout, defendant clearly had the intent to create a very high risk of great bodily harm to Johnson, knowing that death or great bodily harm was the probable result of his actions. This intent existed regardless of whether the shooting was justified in self-defense, as defendant claims.[76] Accordingly, the trial court did not clearly err by concluding that the prosecution had proved all three elements of manslaughter beyond a reasonable doubt.

Because defendant claims that he was entitled to assert self-defense as a complete justification for shooting Johnson, we also address this claim. "[O]nce the defendant satisfies the initial burden of production, the prosecution bears the burden of disproving the common law defense of self-defense beyond a reasonable doubt."[77] Defendant has satisfied his initial burden of production because he "produc[ed] some evidence from which a [fact-finder] could conclude that the elements

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[74] *Id.* at 3-4.

[75] Moreover, a stipulated laboratory report regarding defendant's revolver revealed that it had five empty shell casings in the cylinder, supporting the trial court's factual conclusion that the weapon had been fired five times.

[76] An affirmative defense, like self-defense, "admits the crime but seeks to excuse or justify its commission. It does not negate specific elements of the crime." *Dupree*, 486 Mich at 704 n 11.

[77] *Id.* at 710.

necessary to establish a prima facie defense of self-defense exist . . . ."[78] The prosecution claims that defendant was not entitled to assert self-defense, however, because defendant was the initial aggressor in the encounter with Johnson. The trial court agreed with this view.

To analyze the trial court's conclusion that defendant was not entitled to the justification of self-defense, we must examine its conclusion that by firing two shots from his car at the outset of the confrontation, defendant was the initial aggressor. The Court of Appeals panel concluded that the trial court had erred by finding that defendant fired two shots from his car at the outset of the confrontation with Johnson. The panel observed that "[o]nly the first shot was attributed to Reese based on Williams indicating she heard the shot and assumed it was from his vehicle."[79] The panel also determined that "[t]here is no testimony or evidence to identify who fired the second shot or where it originated."[80] However, Williams testified that she heard two gunshots, at least one of them coming from the car that she testified was defendant's. Although Williams did not know the source of the second gunshot, it was not clearly erroneous for the trial court to conclude, on the basis of the logical inferences drawn from Williams's testimony, that defendant fired both shots from his car. Moreover, Long's testimony was consistent with this conclusion because Long testified that defendant's car arrived at his and Johnson's residence shortly after he heard the two gunshots from the direction of defendant's car. There being evidence to support the trial

[78] *Id.* at 709-710.

[79] *Reese*, unpub op at 3.

[80] *Id.*

court's conclusion, the Court of Appeals erred by rejecting the trial court's conclusion.

Next, the Court of Appeals concluded that "it seems reasonable to assume that Johnson did not feel threatened or intimidated by this random, preceding gunfire . . . ."[81] To begin with, the Court of Appeals' conclusion does not disprove the trial court's conclusion that defendant was the initial aggressor. Even so, the Court of Appeals' conclusion was erroneous. The panel reached its conclusion by noting that Johnson "continued [to] ambulat[e] toward Reese and Long's house and engag[ed] Reese in conversation . . . ."[82] However, the undisputed testimony is that Johnson was walking toward *his own* house, not defendant's house, a point that the trial court correctly appreciated and that severely undermines the Court of Appeals' theory that defendant could not have felt threatened or intimidated by the initial gunshots. Moreover, although there was testimony that Johnson "engag[ed] Reese in conversation," that conversation was hardly premised on the lack of a perceived threat. Rather, Long testified that Johnson asked, "[W]hat's up with that[?]" In interpreting this question, the trial court "infer[red] from that statement that he's wondering, [']what the heck you doing shooting a gun off by his house[?']" While this question could have been innocuous, given the *context* of the situation, the trial court's interpretation of this exchange was not clearly erroneous. The trial court concluded that Johnson did not view the preceding gunfire as "random," as the Court of Appeals opined, but saw it as an aggressive act. This conclusion was not clearly erroneous. Thus, when all the circumstances are considered as a whole, the Court of Appeals erred by

[81] *Id.*

[82] *Id.*

discounting the trial court's factual conclusion that as the initial aggressor in the shootout between defendant and Johnson, defendant was not entitled to use the doctrine of self-defense as justification for shooting Johnson.

Although the trial court went on to discuss this finding in the context of imperfect self-defense, it remains relevant to reviewing the trial court's conclusion that defendant was *not* entitled to self-defense as a complete justification for shooting Johnson. This Court reiterated in *Riddle* that an " 'aggressor in a chance-medley (an ordinary fist fight, or other nondeadly encounter)' " who " 'finds that his adversary has suddenly and unexpectedly changed the nature of the contest and is resorting to deadly force . . . must not resort to deadly force if there is any other reasonable method of saving himself.' "[83] In this case, the trial court correctly applied the law from *Riddle* and specifically found that defendant had *not* engaged in one such reasonable method of defusing the situation. The trial court explained: "[Defendant] didn't back off. He didn't say, okay, it didn't mean anything." The trial court did not clearly err by concluding that defendant was not entitled to self-defense as a complete justification to homicide.[84]

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[83] *Riddle*, 467 Mich at 133, quoting Perkins & Boyce, Criminal Law (3d ed), p 1121.

[84] The Court of Appeals also claimed that the trial court did not fully analyze defendant's state of mind *at the time of the initial aggression*, and the panel provided extensive analysis on that point to posit a potential circumstance under which defendant could not benefit from the doctrine of imperfect self-defense. However, this analysis—while relevant to analyzing the malice element of murder—is irrelevant to defendant's claim that the evidence was insufficient to establish the elements of manslaughter. While the prosecutor argued that defendant had a malicious intent at the time of the initial aggression, it is not necessary for

The Court of Appeals also examined the timing of the events and concluded that "there was a delay between the first shots and any further aggression between these combatants," which might have allowed for a cooling-off period.[85] Thus, the panel speculated that "Johnson knew when he approached and engaged Reese verbally that he was no longer in imminent danger but elected to initiate a new conflict."[86] However, as *Riddle* explained, an initial aggressor may find that his adversary " 'suddenly and unexpectedly changed the nature of the contest and is resorting to deadly force.' "[87] While the trial court and the Court of Appeals disagreed about whether the events constituted a single, escalating conflict or separate incidents, the trial court's decision to treat them as a single, escalating conflict was not clearly erroneous.[88]

The Court of Appeals' opinion is deficient for all the foregoing reasons, but when considered as a whole, it is difficult to escape the conclusion that the panel simply substituted its interpretation of the testimony for the trial court's. This is inappropriate when the standard of review requires an appellate court to accept the trial court's findings of fact unless they are *clearly erroneous*.[89] This standard is higher than the standard for reviewing questions of law because the finder of fact

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this Court to review the Court of Appeals' claim as it relates to the instant case, given that defendant has been acquitted of second-degree murder.

[85] *Reese*, unpub op at 4.

[86] *Id.* at 5.

[87] *Riddle*, 467 Mich at 133, quoting Perkins & Boyce, Criminal Law (3d ed), p 1121.

[88] The Court of Appeals' acknowledgement that "[*a*]*rguably*, Reese withdrew from the conflict," *Reese*, unpub op at 4 (emphasis added), further supports this conclusion.

[89] MCR 2.613(C); *Robinson*, 475 Mich at 5.

often must choose between conflicting and contradictory testimony and is "in a far better position than is this Court"—or the Court of Appeals—"to determine [witnesses'] credibility."[90]

In summary, the evidence as outlined here was sufficient for a fact-finder to have concluded that defendant was guilty of each of the elements of voluntary manslaughter and that defendant was not entitled to use self-defense. Moreover, the trial court did not clearly err in rendering its findings of fact on the elements of voluntary manslaughter and defendant's self-defense claim. Accordingly, defendant is not entitled to a new trial on the ground that the evidence was insufficient.

V. CONCLUSION

Because the common law of murder and manslaughter did not recognize the doctrine of "imperfect self-defense" at the time the Legislature codified those crimes, this Court concludes that the doctrine of imperfect self-defense does not independently mitigate murder to manslaughter. Rather, in deciding between murder and the lesser included offense of manslaughter, the fact-finder must determine whether the prosecution has proved the element distinguishing the two crimes: malice. While some "imperfect self-defense" situations may involve "provocation [as] the circumstance that negates the presence of malice,"[91] courts may not use the doctrine of imperfect self-defense to shortcut any analysis of the elements of the two crimes.

In this case, the Court of Appeals erred by concluding that the trial court's verdict was clearly erroneous. For

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[90] *People v Szymanski*, 321 Mich 248, 253; 32 NW2d 451 (1948).

[91] *Mendoza*, 468 Mich at 536.

the foregoing reasons, the trial court's verdict was not clearly erroneous and is affirmed. We therefore reverse the Court of Appeals' judgment ordering a new trial, vacate the opinion to the extent that it is inconsistent with the foregoing analysis, and remand to the Court of Appeals for the panel to consider defendant's remaining issue on appeal.[92]

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

MARILYN KELLY, J. (*concurring in part and dissenting in part*). I concur in the majority's decision to reinstate defendant's conviction for manslaughter but dissent from the pronouncement that the doctrine of imperfect self-defense does not exist in Michigan law. Any opining about the doctrine is unnecessary to resolve this matter and should be left for another day and a more appropriate case.

Defendant was convicted of manslaughter after a bench trial. In the Court of Appeals, he asserted that he was entitled to an acquittal on the basis of self-defense and that the trial judge's findings of fact were clearly erroneous. At issue was the judge's finding that defendant was the initial aggressor.

The Court of Appeals vacated the manslaughter conviction and remanded for a new trial. The prosecution appealed in this Court, asserting that the trial court's finding was not clearly erroneous and that defendant's manslaughter conviction should be reinstated.

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[92] We do not disturb the Court of Appeals' affirmation of defendant's felon-in-possession and felony-firearm convictions because defendant has not cross-appealed those convictions.

The majority opinion agrees that the finding was not clearly erroneous. Because that is the question at issue on appeal in this Court, answering it is all that is needed to resolve the appeal. Hence, a determination whether imperfect self defense should continue to exist in Michigan law is unnecessary to the resolution of this case and irrelevant. The appropriate holding is that the Court of Appeals incorrectly applied the clear error standard in setting aside the finding that defendant was the initial aggressor.

Because the trial court acquitted defendant of second degree murder, for the prosecution to renew the count would constitute double jeopardy.[1] As the prosecution stated in its arguments before this Court, we cannot now consider whether defendant should have been convicted of murder; that ship has sailed. At this point, the prosecution can charge and try defendant only for manslaughter. Hence, the doctrine of imperfect self-defense could not arise again in this matter, it not being a mitigating defense to manslaughter. Consequently, answering the question in this decision of whether imperfect self-defense exists has no effect on the relief available to either party.

Further supporting this position is the fact that both parties stated at oral argument that this is not the case to address the doctrine of imperfect self-defense. However intertwined the doctrine may have been with the lower court's ruling, we need not adjudicate its appropriateness in order to decide the case. The majority has selectively dissected the defense out of the lower court's analyses and dispatched it from Michigan's jurispru-

[1] See also MCL 768.33, which states: "When a defendant shall be acquitted or convicted upon any indictment for an offense, consisting of different degrees, he shall not thereafter be tried or convicted for a different degree of the same offense . . . ."

dence despite the fact that doing so was unnecessary and neither party requested it. I would reverse the Court of Appeals' judgment and reinstate defendant's conviction for manslaughter. But I would not reach out to strike down the doctrine of imperfect self-defense.

CAVANAGH and HATHAWAY, JJ., concurred with MARILYN KELLY, J.

PEOPLE v WILLIAMS

Docket No. 141161. Argued November 8, 2011 (Calendar No. 3). Decided May 15, 2012.

Glenn T. Williams was charged in the Muskegon Circuit Court with the armed robberies of a gas station and a tobacco shop in violation of MCL 750.529. He pleaded *nolo contendere* with regard to the gas-station incident and guilty of the tobacco-shop incident. After he was sentenced, he moved to withdraw his pleas, alleging that the factual foundations had not been sufficiently established because there was no evidence that he had committed a completed larceny in the gas station and he had not been adequately identified as the robber in the tobacco-shop incident. The trial court, Timothy G. Hicks, J., denied the motions. The Court of Appeals granted defendant's delayed application for leave to appeal but limited the issue to whether defendant had committed a completed larceny in the gas station. The Court of Appeals, TALBOT, J., and OWENS, P.J. (GLEICHER, J., dissenting), affirmed, holding that under amendments of the statutes by 2004 PA 128, the crimes of robbery and armed robbery now encompass attempts to commit those offenses and no longer require a completed larceny. 288 Mich App 67 (2010). The Supreme Court granted defendant's application for leave to appeal. 489 Mich 856 (2011).

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

The Legislature's amendments of MCL 750.529 and MCL 750.530 by 2004 PA 128 effected a substantive change in the law governing robbery; a completed larceny is no longer necessary to sustain a conviction for robbery or armed robbery.

1. The plain language of the 2004 amendments of MCL 750.529 and MCL 750.530 establishes the Legislature's clear intent to include attempts to rob within the scope of robbery. At common law, robbery required a completed larceny to support a conviction, and the Legislature included this requirement when it codified those crimes in 1838. Before it was amended in 2004, MCL 750.529, the statute that defines armed robbery, made it a felony to assault a person and feloniously rob, steal, and take money or property from that person while armed with an article that is or appears to be a dangerous

weapon. However, the 2004 amendments of MCL 750.530, the statute defining robbery, and MCL 750.529 made it a felony to use force or violence "in the course of committing a larceny." The Legislature specifically defined this phrase in MCL 750.530(2) to include acts that occur in an attempt to commit the larceny. Because it is inherent in the word "attempt" that the illegal act intended is not accomplished, the phrase "in an attempt to commit the larceny" unambiguously applies to situations in which a criminal defendant makes an effort or undertakes an overt act with an intent to deprive another person of his or her property but does not achieve the deprivation of property. Had the Legislature merely intended in 2004 PA 128 to adopt the transactional theory of robbery, under which a defendant has not completed a robbery until having escaped with stolen property, the deletion and replacement of the words "rob, steal, and take" would have been unnecessary. The clear language of the amended statutes reflects a legislative intent to effect a broader change in the robbery statutes by including attempted robbery within the understanding of robbery itself, a policy choice that represents an exercise of the Legislature's prerogative to define the elements of a crime.

2. Because an attempted larceny may satisfy the requirements of MCL 750.529 and MCL 750.530, as amended, the facts elicited at defendant's plea allocution were sufficient to sustain his conviction for armed robbery, and the circuit court did not err by denying defendant's motion to withdraw that plea.

Affirmed.

Justice MARILYN KELLY, joined by Justices CAVANAGH and HATHAWAY, dissenting, would have reversed, concluding that the Legislature did not provide a clear indication that it intended to abrogate the common-law requirement that an armed robbery include a completed larceny when it amended the relevant statutes in 2004. Rather, the legislative history of the amendments made clear that the revisions of the robbery statutes were intended to elevate to robbery any completed larceny that included force before, during, or after the taking. The legislative history explicitly indicated that a completed larceny remains part of a robbery. Because there was no evidence that defendant committed a larceny at the tobacco store, there was an inadequate factual basis to support a finding that defendant was guilty of armed robbery, and the circuit court abused its discretion by denying defendant's request to withdraw his plea.

ROBBERY — ATTEMPTS TO COMMIT LARCENY.

A person who, in the course of committing a larceny of any money or other property that may be the subject of larceny, uses force or

> violence against any person who is present, or who assaults or puts the person in fear, is guilty of robbery; the phrase "in the course of committing a larceny" includes acts that occur in an attempt to commit the larceny, during commission of the larceny, or in flight or attempted flight after the commission of the larceny or in an attempt to retain possession of the property; a completed larceny is not necessary to sustain a conviction for the crime of robbery or armed robbery (MCL 750.529, 750.530).

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Tony Tague*, Prosecuting Attorney, and *Charles F. Justian*, Chief Appellate Attorney, for the people.

Peter Ellenson for defendant.

YOUNG, C.J. Defendant appeals here his conviction of armed robbery. In particular, defendant argues that because he was unsuccessful in feloniously taking or removing any actual property from the intended target of his robbery, there was not a sufficient factual basis to support his guilty plea to the charge of armed robbery. We disagree. When the Legislature revised the robbery statute, MCL 750.530, to encompass a "course of conduct" theory of robbery, it specifically included "an attempt to commit the larceny" as sufficient to sustain a conviction for robbery itself. We conclude that this amendment effectuated a substantive change in the law governing robbery in Michigan such that a completed larceny is no longer necessary to sustain a conviction for the crime of robbery or armed robbery.

I. FACTS AND PROCEDURAL HISTORY

On July 13, 2006, defendant entered a gas station, declared that he had a gun, and ordered the attendant to give him all the money in the cash register. After the attendant complied, defendant forced the attendant

into a back room and fled the scene with approximately $160 in stolen cash. The next day, defendant entered a tobacco shop, approached the clerk with his hand in his jacket, and stated, "You know what this is, just give me what I want." The clerk did not give defendant any money or property, and defendant fled from the store without having stolen anything. Defendant was apprehended later that day by the police.

The prosecutor charged defendant with armed robbery[1] of the gas station and, in a separate information, charged defendant alternatively with assault with intent to rob while armed[2] and armed robbery for the events related to the tobacco shop. Defendant elected to plead guilty in both cases. At defendant's plea hearing, the prosecutor advised that he would dismiss the charge of assault with intent to rob while armed in the tobacco shop case in return for defendant's guilty plea to armed robbery.

After advising defendant of his options and constitutional rights, the circuit court established a factual basis for the plea relating to the incident that occurred at the tobacco shop. Under questioning by the prosecutor, defendant admitted that he had entered the tobacco shop with the intent to steal money, had his hand "up under" his coat, and told the clerk, "You know what this is, just give me what I want." Defendant further admitted that "it was [his] intent, at that time, for [the clerk] to give [him] the money out of the cash register." The court accepted defendant's guilty plea.[3] On February 9, 2007, the court sentenced defendant pursuant to a plea

[1] MCL 750.529.

[2] MCL 750.89.

[3] Defendant also entered a *nolo contendere* plea with regard to the gas station robbery.

entered in accordance with *People v Cobbs*[4] to concurrent prison terms of 24 to 40 years for the tobacco shop and gas station robberies.

Defendant subsequently moved to withdraw his pleas, contending that an adequate factual basis did not exist to support either conviction. Pertinent here, defendant argued that there was no evidence that he had taken or removed any property from the tobacco shop and that, absent a completed larceny, he could not be found guilty of armed robbery. The circuit court denied defendant's motions. The court ruled that the language of the armed robbery statute as amended in 2004 allows for a conviction based on an attempted larceny, a basis that the plea discussions substantiated.[5] The Court of Appeals granted defendant's delayed application for leave to appeal, limited to the issue whether a factual basis existed for his conviction of the tobacco store robbery.[6]

In a split decision, the Court of Appeals affirmed.[7] The majority acknowledged that while at common law a robbery required a completed larceny, the crimes of robbery and armed robbery now encompass attempts to commit those offenses following the 2004 statutory amendments. The dissenting judge argued that when the 2004 revisions are viewed through the "lens of common-law definitions," there is inadequate support

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[4] *People v Cobbs*, 443 Mich 276; 505 NW2d 208 (1993). Defendant and the court agreed that defendant's minimum sentence would not exceed 24 years.

[5] The circuit court also denied defendant's motion to withdraw his *nolo contendere* plea with regard to the gas station robbery, holding that the plea proceeding and the police report established a sufficient factual basis for the plea.

[6] *People v Williams*, unpublished order of the Court of Appeals, entered June 16, 2008 (Docket No. 284585).

[7] *People v Williams*, 288 Mich App 67; 792 NW2d 384 (2010).

for the conclusion that the armed robbery statute would permit a conviction without an accomplished larceny.[8]

We granted defendant's application for leave to appeal to determine "whether a larceny needs to be completed before a defendant may be convicted of armed robbery."[9]

II. STANDARD OF REVIEW

This appeal concerns the proper interpretation of MCL 750.529 and MCL 750.530 and, in particular, whether the Legislature intended to remove the completed larceny requirement from the crime of robbery when it amended those statutes in 2004. Matters of statutory interpretation raise questions of law, which this Court reviews de novo.[10]

III. THE CRIME OF ROBBERY IN MICHIGAN

In this appeal, we are concerned with the statutes pertaining to robbery, MCL 750.530, and armed robbery, MCL 750.529. At common law, the offense of robbery was defined as "the felonious taking of money or goods of value from the person of another or in his presence, against his will, by violence or putting him in fear."[11] "To constitute robbery, it [was] essential that there be a 'taking from the person.' "[12] Thus, common law robbery required a completed larceny. Armed robbery required the same showing with the additional element that the robber was armed with a dangerous weapon.[13]

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[8] *Id.* at 91, 93 (GLEICHER, J., dissenting).

[9] *People v Williams*, 489 Mich 856 (2011).

[10] *People v Morey*, 461 Mich 325, 329; 603 NW2d 250 (1999).

[11] *People v Covelesky*, 217 Mich 90, 96; 185 NW 770 (1921) (citation and quotation marks omitted).

[12] *Id.* at 97 (citation and quotation marks omitted).

[13] *People v Calvin*, 60 Mich 113, 119; 26 NW 851 (1886).

The crimes of robbery and armed robbery have been codified by Michigan statute since 1838.[14] All subsequent iterations of the robbery statutes required a completed larceny, consistent with the common law. Before the 2004 amendments, MCL 750.529, defining armed robbery, provided:

> Any person who shall assault another, and shall feloniously rob, steal and take from his person, or in his presence, any money or other property, which may be the subject of larceny, such robber being armed with a dangerous weapon, or any article used or fashioned in a manner to lead the person so assaulted to reasonably believe it to be a dangerous weapon, shall be guilty of a felony . . . .[15]

In *People v Randolph*, this Court considered the scope of this previous version of the robbery statute and, in particular, whether the Legislature had adopted a "transactional approach" to robbery. Under a transactional theory of robbery, "a defendant has not completed a robbery until he has escaped with stolen [property]. Thus, a completed larceny may be elevated to a robbery if the defendant uses force after the taking and before reaching temporary safety."[16] In *Randolph*, this Court rejected the transactional approach as inconsistent with the plain language of the robbery statutes and common law history of robbery. Instead, we concluded that "the force used to accomplish the taking underlying a charge of unarmed robbery must be contemporaneous with the taking. The force used later to retain stolen property is not included."[17] Therefore, because "a larceny is complete

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[14] See 1838 RS, pt 4, tit I, ch 3, §§ 10 (armed robbery) and 12 (unarmed robbery).

[15] As amended by 1959 PA 71.

[16] *People v Randolph*, 466 Mich 532, 535; 648 NW2d 164 (2002).

[17] *Id.* at 536.

when the taking occurs,"[18] any "force, violence or putting in fear must be used before or contemporaneous with the taking" in order to elevate a larceny to a robbery.[19]

Following this Court's decision in *Randolph*, the Legislature amended the robbery statutes. MCL 750.529, as amended by 2004 PA 128, now provides:

> A person who engages in conduct proscribed under [MCL 750.530, the robbery statute] and who in the course of engaging in that conduct, possesses a dangerous weapon or an article used or fashioned in a manner to lead any person present to reasonably believe the article is a dangerous weapon, or who represents orally or otherwise that he or she is in possession of a dangerous weapon, is guilty of a felony punishable by imprisonment for life or for any term of years. If an aggravated assault or serious injury is inflicted by any person while violating this section, the person shall be sentenced to a minimum term of imprisonment of not less than 2 years.

Robbery is defined within MCL 750.530; as amended by 2004 PA 128, it states, in relevant part:

> (1) A person who, *in the course of committing a larceny* of any money or other property that may be the subject of larceny, uses force or violence against any person who is present, or who assaults or puts the person in fear, is guilty of a felony punishable by imprisonment for not more than 15 years.
>
> (2) As used in this section, *"in the course of committing a larceny" includes acts that occur in an attempt to commit the larceny, or* during commission of the larceny, *or* in flight or attempted flight after the commission of the larceny, or in an attempt to retain possession of the property.[20]

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[18] *Id.* at 543.

[19] *Id.* at 550.

[20] Emphasis added.

IV. ANALYSIS

The question before this Court is whether the Legislature intended to remove the element of a *completed* larceny from the crime of robbery when it amended the statutes in 2004. We hold that the Legislature demonstrated a clear intent to remove the element of a *completed* larceny, signaling a departure from Michigan's historical requirement and its common law underpinnings. Accordingly, an attempted robbery or attempted armed robbery with an incomplete larceny is now sufficient to sustain a conviction under the robbery or armed robbery statutes, respectively.

Our analysis begins, as it must, with the language of the robbery statutes themselves. "The cardinal rule of statutory construction is to discern and give effect to the intent of the Legislature."[21] This Court may best discern that intent by reviewing the words of a statute as they have been used by the Legislature. When a statute's language is clear and unambiguous, this Court will enforce that statute as written.[22]

The Legislature revised the robbery statute at issue here by removing the prior requirement that a robber feloniously "rob, steal or take" property from another, and it replaced this language with a new statutory phrase: "in the course of committing a larceny." Key to solving the interpretative puzzle presented in this case, the Legislature specifically defined that phrase to include acts that "occur in an attempt to commit the larceny, or during commission of the larceny, or in flight or attempted flight after the commission of the larceny, or in an attempt to retain possession of the property."[23]

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[21] *People v Dowdy*, 489 Mich 373, 379; 802 NW2d 239 (2011), quoting *Drouillard v Stroh Brewery Co*, 449 Mich 293, 302; 536 NW2d 530 (1995).

[22] *People v Kowalski*, 489 Mich 488, 498; 803 NW2d 200 (2011).

[23] MCL 750.530(2).

The Court of Appeals adopted the prosecution's argument that the statutory language now "specifically considers and incorporates acts taken in an attempt to commit a larceny, regardless of whether the act is completed."[24] In contrast, defendant and the Court of Appeals dissent argue that the statutory revisions were merely

> intended to expand the temporal scope of the crime [of robbery], transforming it into a transactional offense. Reading [MCL 750.]530(1) and (2) as a contextual whole, it appears that the Legislature sought to make clear that robbery encompasses acts that occur before, during, and after the larceny, not that the Legislature intended to eliminate larceny as an element of the crime.[25]

In other words, construing "the statutory crime through the lens of common-law definitions,"[26] the Court of Appeals dissent would have held that the Legislature intended to do no more than abrogate this Court's decision in *Randolph*. For the reasons stated below, we agree with the prosecution and the Court of Appeals majority.

In revising the robbery statutes, the Legislature replaced the "familiar words"[27] of the common law crime of robbery—"rob, steal and take"—with the phrase "in the course of committing a larceny," which the Legislature specifically defined to include "acts that occur in *an attempt* to commit the larceny." The word "attempt" has a well-known common and legal meaning:

> 1. The act or an instance of making an effort to accomplish something, [especially] without success. 2. *Criminal*

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[24] *Williams*, 288 Mich App at 75.

[25] *Id.* at 97 (GLEICHER, J., dissenting).

[26] *Id*. at 91.

[27] *Covelesky*, 217 Mich at 100.

> *law.* An overt act that is done with the intent to commit a crime but that falls short of completing the crime.[28]

Particularly in the realm of the criminal law, the word "attempt" is widely used with regard to any type of crime in which a person intends to commit a crime and acts toward its commission but is unsuccessful in its completion.

Indeed, it is inherent in the word "attempt" that the illegal act intended is not accomplished. Accordingly, the plainest understanding of the phrase "in an attempt to commit the larceny" applies to situations in which a criminal defendant makes "an effort" or undertakes an "overt act" with an intent to deprive another person of his property, but does not achieve the deprivation of property. The language of this phrase is clear on its face and not ambiguous in the least, and therefore it must be enforced as written, free of any "contrary judicial gloss."[29]

Defendant's alternative interpretation fails to accord this language its plain and ordinary meaning. Again, defendant argues that the 2004 amendments were merely a legislative response to this Court's decision in *Randolph* and, as such, must be artificially limited to a legislative adoption of the transactional approach to robbery, which *Randolph* had rejected. Defendant contends that the phrase "attempt to commit the larceny" was intended to mean acts done "before" the larceny, and thus, consonant with the transactional approach, the entire time continuum in which force must be used during a robbery now includes acts done before, during, and after the commission of the larceny. This argument fails as a matter of statutory interpretation for two reasons.

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[28] Black's Law Dictionary (8th ed).

[29] *Wayne Co v Hathcock*, 471 Mich 445, 456; 684 NW2d 765 (2004) (citation and quotation marks omitted).

First and foremost, the meaning of the word "attempt" is not synonymous with "before" or "as a preface," as defendant's argument requires. While "attempt" refers to an unsuccessful effort to complete an act, "before" is defined as "in front of; ahead of" and "[p]rior to."[30] These concepts are not equivalent, and the best way to determine the Legislature's intent is by giving plain meaning to the words actually used, rather than presuming that the Legislature *meant* to say something entirely different. This Court will not assume that the Legislature inadvertently made use of one word or phrase instead of another.[31]

Second, the Legislature used the phrase "in an attempt" *twice* in the statute, but defendant would have this Court impute the "before" meaning of "attempt" only to the first use of that phrase, thereby rendering the statutory provision internally inconsistent. In addition to the use of "attempt" in the phrase "in an attempt to commit the larceny," MCL 750.530 also provides that "in the course of committing a larceny" includes "in an attempt to retain possession of the property."[32] Defendant does not argue that his "before" construction of "attempt" should apply to anything

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[30] *The American Heritage Dictionary* (1976).

[31] *Detroit v Redford Twp*, 253 Mich 453, 456; 235 NW 217 (1931). If the Legislature had intended defendant's interpretation of "before," it very easily could have done so by providing, for example:

> As used in this section, "in the course of committing a larceny" includes acts that occur ~~in an attempt to commit~~ before the commission of the larceny, or during commission of the larceny, or in flight or attempted flight after the commission of the larceny, or in an attempt to retain possession of the property.

[32] In full, again, MCL 750.530(2) provides:

> As used in this section, "in the course of committing a larceny" includes acts that occur *in an attempt to commit the larceny*, or during commission of the larceny, or in flight or attempted flight

other than the phrase "in an attempt to commit the larceny."[33] Therefore, in order to adopt defendant's position, this Court would have to hold that the Legislature intended the same phrase to have two different meanings within the same sentence of the same statutory provision. Defendant's interpretation would require this Court not only to *redefine* an unambiguous statutory phrase in a contradictory manner, but to do so *selectively*.

Defendant's interpretation that the Legislature's use of "attempt to commit the larceny" merely serves as a placeholder for actions occurring before the larceny significantly ignores the fact that pre-larceny force was *already contemplated* under the prior version of the statute. *Randolph* itself recognized that when force is used before the larceny, that force is sufficient to sustain a conviction for robbery.[34] Indeed, this Court was in unanimous agreement in *Randolph* on this point.[35] Thus, given that the law *already* provided that force used before the larceny was within the purview of

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after the commission of the larceny, or *in an attempt to retain possession of the property*. [Emphasis added.]

[33] Consistently applying defendant's "before" meaning for "attempt" in construing the phrase "attempt to retain possession" would make the statute utterly senseless: "As used in this section, 'in the course of committing a larceny' includes acts that occur . . . ~~in an attempt to~~ before retaining possession of the property."

[34] See *Randolph*, 466 Mich at 550 ("The rule is simple: a defendant commits an unarmed robbery when he takes the property of another by the use of force, violence, or putting in fear. . . . The force, violence or putting in fear *must be used before or contemporaneous with the taking*.") (emphasis added).

[35] See *id.* (majority position, opinion by MARILYN KELLY, J.); *id.* at 555-556 (MARKMAN, J., dissenting) (arguing in favor of adopting the transactional approach to robbery, stating that when a larceny accompanied by "an assault occurs *at any time during which the property can be said to be in the victim's presence*, a robbery within the meaning of the statute occurs") (emphasis added).

the robbery statute, it would be passing strange for the Legislature to have amended this statutory language if it had merely intended to accomplish what already was. This conclusion is particularly compelling because the 2004 amendments were, in part, a legislative response to *Randolph*.

Instead, we believe that the clear language of the amended statutes reflects a legislative intent to effect a *broader change* in the robbery statutes. The 2004 revisions *deleted* the words denoting *actual* deprivation of property—"rob, steal and take"—and replaced them with a broader phrase: "in the course of committing a larceny."[36] The deletion and replacement of what this Court long ago called the "familiar words" of robbery is perhaps the best and most compelling indication that the Legislature intended an extensive deviation from the common law rule. Such a revision would have been completely unnecessary if the Legislature had merely sought to adopt a transactional theory of robbery.

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[36] Contrary to defendant's argument, we note that the fact that the Legislature used the definite article "the" in the phrase "attempt to commit the larceny" is immaterial to the decision of this case. Defendant argues that the use of a definite article supports his contention that an *actual* larceny must be committed. While we have recognized in appropriate cases that the use of a definite or indefinite article may alter the meaning of a statutory phrase, see, e.g., *Robinson v City of Lansing*, 486 Mich 1, 14; 782 NW2d 171 (2010); *Robinson v Detroit*, 462 Mich 439, 458-463; 613 NW2d 307 (2000), defendant misapprehends the meaning of the definite article in the statute. In context, MCL 750.530(2) provides in relevant part: "As used in this section, 'in the course of committing *a larceny*' includes acts that occur in an attempt to commit *the larceny* . . . ." (Emphasis added). This statutory provision is definitional; that is, its purpose is to define the phrase "in the course of committing a larceny" as used in the statute. The use of the definite article "the" in the phrase "in an attempt to commit the larceny" merely refers to the larceny identified in the term being defined: "in the course of committing *a* larceny." Thus, the "the larceny" referred to in this definitional phrase is *not* a new, completed larceny, but instead provides meaning and explanation for the referent phrase being defined, which itself uses an indefinite article.

Ultimately, defendant and the dissent would have this Court interpret the robbery statutes in accordance with an unstated legislative intent rather than the plain meaning of the words chosen.[37] This approach to statutory interpretation has been consistently criticized and rejected.[38] So too has this Court rejected the dissent's resort to unauthoritative legislative analyses in order to displace statutory language.[39] Because the Legislature specifically defined "in the course of committing a larceny," it would be inappropriate for this Court to provide meaning to that phrase in a contrary or alternative way.[40] But by arguing that the 2004 amendments

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[37] Indeed, the dissent undertakes no effort whatsoever to interpret the *actual words* of the statutes or address any of the text-based arguments that this opinion raises in support of our conclusion.

[38] See, e.g., *Lansing Mayor v Pub Serv Comm*, 470 Mich 154, 164-165; 680 NW2d 840 (2004).

[39] See, e.g., *Frank W Lynch & Co v Flex Technologies, Inc*, 463 Mich 578, 587; 624 NW2d 180 (2001) (stating that "in Michigan, a legislative analysis is a feeble indicator of legislative intent and is therefore a generally unpersuasive tool of statutory construction"); *In re Certified Question from the United States Court of Appeals for the Sixth Circuit (Kenneth Henes v Continental Biomass)*, 468 Mich 109, 115 n 5; 659 NW2d 597 (2003) (discussing why a legislative analysis, as opposed to other forms of legislative history, is a poor aid in statutory interpretation and thus "should be accorded very little significance by courts when construing a statute").

[40] For similar reasons, we reject the "common law lens" approach employed by the Court of Appeals dissent in this case, the result of which effectively writes the word "attempt" out of the statute. The dissent concluded that "the Legislature did not intend that the armed robbery statute would permit a conviction absent an accomplished larceny" because "[u]nder the common law, the crime of robbery indisputably included as an essential element the commission of a larceny." *Williams*, 288 Mich App at 92-93 (GLEICHER, J., dissenting). The Court of Appeals dissent purported to rely on the well-established principle that because the basis for the criminal law of this state is the common law, see *People v McDonald*, 409 Mich 110, 117; 293 NW2d 588 (1980), the Legislature must make clear when it intends to modify the common law. However, the dissent below failed to acknowledge the full significance of its own

of MCL 750.530 should be limited to the adoption of a transactional approach to robbery, that is precisely what defendant and the dissent would have this Court do. Even recognizing that the Legislature's 2004 revisions were spurred by a response to *Randolph*, it is clear that the Legislature has plainly and objectively done more than adopt a transactional approach to robbery. The Legislature's decision to include attempted robbery within the understanding of robbery itself represents a

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express statements that, as each of the authorities it cited explicitly noted, the common law understandings remain in effect *only until the Legislature acts in a different or contrary manner*. See *Williams*, 288 Mich App at 90 (GLEICHER, J., dissenting) ("The common-law definition of a crime binds Michigan courts *until the Legislature modifies the elements of the crime*."), citing *People v Perkins*, 468 Mich 448, 455; 662 NW2d 727 (2003) (emphasis added); *Williams*, 288 Mich App at 91 (GLEICHER, J., dissenting) (" '[W]hen words are adopted having a settled, definite and well known meaning at common law it is to be assumed they are used with the sense and meaning which they had at common law *unless a contrary intent is plainly shown*.' "), quoting *Covelesky*, 217 Mich at 100 (emphasis added); *Williams*, 288 Mich App at 91 (GLEICHER, J., dissenting) (stating that when the Legislature borrows a term of art, " '*absence of contrary direction* may be taken as satisfaction with widely accepted definitions, not as a departure from them' "), quoting *People v Riddle*, 467 Mich 116, 125; 649 NW2d 30 (2002), and *Morissette v United States*, 342 US 246, 263; 72 S Ct 240; 96 L Ed 288 (1952) (emphasis added). While a statute "will not be extended by implication to abrogate established rules of common law," the statute "must be construed sensibly and in harmony with the legislative purpose." *Rusinek v Schultz, Snyder & Steele Lumber Co*, 411 Mich 502, 508; 309 NW2d 163 (1981).

Thus, if the Legislature modifies a criminal statute, courts must look for "a contrary intent" from the common law understanding to determine whether the Legislature has effected a substantive change in the way the crime is understood. When, as here, such a change is plainly shown, it is insufficient to continue to view the statute through a "common law lens." Such an approach would be inconsistent with appropriate principles of judicial construction. "In the course of committing a larceny" is a statutory, not common law, phrase, and it is *explicitly defined* in an unambiguous manner by MCL 750.530. Accordingly, that definition *must* control, and the "lens of the common-law definitions" may not be used to provide a gloss on the statutorily provided meaning.

legislative choice—an exercise of its prerogative to define the elements of a crime—that this Court will not upset.

We further note that the Legislature's particular policy decision in amending the robbery and armed robbery statutes is consistent with the Model Penal Code (MPC), which provides:

> (1) Robbery Defined. A person is guilty of robbery if, *in the course of committing a theft*, he:
>
> (a) Inflicts serious bodily injury upon another; or
>
> (b) Threatens another with or purposely puts him in fear of immediate serious bodily injury; or
>
> (c) Commits or threatens immediately to commit any felony of the first or second degree.
>
> An act shall be deemed "in the course of committing a theft" if it occurs *in an attempt to commit theft* or in flight after *the attempt* or commission.[41]

It is noteworthy that the MPC's definition of robbery is strikingly similar to that of Michigan's amended robbery statute.[42] The almost identical usage of "in the course of committing a larceny/theft" in the MPC and MCL 750.530 indicates a more expansive conception of robbery than previously existed in Michigan law. In particular, like that of MCL 750.530, the MPC's defini-

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[41] 2 American Law Institute (ALI), Model Penal Code and Commentaries (1980), § 222.1, p 96 (italics added).

[42] Our task when interpreting a statute is to give effect to the intent of the Legislature. Thus, we do not refer to the MPC as a means of interpreting the Michigan statutes at issue, but instead to provide a *context* for those changes. Given the almost identical language used in the MPC and revised statutes, it is reasonable to believe that the statutes were amended not to reinforce but to supplant the traditional understanding of robbery, as the MPC also accomplishes. Thus, the Michigan Legislature's use of the MPC language complements our conclusion that the Legislature was not undertaking an effort to (re)codify the common law understanding with the 2004 revisions.

tion for "in the course of committing a theft" *explicitly includes the attempt form of robbery* in an almost identical fashion. With regard to this change to subsume attempted robbery under the robbery provision itself, the official comment to MPC § 222.1 provides a useful and telling discussion:

> Since common-law larceny and robbery required asportation, the severe penalties for robbery were avoided if the victim had no property to hand over or if the theft were interrupted before the accused laid hold of the goods. Moreover, the penalties for attempted robbery were considerably milder than those authorized for the completed crime. The perception that one who attempts a robbery poses essentially the same dangers as the successful robber led legislatures to develop more serious sanctions for various forms of attempt. The offense of assault with intent to rob was one response and redefining robbery to include an assault with intent to rob was another. Often some distinctions in penalty were preserved.
>
> There is, however, no penological justification for distinctions on this basis. The same dangers are posed by the actor who is interrupted or who is foiled by an empty pocket as by the actor who succeeds in effecting the theft. The same correctional dispositions are justified as well. The primary concern is with the physical danger or threat of danger to the citizen rather than with the property aspects of the crime. By including attempted thefts within the time span during which robbery can occur, Section 222.1 therefore makes it immaterial whether property is obtained.[43]

At least 23 states in addition to Michigan have instituted changes including attempts to rob as sufficient to prove robbery itself, often adopting a "course of conduct" theory of when robbery occurs.[44]

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[43] 2 ALI, Model Penal Code, comment 2(a) to § 222.1, pp 99-100.

[44] See *Alabama*—Ala Code 13A-8-40; *Alaska*—Alas Stat 11.41.510; *Arkansas*—Ark Code Ann 5-12-102; *Delaware*—Del Code tit 11, § 831; *Florida*—Fla Stat 812.13; *Hawaii*—Hawaii Rev Stat 708-842; *Iowa*—

The desire to punish attempted robberies the same as a robbery itself corresponds with the understanding, long recognized in Michigan, that the greater social harm perpetrated in a robbery is the use of force rather than the actual taking of another's property. As this Court has explained:

> Robbery, while containing elements of theft of property, is primarily an assaultive crime. "Robbery violates the social interest in the safety and security of the person as well as the social interest in the protection of property rights. In fact, as a matter of abstract classification, it probably should be grouped with offenses against the person . . . ." Classification as an offense against a person is particularly appropriate where the robbery is committed with the aggravating element of the perpetrator being armed. In this situation, the safety and security of the person is most severely threatened, and the larcenous taking is of secondary importance.[45]

In accordance, the plain language of the 2004 statutory revisions of MCL 750.529 and MCL 750.530 establishes

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Iowa Code 711.1; *Kentucky*—Ky Rev Stat Ann 515.030; *Maine*—Me Rev Stat tit 17-A, § 651; *Maryland*—Md Code Ann, Crim Law 3-402; *Montana*—Mont Code Ann 45-5-401; *New Hampshire*—NH Rev Stat Ann 636:1; *New Jersey*—NJ Stat Ann 2C:15-1; *North Carolina*—NC Gen Stat 14-87; *North Dakota*—ND Cent Code 12.1-22-01; *Ohio*—Ohio Rev Code Ann 2911.02; *Oregon*—Or Rev Stat 164.395; *Pennsylvania*—18 Pa Cons Stat 3701; *Texas*—Tex Penal Code Ann 29.01; *Utah*—Utah Code Ann 76-6-301; *Vermont*—Vt Stat Ann tit 13, § 608; *West Virginia*—W Va Code 61-2-12; *Wyoming*—Wyo Stat Ann 6-2-401.

[45] *People v Hendricks*, 446 Mich 435, 449-450; 521 NW2d 546 (1994), citing *People v Wakeford*, 418 Mich 95; 341 NW2d 68 (1983), and *People v Allen*, 429 Mich 558; 420 NW2d 499 (1988), and quoting Perkins & Boyce, Criminal Law (3d ed), p 350; see also *Wakeford*, 418 Mich at 111 (stating that with regard to armed robbery, "the gravamen of the offense is the armed assault on a person when combined with the taking of money or property" and that "[t]he primary purpose of the statute is the protection of persons; the protection of property afforded by the statute is not significantly greater than that afforded by the statute prohibiting larceny from the person of another").

the Legislature's clear intent to include attempts to rob within the scope of the robbery statutes. Accordingly, when an intended robber is in possession of, appears to be in possession of, or represents that he is in possession of a dangerous weapon as stated in MCL 750.529, that person may be guilty of armed robbery even if the larcenous taking is not completed.

V. APPLICATION

Aside from the question whether a completed larceny is necessary to support a conviction for robbery, the parties in this case do not dispute that defendant's plea was sufficient to sustain a conviction for armed robbery of the tobacco shop. Having held that an attempted larceny may satisfy the requirements of MCL 750.529 and MCL 750.530, as amended, we affirm defendant's conviction.

At his plea allocution, defendant admitted that he assaulted, or otherwise used the threat of force or violence against, the clerk in "the course of committing a larceny" of the tobacco shop. Defendant admitted that it was his intent to rob the clerk of the tobacco shop's money. It also was established at defendant's plea hearing that at the time of the robbery defendant intimated that he had a dangerous weapon, both by verbally alluding to this fact and by placing his hand under his clothing so as to represent that he was armed with a weapon. Even though defendant was unsuccessful in obtaining money, his attempt to complete a larceny while representing that he was armed with a dangerous weapon satisfied MCL 750.529. Accordingly, the facts elicited at the plea allocution were sufficient to sustain defendant's conviction for armed robbery, and the circuit court did not err by denying defendant's motion to withdraw that plea.

VI. CONCLUSION

In 2004, the Legislature considerably broadened the scope of the robbery statute, MCL 750.530, to encompass a "course of conduct" theory of robbery, which specifically includes "an attempt to commit the larceny." We conclude that this amendment effectuated a substantive change in the law governing robbery in Michigan such that a completed larceny is no longer necessary to sustain a conviction for the crime of robbery or armed robbery. The judgment of the Court of Appeals is affirmed.

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

MARILYN KELLY, J. (*dissenting*). At issue in this case is whether a larceny must be completed before a criminal defendant may be convicted of armed robbery. The majority concludes that a completed larceny is not necessary to sustain a conviction for that crime. Because I disagree with its conclusion, I respectfully dissent.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

In 2006, a man matching defendant's description entered a gas station in Norton Shores and announced to the station attendant that he had a gun. He demanded all the money in the register. After the attendant complied, the man fled.

The next day, defendant entered a Muskegon County tobacco store. The store clerk was standing behind the cash register. With his hand inside his jacket, defendant announced to the clerk, "[Y]ou know what this is, just give me what I want." However, the clerk did not give defendant money, and defendant fled without stealing

anything. Defendant allegedly broke his leg while in flight, and the police apprehended him later that day. The arresting officers noted that defendant was dressed in the same clothing worn by the man who had robbed the gas station the previous day.

In the information, defendant was charged with armed robbery of the gas station. He was also charged with assault with intent to rob while armed and armed robbery of the tobacco store. In exchange for a guilty plea to the tobacco store robbery and a *nolo contendere* plea to the gas station robbery, the prosecutor dismissed the charge of assault with intent to rob while armed.

At his hearing, defendant stated that he was pleading of his own volition. He said that no promises had been made to induce his pleas, other than a *Cobbs*[1] agreement for a cap on his minimum sentence. While entering defendant's pleas on the record, the prosecutor suggested that the court review the tobacco store incident to establish the necessary facts. Defendant admitted that he had entered the store with the intent to steal money and that he held his hand "up under" his coat. He further admitted that he had told the clerk, "[Y]ou know what this is, just give me what I want." The following exchange ensued:

> *The Prosecutor*: Okay. And it was your intent, at that time, for her to give you the money out of the cash register, is that right?
>
> *The Defendant*: Yeah.
>
> *The Prosecutor*: All right.
>
> *The Court*: Great—
>
> *The Prosecutor*: And I think that satisfies.
>
> *The Court*: Great. I think we're all set on [the tobacco store].

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[1] *People v Cobbs*, 443 Mich 276; 505 NW2d 208 (1993).

After agreeing that the police report established a sufficient factual basis for the gas station robbery, defendant entered a *nolo contendere* plea to that charge. The trial court sentenced defendant pursuant to his *Cobbs* agreement to concurrent terms of imprisonment for 24 to 40 years.

Later, defendant moved to withdraw his pleas, claiming that the factual bases for the charges were insufficient. Specifically, defendant argued that there was no evidence that he had committed a larceny of the tobacco store. He asserted that the police report did not sufficiently identify him as the gas station robber. The trial court denied defendant's motions. With respect to the tobacco store incident, it ruled that the language of the armed robbery statute[2] allows for a conviction predicated on attempted larceny, which the plea discussions substantiated. With respect to the gas station incident, the court ruled that the entirety of the police report and the statements made at the plea hearing established defendant's participation in the robbery.

The Court of Appeals granted defendant's delayed application for leave to appeal, limited to the issue whether a completed larceny was necessary to sustain defendant's conviction of armed robbery of the tobacco store.[3] The Court of Appeals majority concluded that the statutory language defining robbery and armed robbery encompasses attempted larcenies and that, as a result, a completed larceny is not required to obtain a conviction.[4] Judge GLEICHER dissented and would have reached the opposite conclusion.[5]

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[2] MCL 750.529.

[3] *People v Williams*, unpublished order of the Court of Appeals, entered June 16, 2008 (Docket No. 284585).

[4] *People v Williams*, 288 Mich App 67; 792 NW2d 384 (2010).

[5] *Id*. at 91 (GLEICHER, J., dissenting).

We granted defendant's application for leave to appeal.[6]

STANDARD OF REVIEW AND LEGAL BACKGROUND

Matters of statutory interpretation present questions of law, which we review de novo.[7]

The common law underlies Michigan's criminal statutes.[8] Indeed, this Court has long held that the common law definition of a crime binds Michigan courts unless and until the Legislature modifies the elements of a crime.[9] Likewise, we recognized in *People v Covelesky* that "when words are adopted having a settled, definite and well known meaning at common law it is to be assumed they are used with the sense and meaning which they had at common law unless a contrary intent is plainly shown."[10]

Historically, Michigan's robbery statutes are derived from the common law crime of robbery. An essential element of the crime included the commission of a larceny.[11] We observed as much in *Covelesky*, noting that

> [r]obbery at common law is defined as the felonious *taking of money or goods of value* from the person of another or in his presence, against his will, by violence or putting him in

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[6] *People v Williams*, 489 Mich 856 (2011).

[7] *People v Thompson*, 477 Mich 146, 151; 730 NW2d 708 (2007).

[8] Const 1963, art 3, § 7; see also *People v McDonald*, 409 Mich 110, 117; 293 NW2d 588 (1980).

[9] See, e.g., *People v Perkins*, 468 Mich 448, 455; 662 NW2d 727 (2003); *People v Riddle*, 467 Mich 116, 126; 649 NW2d 30 (2002); *People v Schmitt*, 275 Mich 575, 577; 267 NW 741 (1936); *People v Utter*, 217 Mich 74, 86; 185 NW 830 (1921).

[10] *People v Covelesky*, 217 Mich 90, 100; 185 NW 770 (1921).

[11] A "larceny" is an "unlawful taking and carrying away of someone else's personal property with the intent to deprive the possessor of it permanently." Black's Law Dictionary (9th ed).

> fear. This definition has been followed by most of the statutes, and even where the language has been varied sufficiently to sustain, by a literal interpretation, a narrower definition of the offense, it has usually been held that it could not be presumed that the legislature intended to change the nature of the crime as understood at common law.[12]

Thus, at common law, robbery included three elements: (1) a larceny of money or goods of value from a person, (2) against the person's will, (3) by violence or putting the person in fear. Our Court of Appeals has also long observed that a completed larceny is an essential element of armed robbery.[13]

In *People v Randolph*,[14] we examined the original version of MCL 750.530 in the Michigan Penal Code, which provided, in relevant part:

> Any person who shall, by force or violence, or by assault or putting in fear, feloniously rob, steal and take from the person of another, or in his presence, any money or other property which may be the subject of larceny, such robber not being armed with a dangerous weapon, shall be guilty of a felony . . . .[15]

The issue in *Randolph* was whether the crime of robbery set forth in MCL 750.530 was properly viewed by means of a "transactional approach." Under this approach, an offender is not viewed as having completed a robbery until he or she has escaped with stolen merchandise. *Randolph* rejected the transac-

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[12] *Covelesky*, 217 Mich at 96-97 (emphasis added; citation and quotation marks omitted).

[13] See, e.g., *People v Needham*, 8 Mich App 679, 683; 155 NW2d 267 (1967), citing 4 Gillespie, Michigan Criminal Law & Procedure (2d ed), § 2218, pp 2241-2242.

[14] *People v Randolph*, 466 Mich 532; 648 NW2d 164 (2002).

[15] As enacted by 1931 PA 328.

tional approach, holding that if force is used to *re*tain, rather than *ob*tain, property, the crime is outside the scope of MCL 750.530.[16] We further held that, under the common law, the force or violence element of robbery "had to be applied before or during the taking."[17] We explicitly noted that, after the initial larcenous act has been completed, the use of force against a victim to retain stolen property does not transform the offense into armed robbery.[18] Rather, the force or violence must be used before or contemporaneously with the larceny to elevate the offense to robbery.

In response to our decision in *Randolph*, the Legislature amended our robbery statutes in 2004.[19] MCL 750.529, the armed robbery provision, now reads in relevant part as follows:

> A person who engages in conduct proscribed under [MCL 750.530] and who in the course of engaging in that conduct, possesses a dangerous weapon or an article used or fashioned in a manner to lead any person present to reasonably believe the article is a dangerous weapon, or who represents orally or otherwise that he or she is in possession of a dangerous weapon, is guilty of a felony punishable by imprisonment for life or for any term of years.

At the same time, the Legislature also revised the statutory definition of unarmed robbery in MCL 750.530. It did so to clarify the scope of the unlawful conduct proscribed by MCL 750.529, which refers to MCL 750.530. MCL 750.530 now provides:

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[16] *Randolph*, 466 Mich at 541-543.

[17] *Id*. at 538.

[18] *Id*. at 543.

[19] 2004 PA 128.

> (1) A person who, in the course of committing a larceny of any money or other property that may be the subject of larceny, uses force or violence against any person who is present, or who assaults or puts the person in fear, is guilty of a felony punishable by imprisonment for not more than 15 years.
>
> (2) As used in this section, "in the course of committing a larceny" includes acts that occur in an attempt to commit the larceny, or during commission of the larceny, or in flight or attempted flight after the commission of the larceny, or in an attempt to retain possession of the property.

Central to the resolution of this case is the definition of "in the course of committing a larceny" in MCL 750.529(2). Specifically, we must consider whether the addition of the phrase "acts that occur in an attempt to commit the larceny" in that definition eliminated the common law requirement of a completed larceny as a prerequisite for an armed robbery conviction.

ANALYSIS

Against this backdrop, the starting point in any statutory interpretation dispute is the language of the relevant statutes.[20] When considering the correct statutory interpretation, statutory language must be read as a whole.[21] "Individual words and phrases, while important, should be read in the context of the entire legislative scheme."[22] Furthermore, " 'the Legislature is presumed to be aware of, and thus to have considered the effect on, all existing statutes when enacting new laws.' "[23]

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[20] *Briggs Tax Serv, LLC v Detroit Pub Schs*, 485 Mich 69, 76; 780 NW2d 753 (2010).

[21] *Bush v Shabahang*, 484 Mich 156, 167; 772 NW2d 272 (2009).

[22] *Id*.

[23] *People v Feezel*, 486 Mich 184, 211; 783 NW2d 67 (2010), quoting *Walen v Dep't of Corrections*, 443 Mich 240, 248; 505 NW2d 519 (2003).

As Judge GLEICHER noted in her Court of Appeals dissent, the language of MCL 750.530 refutes the proposition that our robbery statutes allow for conviction without proof of a completed larceny.[24] Under MCL 750.530, a person who "in the course of committing a larceny" uses force or violence, puts in fear, or assaults another is guilty of a felony. The statutory phrase "in the course of committing a larceny" includes "acts that occur in an attempt to commit the larceny, or during the commission of the larceny, or in flight or attempted flight after the commission or the larceny, or in an attempt to retain possession of the property."

Through this language, the Legislature explicitly indicated that the use of force or violence at any time during the commission of a larceny subjects offenders to prosecution for armed robbery. Hence, "the Legislature intended to expand the temporal scope of the crime . . . ."[25] The language it chose merely reflects its rejection of *Randolph*. It does not eliminate the requirement of an actual larceny.

The House legislative analysis of HB 5015, which became 2004 PA 128, also supports my conclusion that the Legislature did not intend to abrogate the common law requirement of a completed larceny to sustain a robbery conviction. That analysis described our decision in *Randolph* as the problem that HB 5105 would rectify. It indicated that the bill would eliminate *Randolph*'s holding that applied only to those acts in which force was used to accomplish a larceny.[26] The section describing the contents of the bill indicated that it would expand the crime of armed robbery. The crime would include a person who, in the course of engaging

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[24] *Williams*, 288 Mich App at 96-97 (GLEICHER, J., dissenting).

[25] *Id*. at 97.

[26] House Legislative Analysis, HB 5015, February 12, 2004, p 1.

in the proscribed conduct, "represented orally or otherwise that he or she was in possession of a dangerous weapon."[27]

The arguments for HB 5015 summarized in the House legislative analysis further illustrate the bill's purpose. For example, one such argument for the bill stated:

> Currently, a charge of robbery can only be made if force or violence were used to *commit the larceny*. Revising the statutes will allow prosecutors more latitude to prosecute similar crimes in similar ways. For example, under the recent court interpretation of the robbery laws, it would be a crime of armed robbery if a gun were brandished immediately before or while property *was being taken*. However, it would not be a crime of armed robbery if the gun was not brandished until the suspect was trying to evade capture by a security guard or passerby. The bill would revise the state's robbery statutes to include any *crime of larceny* that involved the use of force or violence, or fear, *at any time during the commission of the crime*. Therefore, if force or violence were used *to take property*, *to retain property*, or to evade apprehension *after taking property*, the act could constitute robbery.[28]

A second argument in support of the bill stated:

> Before the 2002 state supreme court decision interpreted the robbery statutes as applying only in those cases in which force or violence were used *in the taking of property*, the state's appellate courts were moving towards what is known as the "transactional approach" . . . . Even though this approach included as robbery some acts that would not be considered robbery under the *Randolph* decision, it still is problematic. For example, say property *is taken* from a convenience store without force, but force is used to keep possession of the stolen property or in an attempt to flee from

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[27] *Id*.

[28] *Id*. at 2 (emphasis added).

> a security guard or police officer. Under the transactional approach, the crime would be elevated to robbery if the suspect escaped apprehension and attained temporary safety but would not be robbery if the suspect were apprehended by the security guard or police officer because that means he or she had never attained temporary safety. Moreover, the current law reflects the mindset of the early 1830s, whereas the bill is similar to revisions other states have made that include not only *the actual taking or larceny* as the crime of robbery, but also those acts committed in trying to keep possession of the property and acts committed in trying to escape apprehension.[29]

These arguments make clear that the revisions of the robbery statutes were intended to elevate to robbery any completed larceny that included force before, during, or after the taking. They explicitly indicate that a completed larceny remains part of a robbery. The Legislature was merely displeased with *Randolph* and enacted legislation to allow for an enhanced charge of robbery when a larcenist employs force.

While the language of the House legislative analysis provides an understanding of the Legislature's intentions, equally telling is what is lacking from that analysis. Nowhere in the public act or the House legislative analysis is there any indication that the Legislature intended to abrogate the common law requirement that a robbery include a completed larceny. Although the Legislature has the authority to set aside the common law, it has long been recognized that "[w]hen it does so, it should speak in no uncertain terms."[30] In 2004 PA 128, there are no "terms," let alone "uncertain" ones, that support the conclusion

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[29] *Id*. at 2-3 (emphasis added).

[30] *Hoerstman Gen Contracting v Hahn*, 474 Mich 66, 74; 711 NW2d 340 (2006); see also *Bandfield v Bandfield*, 117 Mich 80, 82; 75 NW 287 (1898).

that a completed larceny is no longer an element of robbery.[31]

Therefore, robbery still requires a completed larceny as a predicate to conviction. The majority's conclusion to the contrary defies the statutory language as well as the Legislature's intent.

THE MAJORITY OBLITERATES THE DISTINCTION BETWEEN ARMED ROBBERY AND ASSAULT WITH INTENT TO ROB AND STEAL WHILE ARMED

A further indication that the majority's statutory interpretation is incorrect is that it effectively writes

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[31] By fiat, the majority announces that the Court has rejected my "resort to unauthoritative legislative analyses in order to displace statutory language." *Ante* at 178. Indeed, both cases the majority cites for this proposition are merely the personal preferences of then Justice YOUNG and the justices subscribing to his interpretive methods. But those methods are not binding on other justices of the Court. To be clear, I reject the notion that my brethren may hamstring the manner in which I engage in statutory interpretation. While the majority may prefer to ignore these interpretive aids, I do not. Nor am I alone. As Justice Stevens of the United States Supreme Court stated:

> In refusing to examine the legislative history that provides a clear answer to the question whether Congress intended the scope of the mineral reservations in these two statutes to be identical, the plurality abandons one of the most valuable tools of judicial decisionmaking. As Justice Aharon Barak of the Israel Supreme Court perceptively has explained, the "minimalist" judge "who holds that the purpose of the statute may be learned only from its language" retains greater discretion than the judge who "will seek guidance from every reliable source." Judicial Discretion 62 (Y. Kaufmann transl.1989). A method of statutory interpretation that is deliberately uninformed, and hence unconstrained, increases the risk that the judge's own policy preferences will affect the decisional process.

BedRoc Ltd, LLC v United States, 541 US 176, 192; 124 S Ct 1587; 158 L Ed 2d 338 (2004) (Stevens, J., dissenting); see also *In re Certified Question from the United States Court of Appeals for the Sixth Circuit (Kenneth Henes v Continental Biomass)*, 468 Mich 109, 119; 659 NW2d 597 (2003) (CAVANAGH, J., concurring), and *Frank W Lynch & Co v Flex Technologies, Inc*, 463 Mich 578, 588; 624 NW2d 180 (2001) (KELLY, J., concurring).

out of existence the crime of assault with intent to rob and steal while armed. In this regard, MCL 750.89 provides:

> Assault with intent to rob and steal being armed—Any person, being armed with a dangerous weapon, or any article used or fashioned in a manner to lead a person so assaulted reasonably to believe it to be a dangerous weapon, who shall assault another with intent to rob and steal shall be guilty of a felony, punishable by imprisonment in the state prison for life, or for any term of years.

Thus, a person violates MCL 750.89 if he or she intends to rob another while in possession of a weapon but fails and a completed larceny does not occur.

Under the majority's flawed analysis, the armed robbery statute, MCL 750.529, is now nearly identical to assault with intent to rob and steal while armed, MCL 750.89. Indeed, a defendant may now be convicted of armed robbery if (1) while armed with a dangerous weapon or any article used or fashioned in a manner to lead a person to believe it to be a dangerous weapon, (2) he or she assaults another with intent to rob and steal. There is no longer a distinction between armed robbery and assault with intent to rob and steal while armed. Yet the Legislature saw fit to draw a distinction between the two crimes by requiring a *completed* larceny for armed robbery, not merely an *intended* one. Otherwise, there would be no purpose to having two discrete statutes on the books.

The majority's analytical mistake is made clear when reference is made to our criminal jury instructions. When a defendant is charged with armed robbery, trial courts instruct the jury as follows:

> (1) The defendant is charged with the crime of armed robbery. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, the defendant [used force or violence against / assaulted / put in fear] *[state complainant's name]*.

(3) Second, the defendant did so while [he / she] was in the course of committing a larceny. A "larceny" is the taking and movement of someone else's property or money with the intent to take it away from that person permanently.

"In the course of committing a larceny" includes acts that occur in an attempt to commit the larceny, or during the commission of the larceny, or in flight or attempted flight after the commission of the larceny, or in an attempt to retain possession of the property or money.

(4) Third, *[state complainant's name]* was present while defendant was in the course of committing the larceny.

(5) Fourth, that while in the course of committing the larceny, the defendant:

[Choose one or more of the following as warranted by the charge and proofs:]

(a) possessed a weapon designed to be dangerous and capable of causing death or serious injury; [or]

(b) possessed any other object capable of causing death or serious injury that the defendant used as a weapon; [or]

(c) possessed any [other] object used or fashioned in a manner to lead the person who was present to reasonably believe that it was a dangerous weapon; [or]

(d) represented orally or otherwise that [he / she] was in possession of a weapon.[32]

When a defendant is charged with assault with intent to rob and steal while armed, trial courts instruct the jury as follows:

(1) The defendant is charged with the crime of assault with intent to commit armed robbery. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

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[32] CJI2d 18.1.

(2) First, that the defendant assaulted *[name complainant]*. There are two ways to commit an assault. Either the defendant must have attempted or threatened to do immediate injury to *[name complainant]*, and was able to do so, or the defendant must have committed an act that would cause a reasonable person to fear or apprehend an immediate injury.

(3) Second, that at the time of the assault, the defendant was armed with:

[Choose one or more of the following:]

(a) A weapon designed to be dangerous and capable of causing death or serious injury; [or with]

(b) Any [other] object capable of causing death or serious injury that the defendant used as a weapon; [or with]

(c) Any [other] object used or fashioned in a manner to lead the person who was assaulted to reasonably believe that it was a dangerous weapon.

(4) Third, that at the time of the assault the defendant intended to commit robbery. *Robbery occurs when a person assaults someone else and takes money or property from* [*him* / *her*] *or in* [*his* / *her*] *presence, intending to take it from the person permanently*. It is not necessary that the crime be completed or that the defendant have actually taken any money or property. However, there must be proof beyond a reasonable doubt that at the time of the assault the defendant intended to commit robbery.[33]

The key distinction between armed robbery and assault with intent to rob and steal while armed, as highlighted by the model jury instructions, is whether a larceny is completed. To obtain a conviction, the prosecution must prove in both instances that an offender committed an assault. Likewise, both crimes require proof of the use of a weapon or an object fashioned as a weapon. But assault with intent to rob and steal while armed requires only the *intent* to commit a robbery; no completed larceny is

[33] CJI2d 18.3 (emphasis added).

required under CJI2d 18.3(4). By contrast, armed robbery requires a *completed* larceny. In fact, CJI2d 18.1(3) explicitly indicates that the prosecution must prove that a defendant "was in the course of committing a larceny" and defines "larceny" as "the taking and movement of someone else's property . . . ."

As discussed earlier, the Legislature is " 'presumed to be aware of, and thus to have considered the effect on, all existing statutes when enacting new laws.' "[34] Yet under today's decision, the majority has usurped the Legislature's statutory distinction between armed robbery and assault with intent to rob while armed. In essence, it has merged the two offenses into one. Had the Legislature intended to eliminate the crime of assault with intent to rob while armed when it enacted 2004 PA 128, it could have explicitly done so. It did not. The majority offers no response when confronted with this significant analytical flaw.

Applying my analysis to this case, I believe that the trial court abused its discretion by denying defendant's motion to withdraw his plea.[35] There is no evidence that defendant committed a larceny at the tobacco store, and therefore there is an inadequate factual basis to support a finding that defendant is guilty of armed robbery. Therefore, I would reverse the judgment of the Court of Appeals.

CONCLUSION

I dissent from the majority's holding that a completed larceny is no longer necessary to sustain a

[34] *Feezel*, 486 Mich at 211, quoting *Walen*, 443 Mich at 248.

[35] See *People v Watkins*, 468 Mich 233, 238; 661 NW2d 553 (2003) ("Before accepting a guilty plea, a trial court must question the defendant to ascertain whether there is support for a finding that the defendant is guilty of the offense to which he is pleading guilty.").

conviction for armed robbery. The Legislature did not provide a clear indication that it wished to depart from the common law. Accordingly, I would reverse the judgment of the Court of Appeals and remand this case to the trial court for further proceedings.

CAVANAGH and HATHAWAY, JJ., concurred with MARILYN KELLY, J.

JOSEPH v AUTO CLUB INSURANCE ASSOCIATION

Docket No. 142615. Argued December 6, 2011 (Calendar No. 4). Decided May 15, 2012.

Doreen Joseph brought an action in the Macomb Circuit Court against Auto Club Insurance Association, seeking to recover personal protection insurance (PIP) benefits under the no-fault automobile insurance act for case-management services provided by her family members dating back to 1977 when she was involved in an automobile accident and suffered traumatic brain injury and quadriplegia. Defendant moved for partial summary disposition on the basis that the claim, brought in 2009, was barred by the rule in MCL 500.3145(1) prohibiting the recovery of PIP benefits for losses incurred more than one year before the date on which the action was commenced. Plaintiff argued that the tolling provision in the Revised Judicature Act for minors and insane persons, MCL 600.5851(1), preserved her right to recover damages incurred more than one year before suit was filed. Relying on *Univ of Mich Regents v Titan Ins Co*, 487 Mich 289 (2010), the court, Richard L. Caretti, J., denied defendant's motion. Defendant applied for interlocutory leave to appeal in the Court of Appeals and then filed a bypass application for leave to appeal in the Supreme Court. The Supreme Court granted the bypass application. 489 Mich 924 (2011).

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

The tolling provision in MCL 600.5851(1) addresses only when an action may be brought and does not preclude application of the one-year-back rule in MCL 500.3145(1), which separately limits the amount of benefits that may be recovered. *Univ of Mich Regents* is overruled and *Cameron v Auto Club Ins Ass'n*, 476 Mich 55 (2006), which had held that the minority/insanity tolling provision did not operate to toll the one-year-back rule, is reinstated.

1. MCL 500.3145(1) contains two limitations on the time for filing suit and one limitation on the period for which benefits may be recovered. Under this provision, a person filing a claim for PIP

benefits must do so within a year of the accident unless the insured gives written notice of injury or previously received PIP benefits from the insurer. If notice was given or payment was made, the action may be commenced within one year after the most recent loss has been incurred. However, in any case, recovery is limited to losses incurred during the one year immediately before the filing of the action. MCL 600.5851(1) concerns when minors and insane persons may bring an action; it does not pertain to the damages recoverable once an action has been brought. Thus, the tolling provision in MCL 600.5851(1) is irrelevant to the damages-limiting one-year-back rule in MCL 500.3145(1). Plaintiff's recovery in this case was limited to the losses she incurred on or after February 27, 2008, which was one year before she filed her complaint.

2. *Univ of Mich Regents*, which held to the contrary, was not supported by the statutory language and must be overruled. Because *Univ of Mich Regents* ignored the Legislature's clear and unambiguous directives in MCL 500.3145(1) and MCL 600.5851(1) by failing to enforce these statutory provisions as written, it undermined the reliance interest that the people of the state have on that language. Because *Univ of Mich Regents* was wrongly decided and the reliance interests weigh in favor of overruling it, stare decisis did not compel adherence to its holding.

Reversed and remanded for entry of partial summary disposition in defendant's favor.

Justice MARILYN KELLY, joined by Justices CAVANAGH and HATHAWAY, dissenting, would have reaffirmed the decision in *Univ of Mich Regents*, which correctly decided the issue. MCL 600.5851(1) does not create an independent cause of action. It must be read with the statute under which plaintiff seeks recovery. Reading MCL 600.5851(1) together with MCL 500.3145(1) grants a minor or insane person one year after that disability is removed to bring his or her claim, which includes the right to recover all of his or her PIP benefits. The ruling in *Cameron* upended 25 years of settled law, disposing of many claims that were supposedly saved under MCL 600.5851(1) by denying claimants the opportunity to recover benefits. Given its language, the saving provision of MCL 600.5851(1) supersedes all limitations in MCL 500.3145(1), including the one-year-back rule's limitation on the period of recovery.

LIMITATION OF ACTIONS — INSURANCE — NO-FAULT — REVISED JUDICATURE ACT — ONE-YEAR-BACK RULE — ACTIONS BY MINORS AND INSANE PERSONS.

The tolling provision in MCL 600.5851(1) of the Revised Judicature Act allowing minors and insane persons one year after the removal

of that disability to bring an action does not toll the one-year-back rule in MCL 500.3145(1) of the no-fault automobile insurance act, which limits the amount of personal protection insurance benefits recoverable to those losses incurred within the one year immediately before the date on which the action was commenced.

Law Offices of Paul Zebrowski & Associates (by *Thomas A. Biscup*) for Doreen Joseph.

Siemion Huckabay, P.C. (by *James W. Bodary*), and *Gross & Nemeth, P.L.C.* (by *James G. Gross*), for Auto Club Insurance Association.

Amici Curiae:

Speaker Law Firm, PLLC (by *Liisa R. Speaker*), and *Sinas, Dramis, Brake, Boughton & McIntyre, P.C.* (by *George T. Sinas*), for the Coalition Protecting Auto No-Fault.

Plunkett Cooney (by *Mary Massaron Ross* and *Josephine A. DeLorenzo*) for the Insurance Institute of Michigan.

Dykema Gossett PLLC (by *Jill M. Wheaton* and *Joseph Erhardt*) for the Michigan Catastrophic Claims Association.

Law Offices of Ronald M. Sangster, PLLC (by *Ronald M. Sangster, Jr.*), for Michigan Defense Trial Counsel.

Anselmi & Mierzejewski, P.C. (by *Mark D. Sowle*), for Titan Insurance Company.

MARY BETH KELLY, J. We granted defendant Auto Club Insurance Association's bypass application for leave to appeal in this case to determine whether the minority/insanity tolling provision of MCL 600.5851(1) applies to toll the one-year-back rule in MCL

500.3145(1) of the no-fault act. The one-year-back rule is designed to limit the amount of benefits recoverable under the no-fault act to those losses occurring no more than one year before an action is brought. Plaintiff here is seeking to recover no-fault benefits for losses dating back 32 years before she brought her action. In denying defendant's motion for partial summary disposition, the circuit court relied on *Univ of Mich Regents v Titan Ins Co*[1] to hold that the minority/insanity tolling provision tolls the one-year-back rule. In *Regents*, this Court held that a saving provision that tolls a statute of limitations also prevents application of the one-year-back rule. *Regents* overruled *Cameron v Auto Club Ins Ass'n*[2] and *Liptow v State Farm Mut Auto Ins Co*,[3] which had held that the saving provisions at issue only tolled a statute of limitations, not statutes limiting damages.

We once again hold that the minority/insanity tolling provision, which addresses only when an action may be *brought*, does not preclude the application of the one-year-back rule, which separately limits the *amount* of benefits that can be recovered. These distinctions were recognized in Michigan law both in *Cameron* as well as several decisions of this Court that predate *Cameron*. Yet this Court's decision in *Regents* conflated these distinct concepts in order to effectuate what the *Regents* majority believed was a broader social good served by expanding the right to recover benefits beyond those allowed by law. We recognize the necessity for, and value of, stability in the law and take no pleasure in overruling a precedent of recent vintage by this Court. But *Regents* itself simply

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[1] *Univ of Mich Regents v Titan Ins Co*, 487 Mich 289; 791 NW2d 897 (2010).

[2] *Cameron v Auto Club Ins Ass'n*, 476 Mich 55; 718 NW2d 784 (2006).

[3] *Liptow v State Farm Mut Auto Ins Co*, 272 Mich App 544; 726 NW2d 442 (2006).

failed to apply our then recent decision in *Cameron*, resulting in a decision that patently failed to enforce the requirements of the statutes that it interpreted. Because the holding in *Regents* contravened the Legislature's clear and unambiguous language in MCL 500.3145(1) and MCL 600.5851(1), *Regents* is overruled and we reinstate *Cameron*. Accordingly, we remand this case to the circuit court for entry of an order granting defendant's motion for partial summary disposition on the basis of the one-year-back rule.

I. FACTS AND PROCEDURAL HISTORY

In June 1977, then 17-year-old plaintiff, Doreen Joseph, was involved in an automobile accident in which she suffered traumatic brain injury and quadriplegia. At the time of the accident, plaintiff had automobile insurance coverage through the Detroit Automobile Inter-Insurance Exchange, defendant's predecessor. Defendant later assumed responsibility for paying plaintiff's personal protection insurance (PIP) benefits. Since the date of plaintiff's injury, defendant has paid more than $4 million in PIP benefits for plaintiff's care.

On February 27, 2009, plaintiff filed a complaint seeking additional PIP benefits for allegedly unpaid case-management services provided by plaintiff's family members. The period for which plaintiff seeks recovery dates back to the date of plaintiff's accident in 1977. Defendant moved for partial summary disposition pursuant to MCR 2.116(C)(10), arguing that the one-year-back rule in MCL 500.3145(1) barred plaintiff's claim with respect to benefits sought for any period more than one year before the February 27, 2009, commencement date of plaintiff's action. Plaintiff responded that her "insanity" over the

past 32 years had operated to toll the one-year-back rule pursuant to the minority/insanity tolling provision of MCL 600.5851(1).[4]

The circuit court denied defendant's motion for partial summary disposition, citing *Regents* for the proposition that the minority/insanity tolling provision tolls the one-year-back rule and, thus, if plaintiff is determined to be "insane," her recovery will not be limited to the year immediately preceding the filing of her complaint. Defendant filed an interlocutory application for leave to appeal in the Court of Appeals and then filed a bypass application for leave to appeal in this Court, arguing that the minority/insanity tolling provision does not apply to the one-year-back rule and that *Regents* was wrongly decided. We entered orders staying the circuit court proceedings[5] and granting defendant's bypass application to consider whether *Regents* was correctly decided.[6]

II. STANDARD OF REVIEW

This Court reviews de novo a circuit court's decision whether to grant or deny summary disposition.[7] Similarly, we review de novo issues of statutory interpretation as questions of law.[8] Our primary goal when interpreting statutes is to discern the intent of the Legislature.[9] To do so, we focus on the best indicator of that intent, the

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[4] The circuit court held that there exists a question of fact regarding whether plaintiff is "insane" for purposes of MCL 600.5851(1). That determination is not at issue in this appeal.

[5] *Joseph v ACIA*, 802 NW2d 351 (Mich, 2011).

[6] *Joseph v ACIA*, 489 Mich 924 (2011).

[7] *Nastal v Henderson & Assoc Investigations, Inc*, 471 Mich 712, 720; 691 NW2d 1 (2005).

[8] *Id*.

[9] *Wickens v Oakwood Healthcare Sys*, 465 Mich 53, 60; 631 NW2d 686 (2001).

language of the statute itself.[10] The words used by the Legislature are given their common and ordinary meaning.[11] If the statutory language is unambiguous, we presume that the Legislature intended the meaning that it clearly expressed, and further construction is neither required nor permitted.[12]

Defendant moved for partial summary disposition pursuant to MCR 2.116(C)(10). Because a motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint, the circuit court must consider the affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion.[13] If the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law.[14]

III. ANALYSIS

A. THE ONE-YEAR-BACK RULE AND THE MINORITY/INSANITY TOLLING PROVISION

This case requires that we again interpret the limitations on recovery of PIP benefits set forth in the no-fault act. The relevant statutory provision of the no-fault act, MCL 500.3145(1), provides in pertinent part:

> An action for recovery of personal protection insurance benefits payable under this chapter for accidental bodily

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[10] *Id*.

[11] MCL 8.3a; *Veenstra v Washtenaw Country Club*, 466 Mich 155, 160; 645 NW2d 643 (2002).

[12] *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999).

[13] *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

[14] MCR 2.116(C)(10) and (G)(4); *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996).

> injury may not be commenced later than 1 year after the date of the accident causing the injury unless written notice of injury as provided herein has been given to the insurer within 1 year after the accident or unless the insurer has previously made a payment of personal protection insurance benefits for the injury. If the notice has been given or a payment has been made, the action may be commenced at any time within 1 year after the most recent allowable expense, work loss or survivor's loss has been incurred. *However, the claimant may not recover benefits for any portion of the loss incurred more than 1 year before the date on which the action was commenced*.[15]

As early as 1984, this Court explained that this statutory provision contains separate and distinct limitations periods that relate both to the timing in which an action may be brought and the damages that may be recovered.[16] Specifically, we have noted that MCL 500.3145(1)

> contains two limitations on the time for filing suit and one limitation on the period for which benefits may be recovered:
>
> "(1) An action for personal protection insurance [PIP] benefits must be commenced not later than one year after the date of accident, *unless* the insured gives written notice of injury or the insurer previously paid [PIP] benefits for the injury.
>
> "(2) *If* notice has been given or payment has been made, the action may be commenced at any time within one year after the most recent loss was incurred.
>
> "(3) Recovery is limited to losses incurred during the one year preceding commencement of the action."[17]

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[15] Emphasis added.

[16] *Welton v Carriers Ins Co*, 421 Mich 571, 576; 365 NW2d 170 (1984).

[17] *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 574; 702 NW2d 539 (2005), quoting *Welton*, 421 Mich at 576.

Accordingly, a person filing a claim for PIP benefits must do so within a year of the accident unless the insured gives written notice of injury or previously received PIP benefits from the insurer. If notice was given or payment was made, the action can be commenced within one year of the most recent loss. In any case, though, recovery is limited only to losses that have been incurred during the year before the filing of the action.

The final limitation provided in MCL 500.3145(1) is the limitation on damages known as the one-year-back rule. In *Devillers v Auto Club Ins Ass'n*, we discussed the significance of the legislative distinction between statutes of limitations and provisions that limit damages, noting that

> although a no-fault action to recover PIP benefits may be *filed* more than one year after the accident and more than one year after a particular loss has been incurred (provided that notice of injury has been given to the insurer or the insurer has previously paid PIP benefits for the injury), § 3145(1) nevertheless limits *recovery* in that action to those losses incurred within the one year preceding the filing of the action.[18]

Our Legislature has also independently established, in the Revised Judicature Act (RJA),[19] a *general* tolling provision in order to aid those who are minors or legally insane. The minority/insanity tolling provision of MCL 600.5851(1) extends the time for filing suit by tolling an otherwise applicable statute of limitations.[20] MCL 600.5851(1) provides in relevant part:

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[18] *Devillers*, 473 Mich at 574; see also *Howard v Gen Motors Corp*, 427 Mich 358, 385-387; 399 NW2d 10 (1986) (opinion by BRICKLEY, J.).

[19] MCL 600.101 *et seq*.

[20] See *Lambert v Calhoun*, 394 Mich 179, 181, 192; 229 NW2d 332 (1975).

> [I]f the person first entitled to make an entry or bring an action under this act is under 18 years of age or insane at the time the claim accrues, the person or those claiming under the person shall have 1 year after the disability is removed through death or otherwise, to make the entry or bring the action although the period of limitations has run.

Notably, by its unambiguous terms, this provision concerns *when* a minor or person suffering from insanity may "make the entry or bring the action," and the provision is entirely silent with regard to the amount of damages recoverable once an action has been brought.[21]

B. *CAMERON* AND ITS PROGENY

We first considered the interplay between the one-year-back rule and the minority/insanity tolling provision in *Cameron*.[22] In *Cameron*, the plaintiffs' minor son sustained a closed head injury when an automobile struck his bicycle in 1996. Six years later, in 2002, the plaintiffs filed suit against their no-fault insurer to recover PIP benefits for attendant-care services rendered from 1996 to 1999. The plaintiffs argued that the minority/insanity tolling provision applied to toll the one-year-back rule, rendering recoverable the losses incurred between 1996 and 1999. We disagreed, holding that the minority/insanity tolling provision does not operate to toll the one-year-back rule. We explained in *Cameron*:

> By its unambiguous terms, MCL 600.5851(1) concerns when a minor or person suffering from insanity may "make the entry or bring the action." It does not pertain to the

[21] This is a point that is only relevant to statutes like the no-fault act that contain a unique one-year-back rule, which limits the right of recovery to damages incurred during the year before commencement of the action.

[22] *Cameron*, 476 Mich 55.

> damages recoverable once an action has been brought. MCL 600.5851(1) then is irrelevant to the damages-limiting one-year-back provision of MCL 500.3145(1).[23]

That is,

> the minority/insanity tolling provision in MCL 600.5851(1), by its plain terms, only addresses when an action may be brought. Therefore, it does not apply to toll the one-year-back rule in MCL 500.3145(1) because that provision does not concern when an action may be brought but, instead, limits the amount of PIP benefits a person injured in an automobile accident may recover.[24]

In reaching this conclusion, we overruled the Court of Appeals' decision in *Geiger v Detroit Auto Inter-Ins Exch*,[25] which held that MCL 600.5851(1) applies to toll the one-year-back rule.[26] The *Geiger* panel reasoned

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[23] *Id*. at 62.

[24] *Id.* at 72.

[25] *Geiger v Detroit Auto Inter-Ins Exch*, 114 Mich App 283; 318 NW2d 833 (1982).

[26] By overruling *Geiger*, the dissent contends that "the *Cameron* majority upended 25 years of settled law . . . ." *Post* at 224. Aside from the fact that such "settled law" was a Court of Appeals decision and thus not binding on this Court, the dissent disregards the fundamental principle that not all precedents are deserving of equal respect. *Geiger* ignored the clear and unambiguous language of MCL 500.3145(1) and MCL 600.5851(1) and was, instead, grounded on its own speculative policy considerations. Because *Cameron* closely analyzed the actual statutory language and did not allow policy considerations to dictate the result, it is simply deserving of more regard. Thus, *Cameron* did not "upend 25 years of settled law"; stated in more accurate terms, the *Cameron* majority was compelled to overrule nonbinding precedent premised on a faulty legal analysis.

Contrary to the dissent, our conclusion that *Cameron* is "better reasoned" is not an altogether subjective determination. Instead, it is based on a straightforward reading of both *Cameron* and *Geiger*, which, even the dissent can hardly deny, would lead almost any reader to conclude that *Cameron* is focused principally on the statutory language in dispute, while *Geiger* is focused principally on policy considerations.

that reading the statute in a contrary fashion would "severely limit the utility" of the minority/insanity tolling provision "and could deprive a person of benefits to which he would otherwise be rightfully entitled."[27] This Court held that *Geiger*'s conclusion was not supported by the statutory texts and contravened the Legislature's unambiguous directives, compelling its overruling. As *Cameron* explained:

> [W]e must assume that the thing the Legislature wants is best understood by reading what it said. Because what was said in MCL 500.3145(1) and MCL 600.5851(1) is clear, no less clear is the policy. Damages are only allowed for one year back from the date the lawsuit is filed. We are enforcing the statutes as written. While some may question the wisdom of the Legislature's capping damages in this fashion, it is unquestionably a power that the Legislature has under our Constitution.[28]

After our decision in *Cameron*, the Court of Appeals in *Liptow*[29] applied *Cameron*'s reasoning to hold that separate tolling provisions for state political subdivisions[30] do not preclude the application of the one-year-back rule. The panel reasoned that the plain statutory

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Because such statutory language constitutes the best indicator of legislative intent, we believe that *Cameron* is "better reasoned." Although we appreciate that our dissenting colleagues are free to disagree with this assessment, judgments nonetheless must be made. And we have sought to exercise our own best judgment in assessing the precedents before us.

[27] *Geiger*, 114 Mich App at 291.

[28] *Cameron*, 476 Mich at 63 (citation omitted).

[29] *Liptow*, 272 Mich App 544.

[30] See MCL 600.5821(4), which provides in pertinent part:

> Actions brought in the name of . . . any political subdivision of the state of Michigan . . . for the recovery of the cost of maintenance, care, and treatment of persons in hospitals . . . are not subject to the *statute of limitations* and may be *brought* at any time without limitation, the provisions of any statute notwithstanding. [Emphasis added.]

text of MCL 600.5821(4) indicates that the Legislature intended to exempt the state from statutes of limitations when bringing an action to recover public funds. As in *Cameron*, the Court recognized that the one-year-back rule is not a statute of limitations, but a damages-limiting provision. Accordingly, because MCL 600.5821(4) does not address damages limitations, the Court of Appeals determined that it has no effect on the one-year-back rule.[31] Thus, *Liptow* held that while a political subdivision may *bring an action* at any time pursuant to MCL 600.5821(4), it cannot *recover benefits* for any portion of the loss incurred more than one year before the date on which the action was commenced.

C. *REGENTS*

Four years after *Cameron* and *Liptow*, in *Regents*, this Court again considered whether a saving provision tolling a statute of limitations similarly tolls the one-year-back rule.[32] In *Regents*, the plaintiffs brought an action seeking payment from the defendant insurer for the full cost of medical treatment provided to the defendant's insured who had been treated at the university's hospital following an automobile accident. The circuit court held that the one-year-back rule barred the plaintiffs from recovering any portion of the loss incurred more than one year before commencement of the action, and the Court of Appeals affirmed. In a narrowly divided decision, this Court reversed the decisions of the lower courts and overruled the recent decisions in *Cameron* and *Liptow*, holding, in part, that the minority/insanity tolling provision does, in fact, toll the one-year-back rule. The *Regents* Court, essentially adopting the dissenting position from *Cameron*, held that "the 'action' and 'claim' preserved by [the

[31] *Liptow*, 272 Mich App at 555-556.

[32] *Regents*, 487 Mich 289.

minority/insanity tolling provision] include the right to collect damages" because "the right to bring an action would be a hollow one indeed if a plaintiff could not recover damages."[33] According to *Regents*, the one-year-back rule in MCL 500.3145(1) is inapplicable to a statute that preserves a plaintiff's right to bring an action. That is, because MCL 600.5851(1) preserves the rights of minors and insane persons by granting them one year after their disabilities have been removed to bring their civil actions, MCL 600.5851(1) precludes application of the one-year-back rule.

Three justices strongly dissented from the decision to overrule *Cameron* and erase the long-recognized distinction between statutes of limitations and the damages-limiting provision of the no-fault statute. The dissenting justices explained that because the one-year-back rule "serves only as a limitation on the recovery of benefits" and "does not define a period within which a claimant may file a cause of action," the one-year-back rule "lies outside the scope of what is affected by the RJA's minority/insanity tolling provision."[34] By holding to the contrary, the dissenting justices concluded that the majority had failed to enforce as written the unambiguous language of the one-year-back rule, and had attempted instead to "discern the purpose of the statute from something other than its actual language."[35]

D. *REGENTS* WAS WRONGLY DECIDED

We believe that the ruling in *Regents* was erroneous for the simple reason that the statutory texts of MCL 500.3145(1) and MCL 600.5851(1) plainly do not sup-

[33] *Id.* at 299.

[34] *Id*. at 333 (MARKMAN, J., dissenting).

[35] *Id*. at 336.

port it. MCL 600.5851(1) gives minors and insane persons one year after the removal of their disabilities "to make the entry or bring the action." By its very terms, the minority/insanity tolling provision is a timing mechanism specifying *when* a minor or insane person may bring his or her claim; it places no limitation on, and makes no reference to, *the amount of damages* that can be recovered after the action has been brought. The one-year-back rule in MCL 500.3145(1), on the other hand, forecloses a claimant from recovering "benefits for any portion of the loss incurred more than 1 year before the date on which the action was commenced." By its very terms, then, the one-year-back rule is a damages-limiting provision because it limits a claimant's recovery to those losses incurred during the year before the filing of the action.

By concluding that the minority/insanity tolling provision of MCL 600.5851(1) operates to toll the one-year-back rule in MCL 500.3145(1), *Regents* failed to recognize the critical distinction between having the general right to commence an action and the limitation on the right to recover no-fault benefits for losses occurring more than one year before the filing of the action. Indeed, *Regents* impermissibly interpreted the phrase "bring the action" in MCL 600.5851(1) as conferring on a claimant the right to "bring the action and recover an unlimited amount of damages," an interpretation which cannot be extracted from the plain and unambiguous statutory text. The dissenting justices in *Regents* recognized this distinction, contrasting the one-year-back rule, which provides that the claimant "may not recover benefits for any portion of the loss incurred more than 1 year before the date on which the action was commenced," with MCL 600.5821(4), which provides that an action by the state or one of its political

subdivisions "may be brought at any time without limitation." The dissenting justices in *Regents* properly observed:

> [W]hen these two provisions are read together, it is clear that while a political subdivision may *bring* an action at any time, it cannot *recover* benefits for any portion of the loss incurred more than 1 year before the date on which the action was commenced. In other words, MCL 600.5821(4), which pertains only to *when* an action may be commenced, does not preclude the application of the one-year-back rule, which only limits *how much* can be recovered after the action has been commenced.[36]

This interpretation is merely an extension of the same legal rationale applied in *Cameron*, in which the Court distinguished the plain language of the one-year-back rule from the plain language of the minority/insanity tolling provision.

Again, the rules of statutory interpretation mandate that we give effect to the Legislature's intent, relying on the plain language of the no-fault statute itself. If the statutory language is unambiguous, we must presume that the Legislature intended the meaning it clearly expressed and further construction is neither required nor permitted.[37] As is evident from its holding, the interpretation advanced by *Regents* superseded the Legislature's explicit intent that recovery of PIP benefits be limited to losses incurred within one year before the date on which an action is filed. The statutory provision containing the one-year-back rule employs plain, clear, and simple language. The minority/insanity tolling provision sets forth an equally simple concept, tolling the time in which an action may be commenced after a person's disability is removed. This tolling

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[36] *Id*. at 339.

[37] *Sun Valley Foods*, 460 Mich at 236.

provision, however, is silent regarding the amount of damages a claimant may recover and, accordingly, there is no support for the conclusion that the minority/insanity tolling statute precludes application of the no-fault act's one-year-back rule. Because *Regents* reached such a conclusion, it was wrongly decided.

Application of the *Regents* Court's interpretation of the one-year-back rule to this case illustrates how that decision defeats the very purpose of the rule. Under *Regents*, plaintiff would be permitted to recover PIP benefits for those losses incurred during the 32 years *predating* the filing of her action on February 27, 2009, in addition to those losses incurred *after* that date and continuing for the remainder of her life. Permitting recovery in that manner ignores the plain language of the one-year-back rule, which limits plaintiff's recovery to those losses incurred within one year before February 27, 2009, while still allowing additional recovery for all losses incurred after that date. Although the minority/insanity tolling provision may certainly toll myriad statutory provisions that contain a statute of limitations, it cannot toll the one-year-back rule of MCL 500.3145(1) because the one-year-back rule is not a statute of limitations in that it does not limit the period of time within which a claimant may file an action; rather, the one-year-back rule places a limitation on the amount of damages a claimant is entitled to recover. Furthermore, the one-year-back rule does not serve those purposes typically associated with a statute of limitations because it does not operate to cut off a claim or bar the action or the recovery; it simply limits the compensation available to the claimant.[38] Because the no-fault act's one-year-back rule and the RJA's

[38] The dissent characterizes our interpretation of MCL 500.3145(1) and MCL 600.5851(1) as "tend[ing] toward the absurd." *Post* at 225.

minority/insanity tolling provision serve manifestly different purposes and function independently of each other, the one-year-back rule is not the subject of tolling under the minority/insanity tolling provision. And this proper interpretation comports both with the plain language of the statute and the legislative purpose of keeping insurance premiums at affordable rates while

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There is no need for this Court to address the "absurd results" doctrine in this case because there is simply no result here that is absurd. Indeed, the dissent's argument that this construction produces an absurd result was fully considered and rejected in *Cameron*. As reiterated by the dissenting justices in *Regents*, " '[i]n choosing to make no-fault insurance compulsory for all motorists, the Legislature has made the registration and operation of a motor vehicle inexorably dependent on whether no-fault insurance is available at fair and equitable rates.' " *Regents*, 487 Mich at 346-347 (MARKMAN, J., dissenting), quoting *Shavers v Attorney General*, 402 Mich 554, 599; 267 NW2d 72 (1978) (alteration in original). It therefore bears repeating that it is certainly quite *possible* that in a system that provides mandatory unlimited lifetime benefits, the Legislature intended to impose a limitation on recovery of no-fault benefits in order to make no-fault insurance affordable. This limitation is not only sensible, but necessary for the survival of the no-fault system.

Insofar as the dissent asserts that it "defies common sense" to think "[t]hat the Legislature wanted to grant a minor or insane person the right to prove his or her damages in a court of law while lacking any opportunity to be awarded them," *post* at 225-226, we note that the statutory language plainly does not confer on a claimant a right to prove and recover an unlimited amount of damages. Instead, the plain language merely confers a right, under certain circumstances, to bring an action despite the period of limitations having expired. The dissent utterly fails to recognize that the one-year-back rule does not operate to preclude a claimant from recovering *any* damages; rather, a claimant will find himself or herself without any recovery as a result of the one-year-back rule's operation only if the claimant has not suffered any losses within the one year immediately preceding the filing of the action. Contrary to the dissent, "that this result will occur 'only' in some circumstances," *post* at 226 n 11, hardly constitutes our only response to its claim of "absurdity." As previously explained, it is possible that the Legislature chose to impose a limitation on the recovery of no-fault benefits to ensure the financial integrity of the no-fault system. See also *Regents*, 487 Mich at 346-347 (MARKMAN, J. dissenting).

providing victims of motor vehicle accidents assured, adequate, and prompt reparation for certain economic losses.[39]

E. STARE DECISIS

Having concluded that *Regents* was wrongly decided, we must decide whether stare decisis nevertheless compels our adherence to its holding. The test for determining whether stare decisis compels continued adherence to a precedent is set forth in *Robinson v Detroit*[40] and calls for us to examine, among other factors, "(a) whether the earlier decision was wrongly decided, and (b) whether overruling such decision would work an undue hardship because of reliance interests or expectations that have arisen."[41]

First, as discussed previously, *Regents* was wrongly decided for the simple reason that it ignored the Legislature's clear and unambiguous directives in MCL 500.3145(1) and MCL 600.5851(1) by failing to enforce these statutory provisions as written. Rather than grounding its analysis on the proper and historically accepted interpretation of the one-year-back rule, the *Regents* decision appears to have focused on the majority's concern that a plaintiff allowed to bring a suit under the minority/insanity tolling provision would be precluded by the one-year-back rule from recovering all the damages that might otherwise be permitted outside

[39] See, e.g., *Tebo v Havlik*, 418 Mich 350, 366; 343 NW2d 181 (1984); *Celina Mut Ins Co v Lake States Ins Co*, 452 Mich 84, 89; 549 NW2d 834 (1996); *O'Donnell v State Farm Mut Auto Ins Co*, 404 Mich 524, 547; 273 NW2d 829 (1979).

[40] *Robinson v Detroit*, 462 Mich 439, 464-468; 613 NW2d 307 (2000).

[41] *Robertson v DaimlerChrysler Corp*, 465 Mich 732, 757; 641 NW2d 567 (2002), citing *Robinson*, 462 Mich at 464-468; see also *Mitchell v W T Grant Co*, 416 US 600, 627-628; 94 S Ct 1895; 40 L Ed 2d 406 (1974) (Powell, J., concurring).

the no-fault context. However, it is the Legislature's enactment of the no-fault act's one-year-back rule that operates to limit the recovery of damages incurred more than one year before an action is commenced, not our interpretation of the minority/insanity tolling provision.

With regard to reliance interests, "the Court must ask whether the previous decision has become so embedded, so accepted, so fundamental, to everyone's expectations that to change it would produce not just readjustments, but practical real-world dislocations."[42] In discussing this factor, the *Regents* Court explained: "*Cameron* is of recent vintage, having been decided a mere four years ago. Hence, reliance on its holding has been of limited duration."[43] *Regents* is of even more recent vintage than was *Cameron*, having been decided a mere 21 months ago. Certainly, *Regents* has not "become so embedded, so accepted, so fundamental, to everyone's expectations that to change it would produce . . . practical real-world dislocations"[44] such that reliance interests will be disrupted. While we view the duration of a decision from this Court as important, we believe the foremost indicator that reliance interests weigh in favor of overruling *Regents* is the plain language of the statutes because it is the unambiguous statutory text that guides the citizenry and their behavior. "This is the essence of the rule of law: to know in advance what the rules of society are."[45] As we have explained:

> [I]f the words of the statute are clear, the actor should be able to expect, that is, rely, that they will be carried out by

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[42] *Robinson*, 462 Mich at 466.

[43] *Regents*, 487 Mich at 305.

[44] *Robinson*, 462 Mich at 466.

[45] *Id.* at 467.

> all in society, including the courts. In fact, should a court confound those legitimate citizen expectations by misreading or misconstruing a statute, it is that court itself that has disrupted the reliance interest. When that happens, a subsequent court, rather than holding to the distorted reading because of the doctrine of stare decisis, should overrule the earlier court's misconstruction. The reason for this is that the court in distorting the statute was engaged in a form of judicial usurpation that runs counter to the bedrock principle of American constitutionalism, i.e., that the lawmaking power is reposed in the people as reflected in the work of the Legislature, and, absent a constitutional violation, the courts have no legitimacy in overruling or nullifying the people's representatives.[46]

Because *Regents* strayed considerably from the statutory language, it undermined the reliance interest that the people of this state have with regard to that language and with regard to a Court that is committed to upholding such language. As a result, it is this Court's duty to restore such reliance interests by restoring the law to mean what its language plainly states—a no-fault "claimant may not recover benefits for any portion of the loss incurred more than 1 year before the date on which the action was commenced."[47]

The one-year-back rule codifies an integral part of the legislative compromise that is the no-fault act, and invalidating that compromise will threaten the continued fiscal soundness of our no-fault system. Given that Michigan is the only state with a no-fault automobile-injury reparations scheme with mandatory, unlimited, lifetime medical benefits, the Legislature adopted a unique approach to defining the temporal limitations for filing suit without allowing open-ended liability or time-barring claims before they accrue. The Legislature

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[46] *Id*.

[47] MCL 500.3145(1).

addressed this problem by enacting the one-year-back rule, which limits recovery to losses incurred within one year before suit was filed. Thus, the creation of MCL 500.3145(1) was the Legislature's reasonable and simple approach to resolving the problem of allowing a reasonable amount of time for pursuing a claim while protecting the fiscal integrity of the no-fault system. However, under the *Regents* interpretation of the one-year-back rule, not only is a claimant permitted to recover those losses incurred after the date on which the action was filed, but recovery also extends to those losses incurred any number of years before the filing date. Permitting a claimant to recover all losses incurred both before and after an action is filed, without any limitation, would nullify this legislative compromise and render the no-fault system unsustainable.

For these reasons, we overrule *Regents* and "return the law, as is our duty, to what we believe the citizens of this state reading these statutes at the time of enactment would have understood [them] to mean."[48] We are mindful of the importance of stability and continuity in the law and approach with great caution a decision to overrule precedent, but to allow the interpretation of MCL 500.3145(1) and MCL 600.5851(1) set forth in *Regents* to stand would result in the endorsement of a decision that utterly failed to enforce the requirements of the very statutes it purported to interpret.

Because the plain and unambiguous language of MCL 500.3145(1) can only be interpreted as limiting the amount of PIP benefits recoverable to those losses incurred within one year before the date the lawsuit is filed, which was the same interpretation advanced by the *Cameron* majority, we reinstate our previous decision in *Cameron*.

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[48] *Robinson*, 462 Mich at 468.

F. APPLICATION

In this case, plaintiff filed her complaint on February 27, 2009, seeking recovery of PIP benefits for losses dating back 32 years. While plaintiff contends that, in light of her alleged insanity, the minority/insanity tolling provision tolls the one-year-back rule, rendering any losses incurred from the date of plaintiff's 1977 accident recoverable, we conclude otherwise. The minority/insanity tolling provision of MCL 600.5851(1), which concerns when an action may be commenced, does not render inoperable the one-year-back rule, which only limits how much can be recovered after the action has been commenced. Consequently, the one-year-back rule does not fall within the purview of what is intended to be tolled by the minority/insanity tolling provision. Accordingly, plaintiff's recovery is limited to losses incurred on or after February 27, 2008.

IV. CONCLUSION

The minority/insanity tolling provision in MCL 600.5851(1) does not apply to toll the one-year-back rule in MCL 500.3145(1) because the one-year-back rule is a damages-limiting provision and does not concern when an action may be brought. These two distinct statutory provisions serve different purposes and by their express language operate separately. Because the decision in *Regents* ignored the plain statutory directive, it is hereby overruled and *Cameron* is reinstated.[49] Accordingly, we reverse the decision of the circuit court denying defendant's motion for partial summary dispo-

[49] The *Regents* Court overruled *Liptow* on the sole basis that it relied on *Cameron*. Because *Cameron* has now been reinstated, the justification for overruling *Liptow* is no longer controlling law.

sition and remand this case to that court for entry of partial summary disposition in defendant's favor.

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

MARILYN KELLY, J. (*dissenting*). Today's decision is this Court's third ruling on the same issue in six years. Yet nothing accounts for its going back and forth on the issue—no new or revised legislation or social upheaval—except changes in the composition of the Court itself.

The majority overrules *Univ of Mich Regents v Titan Ins Co*[1] and reinstates the rule from *Cameron v Auto Club Ins Ass'n*.[2] *Cameron* changed 25 years of settled law[3] and held that the saving provision in MCL 600.5851(1) for minors and insane persons does not preclude the application of the one-year-back rule in MCL 500.3145(1). I authored the majority opinion in *Regents* and continue to believe that it correctly decided this issue. Thus, I would reaffirm our decision in *Regents* and respectfully deplore its demise.

Contrary to the majority's conclusion, MCL 600.5851(1) is not "entirely silent with regard to the amount of damages recoverable once an action has been brought."[4] Rather, as I stated in *Regents*:

> MCL 600.5851(1) does not create its own independent cause of action. It must be read together with the statute under which the plaintiff seeks to recover. In no-fault cases, for example, MCL 600.5851(1) must be read together with

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[1] *Univ of Mich Regents v Titan Ins Co*, 487 Mich 289; 791 NW2d 897 (2010).

[2] *Cameron v Auto Club Ins Ass'n*, 476 Mich 55; 718 NW2d 784 (2006).

[3] See *Geiger v DAIIE*, 114 Mich App 283; 318 NW2d 833 (1982).

[4] *Ante* at 209.

> MCL 500.3145(1). Doing so, the statutes grant infants and incompetent persons one year after their disability is removed to "bring the action" "for recovery of personal protection insurance benefits . . . for accidental bodily injury . . . ." On the basis of its language, MCL 600.5851(1) supersedes all limitations in MCL 500.3145(1), including the one-year-back rule's limitation on the period of recovery.[5]

The majority correctly asserts that our decisions predating *Cameron* recognized that MCL 500.3145(1) contains two limitations on the time for filing suit and one limitation on the period of recovery.[6] It attempts to use that uncontroversial point, however, to characterize *Cameron* as an uncontroversial, predetermined, and straightforward application of our precedent. The characterization is inaccurate.

The significant point is that *Cameron* was the first decision in which this Court recognized the distinction between the limitations in MCL 500.3145(1) *and* applied them differently. In so doing, the *Cameron* majority upended 25 years of settled law and drew a distinction that even the defendant did not initially ask it to draw.[7] These simple facts call into doubt the majority's contentions that *Cameron* was "compelled to overrule nonbinding precedent"[8] and that *Regents* "ignored the

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[5] *Regents*, 487 Mich at 298.

[6] See *ante* at 207, citing *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 574; 702 NW2d 539 (2005), and *Welton v Carrier Ins Co*, 421 Mich 571, 576; 365 NW2d 170 (1984).

[7] See *Cameron*, 476 Mich at 88-90 (CAVANAGH, J., dissenting) (noting that the defendant initially argued that MCL 600.5851(1) should not apply to any of the limitations in MCL 500.3145(1), but that the defendant eventually devised the alternative argument that, even though MCL 600.5851(1) saved the plaintiff's right to file suit, the one-year-back rule nevertheless prevented the plaintiff from recovering any damages that were incurred more than a year before the date of filing suit).

[8] *Ante* at 210 n 26. The majority also repeats a theme originating from Justice MARKMAN's concurrence in *Rowland v Washtenaw Co Rd Comm*,

Legislature's clear and unambiguous directive[] in MCL 500.3145(1) . . . ."[9] If the Legislature's directive were truly so clear and unambiguous, why did the prevailing interpretation of MCL 500.3145(1) go unchallenged for nearly 25 years?

As observed by the dissenting opinions in *Cameron*, the majority's interpretation of MCL 600.5851(1) and MCL 500.3145(1) in *Cameron* and this case tends toward the absurd.[10] That the Legislature wanted to grant a minor or insane person the right to prove his or her damages in a court of law while lacking any opportunity

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477 Mich 197, 226; 731 NW2d 41 (2007) (MARKMAN, J., concurring), that "not all precedents are built alike" because some are "better reasoned." See *ante* at 210-211 n 26. I have no doubt the majority believes that *all* of its decisions overruling previous cases are better reasoned than its predecessors'; otherwise, overruling those cases would seem foolish indeed. But any establishment of a *hierarchy* of precedents is inherently flawed because whether one decision is better reasoned than another is "undoubtedly in the eye of the beholder." *Regents*, 487 Mich at 303 n 28. Given the subjective nature of this "better reasoned" inquiry, such an approach would serve no purpose other than to shield the majority's allegedly better-reasoned precedents from scrutiny.

The majority claims that this inquiry is not subjective because, given that *Cameron* focused principally on the statute's language, not "policy considerations," it is objectively "better reasoned" than *Geiger*. Even accepting the majority's characterization, this assertion is flawed. An objective person reading an absurd decision that is based on a seriously strained reading of statutory language (*Cameron*) might reasonably find a contrary decision primarily focused on "policy considerations" (*Geiger*) to be "better reasoned." The majority's disdain for policy considerations in favor of a focus on statutory language that it inevitably determines is "clear and unambiguous"—even when it is not—does not an objective determination make.

Finally, it appears that, unlike the majority, the Legislature did not consider *Geiger* to be "premised on a faulty legal analysis." *Ante* at 210 n 26. It did not supersede *Geiger* by amending the applicable statutes from 1982 to 2006.

[9] *Ante* at 218.

[10] *Cameron*, 476 Mich at 103 n 12 (CAVANAGH, J., dissenting); *id*. at 109-130 (KELLY, J., dissenting).

to be awarded them defies common sense. Yet under the *Cameron* regime restored today, many claims supposedly "saved" by MCL 600.5851(1) will be disposed of in precisely that fashion.[11] This result creates a false promise. I cannot conclude that the Legislature intended such a promise.

I dissent from the majority's decision to overrule *Regents* and reinstate the rule from *Cameron* that MCL 600.5851(1) does not preclude application of the one-year-back rule in MCL 500.3145(1). I would hold that MCL 600.5851(1) saves a minor or insane person's "claim," which includes the right to recover all of his or her personal protection insurance benefits.

CAVANAGH and HATHAWAY, JJ., concurred with MARILYN KELLY, J.

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[11] The majority's response to this obvious absurdity is that it will "only" occur if the injured person has suffered no losses in the year preceding the filing of the action. The majority's speculation that this result will occur "only" in some circumstances does nothing to undercut its absurdity. And it will provide cold comfort for those caught in this judicially created trap.

DEPARTMENT OF ENVIRONMENTAL QUALITY v
WORTH TOWNSHIP

Docket No. 141810. Argued November 9, 2011 (Calendar No. 4). Decided May 17, 2012.

The Department of Environmental Quality (DEQ) and its director brought an action in the Ingham Circuit Court seeking injunctive relief against Worth Township. Plaintiffs alleged that defendant lacked a sanitary-sewerage system, that defendant relied on private septic systems to process sewage generated within its borders, that many of those septic systems were failing, and that as a result of the failed septic systems, sewage with high levels of fecal coliform and *E. coli* bacteria was being discharged into the waters of the state, including Lake Huron. Plaintiffs claimed that defendant was responsible for the discharges under part 31 of the Natural Resources and Environmental Protection Act (NREPA), MCL 324.3101 *et seq*., and asked the court to require defendant to construct a sanitary-sewerage system. Defendant moved for summary disposition under MCR 2.116(C)(8) and (10). The court, Joyce Draganchuk, J., denied the motion. Defendant sought interlocutory leave to appeal. The Court of Appeals denied the application. The parties subsequently filed cross-motions for summary disposition under MCR 2.116(C)(10). The trial court granted plaintiffs' motion for summary disposition, denied defendant's motion for summary disposition, assessed defendant fines and attorney fees, and ordered defendant to take necessary corrective measures within a certain time frame to prevent the discharge of raw sewage. Defendant appealed. The Court of Appeals, SAWYER, J., and OWENS, P.J. (O'CONNELL, J., dissenting), reversed the trial court's ruling and remanded for entry of summary disposition in favor of defendant, holding that under MCL 324.3109(2), a municipality cannot be required to prevent the discharge of raw sewage into state waters if the municipality itself had not discharged the sewage and had not otherwise accepted responsibility pursuant to MCL 324.3109(3). 289 Mich App 414 (2010). The Supreme Court granted plaintiffs' application for leave to appeal. 489 Mich 856 (2011).

In an opinion by Justice HATHAWAY, joined by Justices CAVANAGH, MARILYN KELLY, MARKMAN, MARY BETH KELLY, and ZAHRA, the Supreme Court *held*:

Under NREPA, a municipality can be held responsible for and required to prevent a discharge of raw sewage from within its borders into state waters by private citizens. MCL 324.3109(2) creates a presumption that a municipality has violated NREPA when a discharge originated within its boundaries.

1. Generally, MCL 324.3109(1)(a) prohibits a person, including a governmental entity, from directly or indirectly discharging into state waters a substance that is or may become injurious to the public health, safety, or welfare. MCL 324.3109(2) specifically provides that the discharge of any raw sewage of human origin into any state waters shall be considered prima facie evidence of a violation of part 31 of NREPA by the municipality in which the discharge originated unless the discharge was permitted by the DEQ. Interpreting MCL 324.3109(2) to create a presumption that a municipality has violated NREPA when a discharge originated within its boundaries, regardless of who actually caused the discharge, rather than a presumption that the municipality itself discharged the sewage, as the Court of Appeals held, is consistent with the historical statutory obligation of municipalities to oversee the proper disposal of sewage within their boundaries. It is also consistent with the statutory subsections surrounding MCL 324.3109(2). MCL 324.3109(4) and (5) address specific substances that, when discharged, provide prima facie evidence of a violation and are presumed to be injurious but, unlike MCL 324.3109(2), those subsections do not identify the party that will be held responsible for the discharge. MCL 324.3109(2) not only creates a presumption that the discharge of any raw sewage is injurious, it actually identifies the party responsible for the discharge as the municipality in which the discharge originated. MCL 324.3109(3), which provides an exception from municipal responsibility for discharges from a sewerage system that the municipality does not own, is inapplicable to the facts of this case because there is no sewerage system in Worth Township. Moreover, given that any municipality that actually discharges an injurious substance is already in violation of MCL 324.3109(1), interpreting MCL 324.3109(2) as operating solely to create a presumption of liability, and only in cases in which human sewage constitutes the discharged substance, would come close to rendering MCL 324.3109(2) nugatory.

2. Defendant may be held responsible for a discharge as a municipality under MCL 324.3109 despite the fact that other municipalities, such as the county and state within which the township is located, could also have been held responsible. Townships have the historical responsibility and the statutory authority to prevent the discharge of raw sewage by taking such actions as creating sewerage systems, adopting ordinances that require indi-

vidual property owners to connect to these systems, condemning individual properties that are injurious to the public health, and granting franchises to public utilities within their boundaries.

3. The trial court had the authority to require defendant to take necessary corrective action to prevent the discharge at issue under MCL 324.3115(1), which provides circuit courts jurisdiction to restrain violations of and require compliance with part 31 of NREPA.

Reversed; case remanded to the Court of Appeals for consideration of defendant's remaining arguments on appeal.

Chief Justice YOUNG, dissenting, stated that the majority's imposition of strict liability on municipalities for all injurious discharges of human sewage that originate within their borders is unsupported by the text of the statute. He would have concluded that, because MCL 324.3109(2) unambiguously contains a presumption of a violation by a municipality, the presumption in that subsection may be rebutted by a municipality's showing either that the discharge of raw human sewage did not violate part 31 of NREPA or that the municipality was not in fact the discharging party. Because the documentary evidence indicated that defendant was not the actual source of the contamination and the DEQ conceded that defendant would prevail if permitted to rebut causation, defendant was entitled to summary disposition of the claim brought under MCL 324.3109(2). Chief Justice YOUNG would have reversed in part and remanded the case for the trial court to determine whether a basis existed to impose liability under MCL 324.3112, which prohibits discharges of waste or waste effluent without a permit.

1. ENVIRONMENT — NATURAL RESOURCES AND ENVIRONMENTAL PROTECTION ACT — WATER POLLUTION — DISCHARGES OF RAW HUMAN SEWAGE — MUNICIPAL CORPORATIONS — REBUTTABLE PRESUMPTIONS — SOURCES OF DISCHARGE.

A municipality can be held responsible under the Natural Resources and Environmental Protection Act (NREPA) for, and required to prevent, a discharge of raw human sewage that originated within the municipality's borders, even if the raw sewage was discharged by a private party and not by the municipality itself; the rebuttable presumption created in MCL 324.3109(2) is that NREPA has been violated when raw sewage has been discharged into state waters, not that the municipality itself discharged the sewage.

2. ENVIRONMENT — NATURAL RESOURCES AND ENVIRONMENTAL PROTECTION ACT — WATER POLLUTION — DISCHARGES OF RAW HUMAN SEWAGE — MUNICIPAL CORPORATIONS.

A municipality, such as a township, may be held responsible for a discharge of raw human sewage under MCL 324.3109 despite the fact

that other municipalities, such as the county and state within which the township is located, could also have been held responsible for the discharge.

3. ENVIRONMENT — NATURAL RESOURCES AND ENVIRONMENTAL PROTECTION ACT — WATER POLLUTION — MUNICIPAL CORPORATIONS — DISCHARGES OF RAW HUMAN SEWAGE — JURISDICTION.

A circuit court has jurisdiction to require a municipality to take necessary corrective action to prevent a discharge of raw human sewage pursuant to the court's authority under MCL 324.3115(1) to restrain violations of and require compliance with part 31 of NREPA, MCL 324.3101 *et seq*.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Richard A. Bandstra*, Chief Legal Counsel, and *Alan F. Hoffman* and *Neil D. Gordon*, Assistant Attorneys General, for plaintiffs.

Hubbard Law Firm, P.C. (by *Michael G. Woodworth*), for defendant.

Amici Curiae:

Bauckham, Sparks, Lohrstorfer, Thall & Seeber, P.C. (by *John H. Bauckham*), for the Michigan Townships Association.

McClelland & Anderson, LLP (by *Gregory L. McClelland*, *David E. Pierson*, and *Melissa A. Hagen*), for the Michigan Association of Realtors.

HATHAWAY, J. At issue is whether a municipality such as a township can be held responsible under MCL 324.3109(2) of the Natural Resources and Environmental Protection Act (NREPA)[1] for raw sewage discharged into state waters by private citizens within the township's borders. We conclude that under NREPA, a municipality

[1] MCL 324.101 *et seq*.

can be held responsible for,[2] and required to prevent,[3] the discharge when the raw sewage originates within its borders, even when the raw sewage is discharged by a private party and not directly discharged by the municipality itself.

Therefore, we reverse the judgment of the Court of Appeals because it interpreted MCL 324.3109(2) in a manner that precludes a municipality from being held responsible for such a discharge. We remand this case to the Court of Appeals to address defendant's remaining arguments on appeal.[4]

I. FACTS AND PROCEDURAL HISTORY

This case arises from the contamination of surface waters within and surrounding defendant, Worth Township, including Lake Huron and several of its tributaries. Plaintiff, the Department of Environmental Quality (DEQ),[5] conducted surveys of water quality in the area of concern in 2003, 2006, and 2008. The DEQ collected water samples to verify and quantify the presence and levels of fecal coliform and *E. coli* bacteria. The DEQ also made sensory observations of privately owned septic systems[6] on properties located within the

[2] MCL 324.3109(2).

[3] MCL 324.3115.

[4] We do not decide the issues raised by Worth Township's two additional defenses, including whether the remedial action ordered by the trial court violates the Headlee Amendment, specifically Const 1963, art 9, § 29, and whether MCL 324.3115(1) authorizes the trial court's order imposing a schedule for implementing corrective action, a fine, and an attorney-fee award. Those issues were not addressed by the Court of Appeals and are to be decided on remand.

[5] The director of the DEQ is also listed as a named plaintiff. For ease of reference, we refer to the plaintiffs as the DEQ only.

[6] A functioning septic system provides an area for household and human waste to be safely broken down and disposed of in soil. A system

borders of the township. The survey data demonstrated that the surface waters were contaminated with both fecal coliform and *E. coli* bacteria. The survey data also indicated that the conditions were becoming progressively worse.

There is no municipal "sewerage system"[7] located within the township. The parties agree that the surface waters in the area of concern are contaminated by raw sewage of human origin.[8] The parties also agree that the contamination comes from septic systems on privately owned properties located within Worth Township. The private properties at issue are located in a three- to five-mile area along the shore of Lake Huron. Most of the area was initially developed with summer cottages in mind, but the cottages have increasingly been converted into year-round residences. According to the evidence submitted to the trial court, the majority of the septic systems in the area are old, undersized, and failing. Drain fields are oversaturated with raw sewage,

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generally contains one or more septic tanks, to which waste initially travels from the home. While in the septic tanks, the waste breaks down and separates into solids and liquid, or effluent. The solids remain in the tank. The effluent travels to a soil absorption system, which usually consists of a series of perforated pipes in a trench of sand or gravel, and the treated water is absorbed into soil. See *Dep't of Environmental Quality v Worth Twp*, 289 Mich App 414, 425; 808 NW2d 260 (2010) (O'CONNELL, J., dissenting).

[7] MCL 324.4101(h) defines a "sewerage system." It states:

> "Sewerage system" means a system of pipes and structures including pipes, channels, conduits, manholes, pumping stations, sewage or waste treatment works, diversion and regulatory devices, outfall structures, and appurtenances, collectively or severally, actually used or intended for use by the public for the purpose of collecting, conveying, transporting, treating, or otherwise handling sanitary sewage or other industrial liquid wastes that are capable of adversely affecting the public health.

[8] For the remainder of this opinion, the statutory phrase "raw sewage of human origin" will be referred to as "raw sewage."

and raw sewage is being directed into ditches and streams leading to Lake Huron. In at least one instance, raw sewage was directly discharged over the lake bluff into Lake Huron. As a result of the contamination, this section of Lake Huron has been included on Michigan's list of impaired waters.

After the first survey was performed by the DEQ, Worth Township and the DEQ attempted to remedy the problem. In April 2004, they entered into a district compliance agreement, wherein Worth Township agreed to construct a municipal sewerage system by June 1, 2008. However, Worth Township did not construct such a system, citing a lack of funds. As a result, the DEQ filed this case seeking injunctive relief under part 31 of NREPA, MCL 324.3101 *et seq*., to compel the township to prevent the discharge of raw sewage into the waters of the state.

Worth Township moved for summary disposition, arguing that neither the courts nor the DEQ has the authority to hold a township liable for the discharge of raw sewage from private residences into state waters. The trial court denied the motion. The DEQ then moved for summary disposition, claiming that the undisputed facts entitled it to judgment as a matter of law. The trial court granted the DEQ's motion for summary disposition and directed Worth Township to take necessary corrective measures in a given time frame to prevent the discharge of raw sewage and to pay fines and attorney fees.[9]

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[9] The remedy was ordered pursuant to MCL 324.3115, which sets forth the remedies and penalties for a violation of part 31 of NREPA. It provides in pertinent part:

> (1) The [DEQ] may request the attorney general to commence a civil action for appropriate relief, including a permanent or temporary injunction, for a violation of this part or a provision of

Worth Township appealed the trial court's decision. In a published opinion, the Court of Appeals reversed the trial court's ruling and remanded for entry of summary disposition in favor of the township.[10] The Court of Appeals majority held that under MCL 324.3109(2), a municipality cannot be required to prevent the discharge of raw sewage into state waters when the municipality itself has not discharged the raw

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a permit or order issued or rule promulgated under this part. An action under this subsection may be brought in the circuit court for the county of Ingham or for the county in which the defendant is located, resides, or is doing business. If requested by the defendant within 21 days after service of process, the court shall grant a change of venue to the circuit court for the county of Ingham or for the county in which the alleged violation occurred, is occurring, or, in the event of a threat of violation, will occur. The court has jurisdiction to restrain the violation and to require compliance. In addition to any other relief granted under this subsection, the court, except as otherwise provided in this subsection, shall impose a civil fine of not less than $2,500.00 and the court may award reasonable attorney fees and costs to the prevailing party. However, all of the following apply:

(a) The maximum fine imposed by the court shall not be more than $25,000.00 per day of violation.

(b) For a failure to report a release to the [DEQ] or to the primary public safety answering point under [MCL 324.3111b(1)], the court shall impose a civil fine of not more than $2,500.00.

(c) For a failure to report a release to the local health department under [MCL 324.3111b(2)], the court shall impose a civil fine of not more than $500.00.

* * *

(7) A civil fine or other award ordered paid pursuant to this section shall do both of the following:

(a) Be payable to the state of Michigan and credited to the general fund.

(b) Constitute a lien on any property, of any nature or kind, owned by the defendant.

[10] *Worth Twp*, 289 Mich App at 424.

sewage[11] and the municipality has not otherwise accepted responsibility pursuant to MCL 324.3109(3).[12] The Court of Appeals dissent would have affirmed the trial court's ruling and adopted the trial court's decision as its own.[13]

This Court granted the DEQ's application for leave to appeal.[14] Our grant order framed the issue as "whether [NREPA] empowers the [DEQ] to seek, and the circuit court to grant, an order effectively requiring a township to install a sanitary sewer system when a widespread failure of private septic systems results in contamination of lake waters."[15] While NREPA does not specifically authorize a circuit court to compel a municipality to install a sewerage system to remedy a widespread failure of private septic systems, NREPA does provide that "[t]he court has jurisdiction to restrain [a NREPA] violation and to require compliance"[16] with NREPA. In this case, the trial court's opinion specifically states that it does not compel the construction of a sewerage system. Consistently with MCL 324.3115(1), the trial court directed Worth Township to take necessary corrective action to prevent the discharge at issue. However, the parties agree that the most practical and comprehensive method for restraining the discharge is to construct a sewerage system. Accordingly, the issue before us is whether a municipality can be held responsible under NREPA for raw sewage discharged into state waters by private citizens within the municipality's borders.

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[11] *Id.*

[12] See *id.* at 420.

[13] *Id.* at 444 (O'CONNELL, J., dissenting).

[14] *Dep't of Environmental Quality v Worth Twp*, 489 Mich 856 (2011).

[15] *Id.*

[16] MCL 324.3115(1).

II. STANDARD OF REVIEW

This case involves the interpretation of a statute, which is a question of law that this Court reviews de novo.[17]

III. ANALYSIS

At issue is whether a municipality can be held responsible under NREPA for raw sewage discharged into state waters by private citizens within the municipality's borders. MCL 324.3109 sets forth the statutory framework regarding violations of NREPA involving unlawful discharges into state waters. MCL 324.3109 provides:

> (1) A person shall not directly or indirectly discharge into the waters of the state a substance that is or may become injurious to any of the following:
>
> (a) To the public health, safety, or welfare.
>
> (b) To domestic, commercial, industrial, agricultural, recreational, or other uses that are being made or may be made of such waters.
>
> (c) To the value or utility of riparian lands.
>
> (d) To livestock, wild animals, birds, fish, aquatic life, or plants or to their growth or propagation.
>
> (e) To the value of fish and game.
>
> (2) The discharge of any raw sewage of human origin, directly or indirectly, into any of the waters of the state shall be considered prima facie evidence of a violation of this part by the municipality in which the discharge originated unless the discharge is permitted by an order or rule of the [DEQ]. If the discharge is not the subject of a valid permit issued by the [DEQ], a municipality responsible for the discharge may be subject to the remedies

[17] *People v Lee*, 489 Mich 289, 295; 803 NW2d 165 (2011); *Miller-Davis Co v Ahrens Constr, Inc*, 489 Mich 355, 361; 802 NW2d 33 (2011).

> provided in [MCL 324.3115]. If the discharge is the subject of a valid permit issued by the [DEQ] pursuant to [MCL 324.3112], and is in violation of that permit, a municipality responsible for the discharge is subject to the penalties prescribed in [MCL 324.3115].
>
> (3) Notwithstanding subsection (2), a municipality is not responsible or subject to the remedies provided in [MCL 324.3115] for an unauthorized discharge from a sewerage system as defined in [MCL 324.4101] that is permitted under this part and owned by a party other than the municipality, unless the municipality has accepted responsibility in writing for the sewerage system and, with respect to the civil fine and penalty under [MCL 324.3115], the municipality has been notified in writing by the [DEQ] of its responsibility for the sewerage system.
>
> (4) Unless authorized by a permit, order, or rule of the department, the discharge into the waters of this state of any medical waste, as defined in . . . MCL 333.13801 to 333.13831, is prima facie evidence of a violation of this part and subjects the responsible person to the penalties prescribed in [MCL 324.3115].
>
> (5) Beginning January 1, 2007, unless a discharge is authorized by a permit, order, or rule of the department, the discharge into the waters of this state from an ocean-going vessel of any ballast water is prima facie evidence of a violation of this part and subjects the responsible person to the penalties prescribed in [MCL 324.3115].
>
> (6) A violation of this section is prima facie evidence of the existence of a public nuisance and in addition to the remedies provided for in this part may be abated according to law in an action brought by the attorney general in a court of competent jurisdiction.

When interpreting statutes, this Court must "ascertain and give effect to the intent of the Legislature."[18] The words used in the statute are the most reliable indicator of the Legislature's intent and should be

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

interpreted on the basis of their ordinary meaning and the context within which they are used in the statute.[19] In interpreting a statute, this Court avoids a construction that would render any part of the statute surplusage or nugatory.[20] "As far as possible, effect should be given to every phrase, clause, and word in the statute."[21] Moreover, the statutory language must be read and understood in its grammatical context.[22] When considering the correct interpretation, the statute must be read as a whole, unless something different was clearly intended.[23] Individual words and phrases, while important, should be read in the context of the entire legislative scheme.[24]

We begin by examining the language of MCL 324.3109(1). This subsection sets forth the manner in which a "person" is deemed to have violated part 31 of NREPA. For purposes of part 31, a "person" is defined as "an individual, partnership, corporation, association, governmental entity, or other legal entity." MCL 324.301(h). Thus, the term "person" includes a governmental entity such as Worth Township. MCL 324.3109(1)(a) provides that a person violates part 31 if the person "directly or indirectly discharge[s] into the waters of the state a substance that is or may become injurious to . . . the public health, safety, or welfare." Accordingly, MCL 324.3109(1) is applicable to a governmental entity such as Worth Township if the govern-

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

[20] *People v McGraw*, 484 Mich 120, 126; 771 NW2d 655 (2009), citing *Baker v Gen Motors Corp*, 409 Mich 639, 665; 297 NW2d 387 (1980).

[21] *Sun Valley Foods Co v Ward*, 460 Mich 230, 237; 596 NW2d 119 (1999).

[22] *Herman v Berrien Co*, 481 Mich 352, 366; 750 NW2d 570 (2008).

[23] *Sun Valley*, 460 Mich at 237.

[24] *Herman*, 481 Mich at 366.

mental entity directly or indirectly discharges into state waters a substance that is or may become injurious to public safety.

Next, MCL 324.3109(2) provides specific language with regard to violations by governmental entities. Its first sentence provides that the

> discharge of any raw sewage . . . , directly or indirectly, into any of the waters of the state shall be considered prima facie evidence of a violation of this part by the municipality in which the discharge originated unless the discharge is permitted by an order or rule of the [DEQ].

There is no dispute that raw sewage is being discharged into state waters from within Worth Township. Nor is this discharge permitted by an order or rule of the DEQ. Thus, the phrase "*shall be considered prima facie evidence of a violation of this part by the municipality in which the discharge originated*" is at the core of the dispute before us.

The Court of Appeals majority interpreted this phrase to mean that when raw sewage originating within the municipality's borders is discharged into state waters, this subsection creates a rebuttable presumption that the municipality itself discharged the sewage. And if the municipality proves that it did not cause the discharge, it avoids responsibility.[25] The majority stated:

> MCL 324.3109(2) clearly does not make a municipality automatically and conclusively responsible for a discharge of raw sewage. Rather, it merely creates the presumption that the municipality is responsible until and unless the municipality is able to establish that it did not violate part

[25] "Prima facie evidence" is "[e]vidence that will establish a fact or sustain a judgment unless contradictory evidence is produced." Black's Law Dictionary (8th ed), p 598. Thus, the term "prima facie evidence" creates a presumption that may be rebutted by contradictory evidence.

31 of NREPA, MCL 324.3101 *et seq*., which deals with the protection of water resources.

* * *

In sum, we hold that MCL 324.3109(2) does not impose blanket responsibility on a municipality for any sewage discharge that occurs within its jurisdiction and a corresponding obligation to remedy such discharges without regard to cause. Rather, it merely creates the presumption that such a discharge originated with the municipality. But when, as here, the municipality, [Worth Township] in this case, cannot have been the cause of the discharge, it holds no responsibility for the discharge. And, therefore, there is no basis to impose on [Worth Township] the obligation to pursue the remedy desired by [the DEQ], the installation of a public sanitary-sewerage system. [*Dep't of Environmental Quality v Worth Twp*, 289 Mich App 414, 419, 424; 808 NW2d 260 (2010).]

The Court of Appeals dissent opined that MCL 324.3109(2) creates a rebuttable presumption that part 31 of NREPA has been violated when raw sewage has been discharged into state waters and that the responsibility for rebutting that presumption falls on the municipality where the violation took place. The dissent stated:

[T]he phrase "prima facie evidence" in MCL 324.3109(2) is modified by the phrase "of a violation of this part . . . ." This means that the discharge of raw human sewage into state waters is prima facie evidence of a violation of part 31. Part 31 includes MCL 324.3109(1), which prohibits the discharge of a substance that is or may become injurious to public health, safety, or welfare. Accordingly, this prima facie evidence of a violation of part 31 is rebutted by a showing by the municipality that the discharges are *not* injurious to public health, safety, or welfare, e.g., that the discharges are nominal or will not cause injury. Yet in this case, the discharges are pervasive, extensive, and of such high concentrations that they are

> clearly injurious to the public health, safety, or welfare. [*Worth Twp*, 289 Mich App at 442 (O'CONNELL, J., dissenting).]

The primary distinction between the two interpretations is that the Court of Appeals majority held that MCL 324.3109(2) only creates a rebuttable presumption that a discharge of raw sewage was caused by a municipality in violation of NREPA, whereas the Court of Appeals dissent would have held that the presumption is that NREPA was violated and responsibility for the violation is assigned to the municipality where the violation took place, regardless of who caused the discharge. We find the latter interpretation to be correct. When MCL 324.3109(2) is read in conjunction with the surrounding subsections and in the historical context of statutes governing raw-sewage disposal, it is clear that the Legislature intended to create a presumption that the municipality is in violation of NREPA when a discharge originates within its boundaries, irrespective of who actually caused the discharge.

The historical obligation of a municipality to oversee the proper disposal of sewage within its boundaries is reflected in former MCL 323.1 *et seq*. Specifically, former MCL 323.6(a), as amended by 1965 PA 328, stated, "It shall be unlawful for any person directly or indirectly to discharge into the waters of the state any substance which is or may become injurious to the public health, safety, or welfare . . . ." Former MCL 323.6(b), as amended by that same act, stated:

> The discharge of any raw sewage of human origin, directly or indirectly into any of the waters of the state shall be considered prima facie evidence of the violation of [former MCL 323.6(a)] unless said discharge shall have been permitted by an order, rule, or regulation of the [Water Resources Commission]. Any city, village or township which permits, allows or suffers the discharge of such

> raw sewage of human origin into any of the waters of the state by any of its inhabitants or persons occupying lands from which said raw sewage originates, shall be subject only to the remedies provided for in [former MCL 323.7].

As Judge O'CONNELL noted in his dissent, it is clear that, historically, the Legislature intended that a local unit of government, such as a township, be responsible for discharges into state waters involving raw sewage originating within its boundaries. It is also clear that, historically, the Legislature intended to hold a local unit of government responsible for such a discharge regardless of whether the governmental unit itself caused the discharge or whether the discharge was caused by "inhabitants or persons occupying lands from which" the raw sewage originated.

Former MCL 323.1 *et seq*. was repealed by 1994 PA 451. In its place, 1994 PA 451 enacted NREPA, which includes MCL 324.3109. We conclude that, when read as a whole, MCL 324.3109 continues the historical obligations of MCL 323.6 that allow local units of government to be held responsible for the discharge of raw sewage that originates within their borders into state waters, even when the raw sewage is discharged by a private party and not directly discharged by the local unit itself.[26]

First, like former MCL 323.6(a), MCL 324.3109(1) prohibits a governmental entity itself from discharging injurious substances into state waters. If we were to adopt the Court of Appeals majority's holding that a municipality is responsible under MCL 324.3109(2) only when the municipality itself causes the discharge,

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[26] This conclusion is limited to our interpretation of NREPA. We do not decide whether the Headlee Amendment, specifically Const 1963, art 9, § 29, precludes the state from holding a local unit of government responsible for such a discharge. See note 4 of this opinion.

that provision would be rendered virtually meaningless. The Court of Appeals majority failed to take into consideration that under MCL 324.3109(1), a person violates part 31 of NREPA by discharging a substance into state waters that is or may become injurious to the interests listed in MCL 324.3109(1)(a) through (e)[27] and, thus, if a municipality itself causes such a discharge, it will have violated subsection (1). However, the Court of Appeals also held that under subsection (2) of MCL 324.3109, a municipality violates NREPA if the municipality itself causes the discharge. Accordingly, the Court of Appeals interpreted subsection (2) as providing little more than what is already provided in subsection (1). Though the Court of Appeals majority's interpretation does not render subsection (2) entirely nugatory, it comes close. We therefore reject the Court of Appeals majority's interpretation because the language of subsection (2) must be given full effect.

Second, when reading MCL 324.3109 as a whole, subsections (4) and (5) form a common theme, along with subsection (2), by listing specific substances that, when discharged, create a presumption that part 31 has been violated. As noted, MCL 324.3109(1) provides that a violation occurs when a substance that is or may become injurious is discharged into state waters. The language at issue in MCL 324.3109(2) provides that "[t]he discharge of any raw sewage . . . into any of the waters of the state shall be considered prima facie evidence of a violation of this part . . . ." Likewise, MCL 324.3109(4) provides that "the discharge into the waters of this state of any medical waste . . . is prima facie evidence of a violation of this part . . . ." Additionally, MCL 324.3109(5)

[27] The interest that is implicated in this case is "the public health, safety, or welfare." MCL 324.3109(1)(a).

provides that "the discharge into the waters of this state from an oceangoing vessel of any ballast water is prima facie evidence of a violation of this part . . . ."

Thus, subsections (2), (4), and (5) all provide specific substances that, when discharged, provide prima facie evidence that a violation has occurred. In other words, the listed substances are presumed to be injurious when discharged. As a result of these subsections, raw sewage, medical waste, and ballast water from oceangoing vessels are presumptively injurious to the interests enumerated in MCL 324.3109(1)(a) through (e). In order to rebut that presumption, the responsible entity must demonstrate that the discharge of one or more of those substances is not, or will not become, injurious to the interests enumerated in MCL 324.3109(1)(a) through (e).[28]

Moreover, while all three subsections identify presumptively injurious substances, only MCL 324.3109(2) goes further and identifies the party that will be held responsible for a discharge of such a substance. Subsections (4) and (5) refer to the "responsible" party, but do not identify who the responsible party is. Subsection (4) states in pertinent part:

> [T]he discharge into the waters of this state of any medical waste . . . is prima facie evidence of a violation of

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[28] The plain language of MCL 324.3109(2) is consistent with the plain language of former MCL 323.6(b). As the trial court correctly noted:

> [H]ad the legislature wanted to impose a different scheme of liability, it could have said that the discharge of raw . . . sewage of human origin . . . is prima facie evidence of a violation by the municipality that directly discharges it . . . . They said: "By the municipality in which it originates." Their language adds to the clear intent. When you look at the possibility of what they could have said, it lends further credence to [sic] the clear intent here is to impose liability on the municipality where the discharge originated.

> this part and subjects the *responsible person* to the penalties prescribed in [MCL 324.3115]. [MCL 324.3109(4) (emphasis added).]

Subsection (5) states in pertinent part:

> [T]he discharge into the waters of this state from an oceangoing vessel of any ballast water is prima facie evidence of a violation of this part and subjects the *responsible person* to the penalties prescribed in [MCL 324.3115]. [MCL 324.3109(5) (emphasis added).]

Thus, subsections (4) and (5) state that a "responsible person" will be subject to penalties for a discharge, but they do not identify who that party may be. While subsection (2) contains similar language, it goes a step further by actually identifying the party that will be held responsible for a discharge. It states in pertinent part:

> The discharge of any raw sewage of human origin . . . into any of the waters of the state shall be considered prima facie evidence of a violation of this part *by the municipality in which the discharge originated* . . . . [A] *municipality responsible for the discharge* may be subject to the remedies provided in [MCL 324.3115]. [MCL 324.3109(2) (emphasis added).]

Thus, not only does MCL 324.3109(2) create a presumption that the discharge of any raw sewage is injurious, it actually identifies the party responsible for the discharge as the municipality in which the discharge originated.

Additionally, we disagree with the decision of the Court of Appeals majority because it conflicts with MCL 324.3109(3), which provides:

> Notwithstanding subsection (2), a municipality is not responsible or subject to the remedies provided in [MCL 324.3115] for an unauthorized discharge from a sewerage system as defined in [MCL 324.4101] that is permitted

> under this part and owned by a party other than the municipality, unless the municipality has accepted responsibility in writing for the sewerage system and, with respect to the civil fine and penalty under [MCL 324.3115], the municipality has been notified in writing by the [DEQ] of its responsibility for the sewerage system.

The Court of Appeals majority reasoned that MCL 324.3109(3) further buttressed its holding that the municipality must have actually caused the discharge. The majority stated:

> The argument that the municipality must actually cause the discharge is further buttressed by a third factor. MCL 324.3109(3) explicitly states that a municipality is not responsible for a discharge from a sewerage system that is not operated [sic: owned] by the municipality unless the municipality has accepted responsibility in writing for the sewerage system. If the purpose of [MCL 324.3109(2)] were to impose liability on a municipality merely because a discharge occurred within its boundaries, then subsection (3) would be contradictory. [*Worth Twp*, 289 Mich App at 420.]

We disagree because the Court of Appeals' reasoning ignores important language within subsection (3). The first phrase of subsection (3), "[n]otwithstanding subsection (2)," indicates that it is an exception to subsection (2). Thus, the language of subsection (3) creates an *exception* to subsection (2) under which a municipality will not be responsible for a discharge originating within the municipality's boundaries. The exception is that a municipality will not be responsible for a discharge from a *sewerage system* that the municipality does not own.[29] "Sewerage system" is a statutorily

[29] Specifically, the exception is that a municipality will not be held responsible for a sewerage system that it does not own "unless the municipality has accepted responsibility in writing for the sewerage

defined term that does not include private septic systems.[30] There is no sewerage system in Worth Township, and, as a result, the exception contained in MCL 324.3109(3) is inapplicable to the facts of this case. The Court of Appeals' reliance on MCL 324.3109(3) as support for its holding was misplaced.[31]

Accordingly, when reading the subsections of MCL 324.3109 as a whole, we interpret subsection (2) as placing responsibility for a discharge of raw sewage on the municipality in which the discharge originated and as giving that municipality the burden of showing that the discharged raw sewage does not rise to the "is or may become injurious" standard in order to avoid being subject to the remedies contained in MCL 324.3115. It is clear that by enacting MCL 324.3109(2), the Legislature intended to leave intact the historical obligations of a municipality under former MCL 323.6. The purpose of MCL 324.3109(2) is to allow a municipality to be held responsible for any discharges of raw sewage from within its boundaries into state waters.[32] By holding otherwise, the Court of Appeals frustrated that purpose.

Furthermore, the Court of Appeals majority erroneously concluded that Worth Township could not be held

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system and, with respect to the civil fine and penalty under [MCL 324.3115], the municipality has been notified in writing by the [DEQ] of [the municipality's] responsibility for the sewerage system." MCL 324.3109(3).

[30] MCL 324.4101(h) provides, in pertinent part, that a sewerage system is "a system of pipes and structures . . . *actually used or intended for use by the public* for the purpose of collecting, conveying, transporting, treating, or otherwise handling sanitary sewage . . . ." (Emphasis added.)

[31] Moreover, the fact that the exception in MCL 324.3109(3) exists illustrates that there is a general rule. The general rule contained in MCL 324.3109(2) is that the municipality will be held responsible for a discharge unless an exception applies.

[32] This responsibility is, as noted, subject to the exception contained in MCL 324.3109(3).

responsible as a "municipality" under MCL 324.3109 because the state and townships are municipalities under part 31 and the state has just as much responsibility as a township to remedy the discharge of raw sewage.[33] The Court of Appeals stated:

> For purposes of part 31 of NREPA, MCL 324.3101(m) supplies a particular definition of "municipality": "this state, a county, city, village, or township, or an agency or instrumentality of any of these entities." Thus, the state is as much a municipality as is [Worth Township]. And, by extension, the state bears as much responsibility for the unauthorized discharges at issue in this case as does [Worth Township]. And the state is as liable to the remedies of [MCL 324.3115] as is [Worth Township]. Thus, even if we were to agree with [the DEQ] that MCL 324.3109(2) imposes on a "municipality" the responsibility of installing a sanitary-sewerage system to abate a problem with the discharge of raw sewage, [the DEQ] offer[s] no compelling reason why [it] should be permitted to shift [its] own responsibility to install a sanitary sewer onto [Worth Township]. [*Worth Twp*, 289 Mich App at 422-423.]

Thus, the Court of Appeals reasoned that it would be incorrect to assume that the Legislature intended to allow the state to shift its own responsibility to a municipality such as a township by seeking to enforce an injunction against a township under MCL 324.3109(2) and MCL 324.3115. We disagree.

While it is correct to say that a discharge occurring in a township also "occurs" within the county and state within which the township is located, we disagree with the Court of Appeals' conclusion that this fact relieves a township of responsibility under NREPA. A township is within NREPA's definition of municipality, and it there-

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[33] In MCL 324.3101(m), "municipality" is defined as "this state, a county, city, village, or township, or an agency or instrumentality of any of these entities."

fore can be held responsible as a municipality under MCL 324.3109(2).[34] Moreover, we disagree with the Court of Appeals' conclusion because it overrides the intent of the Legislature by concluding that *no municipalities can be held responsible* simply because several municipalities are responsible under MCL 324.3109(2). This conclusion would always preclude relief under MCL 324.3109(2) because every square inch of Michigan is layered by at least several of the types of entities listed in the definition of "municipality." Such a result is not what the Legislature intended.

Additionally, we note that the most localized form of government involved, such as a township, has the authority to prevent the discharge of raw sewage. Historically, townships have been responsible for overseeing the disposal of sewage generated within the township.[35] Under the Township and Village Public Improvement and Public Service Act, MCL 41.411 *et seq*., a township has the power to finance, construct, and maintain a sewerage system. MCL 41.411(1).[36] A township also has the power to condemn individual properties that are injurious to public health,[37] and a

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[34] As the Court of Appeals noted, the Legislature could have used the term "local unit" instead of "municipality" to ensure that only local governments are held responsible. *Worth Twp*, 289 Mich App at 423. "Local unit" is defined as "a county, city, village, or township or an agency or instrumentality of any of these entities." MCL 324.3101(*l*). However, the Legislature's reference to a "municipality" in MCL 324.3109(2) does not mean that the "local units" included in the definition of "municipality" can avoid responsibility for a discharge within their borders. The definition of "municipality" encompasses local units and, therefore, local units can be held responsible.

[35] See former MCL 323.6(b).

[36] Part 43 of NREPA also grants townships, as local units of government, the authority to construct, operate, and maintain sewers. See MCL 324.4301 *et seq*.

[37] MCL 41.411(3) grants townships condemnation powers and authorizes them to use the condemnation provisions applicable to state

township has the authority to grant franchises to public utilities within its boundaries.[38] Moreover, townships have the authority to adopt ordinances regulating public health, safety, and welfare, including ordinances that require individual property owners to hook up to a sewerage system.[39] There is simply no reason why a township, as a "municipality," cannot be deemed a responsible entity under the language of MCL 324.3109(2) when a discharge occurs within its borders.[40] The Court of Appeals majority erred by concluding otherwise.

Finally, as noted, we hold that the trial court's decision requiring Worth Township to take necessary corrective action to prevent the discharge was within the court's jurisdiction under part 31 of NREPA. MCL 324.3115(1) grants the trial court jurisdiction "to restrain the violation and to require compliance" with part 31. Although the trial court specifically stated that it was not requiring

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agencies and public corporations in MCL 213.21 through 213.25. MCL 213.23 authorizes the taking of private property for "public purposes." This Court has stated that a "public purpose" promotes "*public health*, safety, morals, general welfare, security, prosperity, and contentment of all the inhabitants or residents within the municipal corporation . . . ." *Gregory Marina, Inc v Detroit*, 378 Mich 364, 396; 144 NW2d 503 (1966) (opinion by T. M. KAVANAGH, C.J.) (emphasis added; citation and quotation marks omitted).

[38] See Const 1963, art 7, § 19.

[39] See MCL 41.181, MCL 333.12753(1); see also MCL 324.4301 *et seq*.

[40] There may be instances in which the responsibility for a discharge could logically be placed with one of the other entities listed as a municipality, such as the state. In such instances, it is possible that the DEQ may choose to initiate a suit against that municipality. MCL 324.3115(1) provides that the DEQ "may request the attorney general to commence a civil action for appropriate relief . . . for a violation of [part 31 of NREPA] . . . ." This language implicitly grants the DEQ the discretion to choose the appropriate parties to hold responsible under part 31. In a suit brought under MCL 324.3109(2), the only limitation on the *type* of party that may be sued is that the party must be a "municipality."

Worth Township to construct a sewerage system in this case, it appears that the parties agree that the most practical and comprehensive method to restrain the discharge is for a sewerage system to be constructed. In fact, in the 2004 district compliance agreement, Worth Township agreed to construct the necessary sewerage system, although the township did not ultimately construct that system.

We note, however, that a sewerage system is not the only method available to remedy a widespread discharge. As mentioned earlier, properties that produce discharge could be condemned. Another option would be to institute a pump-and-treat program requiring individual properties' septic systems to be pumped and the contents treated off-site. MCL 324.3115(1) only requires that the method chosen restrain the violation and comply with the provisions of part 31 of NREPA. The trial court's injunction in this case met those requirements.[41]

In sum, we conclude that under MCL 324.3109(2), a municipality can be held responsible for preventing a discharge of raw sewage that originates within its borders, even when the raw sewage is discharged by a private party and not directly discharged by the municipality itself. Additionally, we hold that a township, as a municipality, can be held responsible for such a discharge. Accordingly, we agree with the Court of Appeals dissent that the trial court correctly interpreted MCL 324.3109(2) by granting an injunction requiring Worth Township to take necessary measures to stop the discharge of the raw sewage emanating from private septic systems within its borders. Therefore, we reverse the judgment of the Court of Appeals.[42]

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[41] This holding does not apply to the schedule, fine, and attorney fees included in the trial court's decision.

[42] The Court of Appeals did not rule on Worth Township's remaining arguments that the remedial action ordered by the trial court violated the

IV. RESPONSE TO THE DISSENT

The dissent argues that MCL 324.3109(2) establishes a presumption only that a municipality caused a discharge and that the municipality can rebut the presumption and avoid responsibility by showing that the municipality itself did not cause the discharge. We have considered these arguments, and we respectfully disagree.

First, the dissent asserts that the language "by the municipality" in subsection (2) supports the argument that, when a discharge is determined to have been committed by a party other than the municipality itself, the presumption of municipal liability has been rebutted. However, the actual "discharge" itself constitutes the subject of the first clause of the first sentence of subsection (2) and is not modified by the language "by the municipality." Rather, "by the municipality" modifies "prima facie evidence of a violation of this part." Thus, a discharge under subsection (2) constitutes "prima facie evidence of a violation of this part" by the municipality. It is the "violation" that is attributed to the municipality, not the discharge.

Moreover, any municipality that *actually* discharges an injurious substance is already in violation of subsection (1). If the dissent's interpretation were correct, then subsection (2) would operate solely to create a *presumption* of liability, and only in cases in which human sewage constitutes the discharged substance. Accordingly, under the dissent's interpretation, when there has been a discharge of human sewage, there is a

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Headlee Amendment, specifically Const 1963, art 9, § 29, and that MCL 324.3115(1) does not authorize the trial court's order imposing a schedule for implementing corrective action, a fine, and an attorney-fee award. Accordingly, we remand this matter to the Court of Appeals for a decision on those significant issues to determine the outcome of this case.

rebuttable presumption that the municipality in which the discharge originated was the discharging party. Though the dissent's interpretation does not render subsection (2) entirely nugatory, it comes close. Our interpretation, on the other hand, provides full effect to the language in MCL 324.3109.

Second, the dissent contends that subsection (3) provides the one situation in which a municipality can avoid a presumption of causation under subsection (2): when the discharge is caused by a sewerage system not owned by the municipality. However, evidence that a discharge was caused by another party's sewerage system would itself be sufficient to rebut the subsection (2) presumption under the dissent's reasoning because it shows that a party other than the municipality actually caused the discharge. Thus, the same evidence required to invoke the exception of subsection (3) would also seemingly rebut the dissent's interpretation of the presumption contained in subsection (2). That is, if the dissent is correct that evidence that a party other than the municipality caused the discharge rebuts the subsection (2) presumption, it would be entirely unnecessary for subsection (3) to provide that the subsection (2) presumption does not arise if the discharge is caused by a sewerage system not owned by the municipality.

We respectfully disagree with the dissent's interpretation. Under our holding, the actual cause of the discharge is irrelevant under subsection (2). Subsection (3) is not superfluous because it creates a single circumstance in which the *actual* cause of the discharge is relevant—when the discharge is caused by a sewerage system not owned by the municipality.

Finally, with regard to the dissent's hypothetical situation concerning a portable-toilet company engaging in the systematic discharge of waste into state

waters, we emphasize our holding that a municipality deemed responsible under subsection (2) is only required to restrain a violation and comply with the provisions of part 31 of NREPA. When there is a single property owner actively causing a discharge in violation of MCL 324.3109(1) and the obvious solution is for the owner to stop the discharge, a municipality has options available to accomplish this. These options could include, but are not limited to, passing ordinances, fining the property owner, or obtaining a court order enjoining the discharge. Thus, we disagree with the dissent's characterization of our holding as "an extraordinary measure." *Post* at 267.

Accordingly, we are not persuaded by the arguments raised by the dissenting opinion.

V. CONCLUSION

We conclude that under NREPA, a municipality can be held responsible for, and required to prevent, a discharge of raw sewage that originates within its borders, even when the raw sewage is discharged by a private party and not directly discharged by the municipality itself. Therefore, we reverse the judgment of the Court of Appeals because it interpreted MCL 324.3109(2) in a manner that precludes a municipality from being held responsible for such discharge. Further, we remand this case to the Court of Appeals to address Worth Township's remaining arguments on appeal.

CAVANAGH, MARILYN KELLY, MARKMAN, MARY BETH KELLY, and ZAHRA, JJ., concurred with HATHAWAY, J.

YOUNG, C.J. (*dissenting*). I respectfully dissent from the majority's interpretation of MCL 324.3109(2). MCL 324.3109(2) prohibits the discharge of raw human sewage

into state waters and states that such a discharge "shall be considered prima facie evidence of a violation of this part by the municipality in which the discharge originated . . . ." The majority interprets MCL 324.3109(2) to mean that a municipality is presumed responsible for a discharge of raw human sewage that originated within its borders, that the municipality may *only* rebut the presumption of liability by showing that the discharge of raw human sewage was not injurious, and that the municipality may *not* rebut the presumption of liability by showing that it did not cause the discharge. The majority's decision thus imposes *strict liability* on a municipality for every injurious or potentially injurious discharge of raw human sewage that originates within its borders, even if the municipality can conclusively establish that some other entity caused the pollutant discharge.

Therefore, I respectfully dissent and would conclude that the statutory presumption contained in MCL 324.3109(2) may be rebutted when a municipality shows either that the discharge of raw human sewage did not violate part 31 of the Natural Resources and Environmental Protection Act (NREPA), MCL 324.3101 *et seq*., *or* that it was not in fact the discharging party. Because the documentary evidence from the Department of Environmental Quality (DEQ) indicates that Worth Township is not the *actual* source of the environmental contamination, and the DEQ in fact *concedes* that defendant would prevail if permitted to rebut causation, I believe that defendant is entitled to summary disposition of the claim brought under MCL 324.3109(2).

I. ANALYSIS

MCL 324.3109(2) contains a presumption that provides a basis for holding municipalities liable for discharges of raw human sewage:

> The discharge of any raw sewage of human origin, directly or indirectly, into any waters of the state shall be considered prima facie evidence of a violation of this part by the municipality in which the discharge originated . . . .

" '*Prima facie* evidence is such as in the judgment of the law is sufficient to establish the fact, and, if unrebutted, remains sufficient for that purpose.' "[1] Therefore, if there has been a discharge of raw human sewage into state waters, then the municipality in which the discharge originated is presumed to have violated part 31 of NREPA. The question then becomes: How can a municipality rebut that presumption?

A party can rebut a presumption by introducing evidence that refutes the supporting facts or the presumed facts.[2] The majority concludes that the only way a municipality can rebut the statutory presumption is

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[1] *People v Licavoli*, 264 Mich 643, 653; 250 NW 520 (1933), quoting *Atlantic Land & Improvement Co v Lee*, 93 Fla 579, 584; 112 So 549 (1927). Likewise, Black's Law Dictionary defines "prima facie evidence" as "[e]vidence that will establish a fact or sustain a judgment unless contradictory evidence is produced." Black's Law Dictionary (9th ed), pp 638-639.

[2] See MRE 301:

> In all civil actions and proceedings not otherwise provided for by statute or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.

See also *Reed v Breton*, 475 Mich 531, 539; 718 NW2d 770 (2006) (recognizing that MRE 301 sets forth the general rule regarding presumptions and that "the usual standard required to overcome a rebuttable presumption [is] competent and credible evidence"); *P R Post Corp v Maryland Cas Co*, 403 Mich 543, 552; 271 NW2d 521 (1978) (stating that "[t]he legal effect of the admission of prima facie evidence is to shift the burden of proceeding to the party calling the evidence into question," who must then "come forward with evidence to rebut or contradict its liability . . . ."); *Licavoli*, 264 Mich at 653 (" '*Prima facie* evidence is such as in the judgment of the law is

by "showing that the discharged raw sewage does not rise to the 'is or may become injurious' standard" set forth in MCL 324.3109(1), thereby proving that no "violation" of MCL 324.3109(1) actually occurred.[3] However, MCL 324.3109(2) does not merely presume there has been "a violation of this part." Rather, MCL 324.3109(2) unambiguously presumes there has been "a violation of this part *by the municipality.*"[4]

When used as a preposition, the word "by" means "through the agency of" and "as a result or on the basis of[.]"[5] Accordingly, MCL 324.3109(2) presumes that the "violation of this part" occurred *as a result of or through the agency of the municipality*. This presumption assumes that some action "by the municipality" *caused* or *contributed to* the violation. Therefore, under the plain language of MCL 324.3109(2), a municipality may rebut the presumption in one of two ways: it can show either that no violation of part 31 occurred *or* that the violation occurred, but not as a result of or through the agency of the municipality.

II. THE MAJORITY'S INTERPRETATION OF MCL 324.3109 IS FLAWED

In concluding that a municipality may only rebut the presumption of liability by showing that no violation

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sufficient to establish the fact, and, *if unrebutted*, remains sufficient for that purpose.' "), quoting *Lee*, 93 Fla at 584 (emphasis added).

[3] *Ante* at 247. The majority's brief discussion of how a municipality can rebut the presumption demonstrates that it assumes that failure to comply with MCL 324.3109(1) is the only way a municipality can violate part 31. However, a municipality can violate part 31 in multiple ways. For example, MCL 324.3112 prohibits municipalities from discharging waste effluent without a permit. Therefore, the method by which a municipality can show that there has not been a violation of part 31 in order to refute the presumption of its liability should depend on the DEQ's underlying theory of liability. The majority opinion does not seem to recognize this fact.

[4] Emphasis added.

[5] *Random House Webster's College Dictionary* (2000), defs 10 and 12.

occurred, the majority's interpretation of MCL 324.3109(2) severs the phrase "by the municipality" from the phrases "of a violation" and "of this part." However, the phrase "by the municipality" *modifies* "of this part," which in turn modifies "of a violation." Each subsequent prepositional phrase gives meaning to the preceding phrase, and they cannot be read independently of each other. Thus, the majority errs by concluding that "of this part" is part of the presumption while "by the municipality" is not.

The majority attempts to find meaning in "the surrounding subsections and in the historical context of statutes governing raw-sewage disposal" to support its conclusion that "the municipality is in violation of NREPA when a discharge originates within its boundaries, irrespective of who actually caused the discharge."[6] What is noticeably absent from the majority's analysis, however, is an in-depth evaluation of the *actual* language of MCL 324.3109(2).

The majority dutifully notes that "[t]he words used in the statute are the most reliable indicator of the Legislature's intent and should be interpreted on the basis of their ordinary meaning"[7] and that "the statutory language must be read and understood in its grammatical context."[8] While the majority recites these canons of statutory interpretation, it fails to follow them. Rather than focusing on the plain language of MCL 324.3109(2) in its present form, the majority begins its analysis by looking at antecedent versions of the statute that required "municipalit[ies] to oversee the proper disposal of sewage within

[6] *Ante* at 241.

[7] *Ante* at 237-238.

[8] *Ante* at 238.

[their] boundaries . . . ."[9] As the majority implicitly recognizes by citing cases holding that the *current* language of a statute is the most reliable indicator of a Legislature's intent, importing the historical obligations of *prior* versions of a statute is completely inappropriate when the statutory language is clear and unambiguous.[10]

Moreover, even if the language of a prior statute were a proper indication of the meaning of the *current* version of an unambiguous statute, the prior version of MCL 324.3109(2) undercuts the majority's analysis. Former MCL 323.6, as amended by 1965 PA 328, provided in part:

> (a) It shall be unlawful for any person directly or indirectly to discharge into the waters of the state any substance which is or may become injurious to the public health, safety, or welfare . . . .
>
> (b) The discharge of any raw sewage of human origin, directly or indirectly into any of the waters of the state shall be considered prima facie evidence of the violation of [former MCL 323.6(a)] unless said discharge shall have been permitted by an order, rule, or regulation of the commission. *Any city, village or township which permits, allows or suffers the discharge of such raw sewage of human origin into any of the waters of the state by any of its inhabitants or persons occupying lands from*

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[9] *Ante* at 241.

[10] See *People v Gardner*, 482 Mich 41, 65-66; 753 NW2d 78 (2008) (holding that when interpreting a statute, courts should look to the "statute's plain language" and that "to whatever extent courts correctly divined past legislatures' intents using previously enacted language, those intents should not guide our interpretation of the *unambiguous* language of the current versions of the statutes; the acts of past legislatures do not bind the power of successive legislatures to enact, amend, or repeal legislation"), citing *Studier v Mich Pub Sch Employees' Retirement Bd*, 472 Mich 642, 660; 698 NW2d 350 (2005).

> *which said raw sewage originates, shall be subject only to the remedies provided for in* [*former MCL 323.7*].[11]

Former MCL 323.6(b) had two sentences. The first sentence created a presumption that a discharge of raw human sewage violated former MCL 323.6(a). Most significantly here, the second sentence patently imposed liability on municipalities when they merely allowed or suffered others within their borders to discharge injurious human sewage into state waters.

When the statute was repealed and recodified in NREPA in 1994,[12] the Legislature *removed* the sentence that explicitly imposed liability on the municipalities for the actions of others *and incorporated it into the rebuttable presumption*. In doing so, the Legislature created a scheme in which discharges of raw human sewage are presumed to violate part 31 *and* be caused by the municipalities in which the discharges occurred. The prior language imposing liability on municipalities is no longer absolute in the current statute; the language that imposed absolute municipal liability in the previous statute has been incorporated into the rebuttable presumption provision of the current statute. *Thus, the amended statutory language provides further support for the conclusion that the Legislature abolished municipal liability for merely tolerating the injurious discharges of others and replaced it with a rebuttable presumption of liability regarding causation*. The majority opinion ignores not only the actual language of the current statute but also how it retreated from its predecessor's imposition of strict liability for simply being the locus of a discharge. Both are indications that the majority fails to give the statute the meaning the Legislature intended by its choice of language, especially given that it

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[11] Emphasis added.

[12] MCL 324.90101(1).

retreated from language imposing absolute liability in a prior version of the statute.

The majority also errs in its contextual analysis of MCL 324.3109(2). While understanding MCL 324.3109(2) in the context of the other subsections is beneficial and appropriate,[13] the majority's evaluation of the various subsections is detached from their plain meaning. The majority concludes that if "a municipality is responsible under MCL 324.3109(2) only when the municipality itself causes the discharge, that provision would be rendered virtually meaningless" because it would provide "little more than what is already provided in [MCL 324.3109(1)]."[14]

The majority fails to appreciate the evidentiary significance of a presumption. MCL 324.3109(1) prohibits a person from directly or indirectly discharging an injurious substance into state waters. MCL 324.3109(2) presumes that human sewage is injurious and that its discharge was caused by the municipality in which the discharge occurred. MCL 324.3109(2), therefore, shifts the evidentiary burden and requires the municipality, *rather than the DEQ*, to prove that the discharge was either not violative of part 31 or not caused by the municipality. While the statutory presumption requires the municipality to refute it in order to avoid the penalties and remedies articulated in MCL 324.3115, the general statutory scheme ultimately requires the DEQ to hold the *actual polluters* liable. This distinction appears to be deliberate, given that the DEQ is in a superior position to prosecute individual polluters.[15]

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[13] See *Macomb Co Prosecutor v Murphy*, 464 Mich 149, 159-160; 627 NW2d 247 (2001).

[14] *Ante* at 242-243.

[15] As seen in this case, the DEQ employs personnel capable of investigating pollutant discharges. Moreover, the DEQ has the statutory authority to request that the Attorney General commence a civil action to enforce part 31. MCL 324.3115(1).

The majority also claims that MCL 324.3109(4)[16] and (5)[17] support its interpretation of MCL 324.3109(2). MCL 324.3109(4) and (5) presume that discharges of medical waste and ballast water into state waters are violations of part 31. The majority observes:

> [MCL 324.3109(4) and (5)] state that a "responsible person" will be subject to penalties for a discharge, but they do not identify who that party may be. While [MCL 324.3109(2)] contains similar language, it goes a step further by actually identifying the party that will be held responsible for a discharge.[18]

On the basis of this observation, the majority abruptly concludes that the presumptive identification of the responsible party in MCL 324.3109(2) is not rebuttable. The majority reaches this conclusion by assuming that the only material difference between these subsections is the fact that MCL 324.3109(2) identifies who is responsible for the discharges, while MCL 324.3109(4) and (5) imply that the person who actually caused the discharge is responsible. In doing so, the majority seems to import the grammatical structure of MCL

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[16] MCL 324.3109(4) provides:

> Unless authorized by a permit, order, or rule of the [DEQ], the discharge into the waters of this state of any medical waste, as defined in part 138 of the public health code, 1978 PA 368, MCL 333.13801 to 333.13831, *is prima facie evidence of a violation of this part and subjects the responsible person to the penalties prescribed in* [*MCL 324.3115*]. [Emphasis added.]

[17] MCL 324.3109(5) provides:

> Beginning January 1, 2007, unless a discharge is authorized by a permit, order, or rule of the [DEQ], the discharge into the waters of this state from an oceangoing vessel of any ballast water *is prima facie evidence of a violation of this part and subjects the responsible person to the penalties prescribed in* [*MCL 324.3115*]. [Emphasis added.]

[18] *Ante* at 245.

324.3109(4) and (5) into MCL 324.3109(2) and thereby interpret MCL 324.3109(2) *as if it read*:

> The discharge of any raw sewage of human origin, directly or indirectly, into any of the waters of the state shall be considered prima facie evidence of a violation of this part *and subjects the municipality in which the discharge originated to penalties as prescribed in MCL 324.3115.*

In fact, the phrase "by the municipality" in MCL 324.3109(2) modifies "prima facie evidence of a violation of this part." Accordingly, *the phrase "by the municipality" is part of the presumed fact and is subject to rebuttal by production of contradictory evidence.* It is the majority's failure to recognize this critical grammatical fact that renders its construction fatally flawed.

MCL 324.3109(3) lends additional support to the conclusion that causation is incorporated into the rebuttable presumption. MCL 324.3109(3) provides:

> Notwithstanding subsection (2), a municipality is not responsible or subject to the remedies provided in [MCL 324.3115] for an unauthorized discharge from a sewerage system as defined in [MCL 324.4101] that is permitted under this part and owned by a party other than the municipality, *unless* the municipality has accepted responsibility in writing for the sewerage system and, with respect to the civil fine and penalty under [MCL 324.3115], the municipality has been notified in writing by the [DEQ] of its responsibility for the sewerage system.[19]

MCL 324.3109(3) creates an exception to MCL 324.3109(2). In situations in which there has been an unauthorized discharge from a certain type of sewer within a municipality, the municipality is liable if it agreed to be responsible for the system, *even if the municipality can establish that it did not cause the*

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[19] Emphasis added.

discharge. Moreover, the municipality is subject to the civil fines and penalties enumerated in MCL 324.3115 if it received proper notice from the DEQ. If MCL 324.3109(3) did not exist, a discharge from the sewer system would "be considered prima facie evidence of a violation of this part by the municipality in which the discharge originated" pursuant to MCL 324.3109(2) and the municipality could rebut its presumed liability by showing that it did not cause the discharge.

The Court of Appeals held that MCL 324.3109(2) "merely creates the presumption that . . . a discharge [of raw human sewage] originated with the municipality."[20] The Court of Appeals held that a municipality could rebut this presumption by showing that the municipality did not cause the discharge. The Court of Appeals reasoned that "[i]f the purpose of subsection (2) were to impose liability on a municipality merely because a discharge occurred within its boundaries, then subsection (3) would be contradictory."[21]

In critiquing the Court of Appeals' analysis, the majority states that MCL 324.3109(3) "creates an *exception* to subsection (2) under which a municipality will not be responsible for a discharge originating within the municipality's boundaries. The exception is that a municipality will not be responsible for a discharge from a *sewerage system* that the municipality does not own."[22] The majority reasons that because there is no sewerage system in Worth Township, MCL 324.3109(3) is inapplicable and the Court of Appeals should not have relied on it.

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[20] *Dep't of Environmental Quality v Worth Twp*, 289 Mich App at 414, 424; 808 NW2d 260 (2010).

[21] *Id.* at 420.

[22] *Ante* at 246.

The problem with the majority's analysis is that it ignores the second half of MCL 324.3109(3).[23] The majority seems to assume that the sole purpose of MCL 324.3109(3) is to create one specific circumstance in which the presumption does *not* arise: when the discharge is caused by a private sewer. If the second half of MCL 324.3109(3) did not exist, I would agree with the majority. This, obviously, is not the case. The second half of MCL 324.3109(3) imposes liability on the municipality for a discharge it did not cause—but *only* if it has accepted responsibility in writing and been notified of its responsibility.

A brief illustration may clarify my interpretation of MCL 324.3109(3). Suppose a private entity owns a sewerage system as defined in MCL 324.4101 and there is an unauthorized discharge from that system. If the discharge was of raw human sewage, the municipality in which the discharge occurred is presumed liable under MCL 324.3109(2). However, the municipality could rebut this presumption and avoid liability by showing that it did not cause the discharge. In the absence of MCL 324.3109(3), this would be the end of the matter for the municipality. However, MCL 324.3109(3) continues to impose liability on the municipality *notwithstanding* its ability to rebut the presumption of MCL 324.3109(2) if the municipality had accepted responsibility in writing for the sewerage system and been notified in writing by the DEQ of its responsibility. Therefore, interpreting MCL 324.3109(2) to mean that a municipality can rebut the presumption created by that subsection by showing that the dis-

[23] For purposes of this discussion, I refer to everything before "unless the municipality has accepted responsibility" as the first half of MCL 324.3109(3) and everything from that phrase on as the second half of MCL 324.3109(3).

charge was not injurious or that it was not the actual discharging party is perfectly consistent with MCL 324.3109(3), and the majority errs by concluding otherwise.

In its response to this opinion, the majority recognizes:

> [T]he actual "discharge" itself constitutes the subject of the first clause of the first sentence of [MCL 324.3109(2)] and is not modified by the language "by the municipality." Rather, "by the municipality" modifies "prima facie evidence of a violation of this part." Thus, a discharge under subsection (2) constitutes "prima facie evidence of a violation of this part" by the municipality. It is the "violation" that is attributed to the municipality, not the discharge.[24]

This analysis renders the majority's position internally inconsistent. The majority seems to imply that "by the municipality" is not part of the rebuttable presumption *because* that phrase does not modify "discharge." However, if the majority's implication were correct, then "of a violation" would *also* not be part of the presumption because that phrase, like "by the municipality," modifies "prima facie evidence" and not "discharge." This cannot be.

The presumption takes effect *whenever* there is a "discharge of any raw sewage of human origin" and shifts the evidentiary burden to the municipality. The dispute between the majority and this dissent is not whether "by the municipality" modifies "discharge," but whether the word "by" means that its object—"the municipality"—actually *caused* its antecedent—"a violation." As explained earlier, the ordinary meaning of the word "by" contains this causal requirement: "through the agency of" and "as a result or on the basis

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[24] *Ante* at 252.

of[.]"[25] If the municipality fails to rebut the presumption that it caused the discharge, then I agree with the majority that the " 'violation' . . . is attributed to the municipality . . . ."[26] However, because the majority would *always* subject the municipality to liability for an injurious discharge, *even when the municipality proves that it did not cause the violation*, it is the majority's interpretation that fails to take full account of the meaning of the word "by" and its causal meaning in relation to the evidentiary presumption.

III. CONSEQUENCES OF THE MAJORITY'S INTERPRETATION OF MCL 324.3109

The majority's interpretation of MCL 324.3109(2) renders a municipality strictly liable for the actions of others, even if the municipality has proffered evidence that conclusively establishes the identity of the polluter. Holding a municipality strictly liable for the actions of others is an extraordinary measure, especially when strict liability is not expressly provided by the language of the statute.

One example will suffice to show the broad implications of the majority's interpretation. Suppose that a portable toilet company regularly, but surreptitiously, dumps its collected human waste into state waters within a township and the township can conclusively establish that the company, and not the township, caused the discharges. Under the majority's interpretation of MCL 324.3109(2), the township may not avoid liability for the actions of polluters who are under an *independent* statutory obligation to refrain from discharging waste into state waters. Thus, under the majority's interpretation, the underlying municipality

[25] *Random House Webster's College Dictionary* (2000), defs 10 and 12.

[26] *Ante* at 252.

is *always* responsible for *every* injurious discharge of human waste into state waters, even though individuals *actually* responsible for the discharges have themselves violated MCL 324.3109(1) and are liable for the penalties provided by law. While the Legislature may be within its authority to enact this dual imposition of liability (as it apparently did in the predecessor version of this statute), there is no indication in the text of MCL 324.3109(2) that it intended to do so merely by imposing a rebuttable presumption that makes it easier for the DEQ to hold *somebody else* responsible for the violation.

The majority concludes that imposing strict liability on municipalities for discharges caused by others is not onerous because "a municipality deemed responsible under [MCL 324.3109(2)] is only required to restrain a violation and comply with the provisions of part 31 of NREPA."[27] Imposing, as the majority opinion does, a requirement that a municipality such as Worth Township stop others from polluting state waters is not inconsequential. While a municipality may have the statutory authority to stop pollutant discharges,[28] a municipality may not readily possess the resources to halt illegal discharges and ensure compliance. Condemnation is not a cost-free remedy, and local ordinances designed to prohibit unlawful discharges may be no more effective than the state law that was obviously violated in this case. Further, MCL 324.3115(1) *requires* the imposition of a "fine of not less than $2,500.00" and gives circuit courts the authority to impose attorney fees and costs when there has been a violation of part

[27] *Ante* at 254.

[28] As the majority recognizes, townships have the authority to condemn individual properties that are injurious to public health. MCL 41.411(3). Further, townships have the authority to adopt ordinances that regulate the public health, safety, and general welfare. MCL 41.181(1).

31.[29] Because the majority reads MCL 324.3109(2) as imposing strict liability on the municipality for *any* injurious discharge of human waste into state waters that originates within its borders, the municipality is liable for this mandatory fine even when the municipality ensures *subsequent* compliance with part 31 of NREPA. Thus, the majority's unwarranted expansion of liability to municipalities will subject municipalities to mandatory statutory penalties *even when municipalities take active measures to stop pollutant discharges*.

IV. CONCLUSION

There is a saying that "[h]e who chooses the beginning of a road chooses the place it leads to. It is the means that determine the end."[30] The majority erroneously chooses to begin its analysis with an examination of the historical context of MCL 324.3109 rather than the plain and unambiguous language of the statute. The majority's analytical approach leads it to conclude that a municipality without a proper permit is liable for every injurious or potentially injurious discharge of raw human sewage that originates within its borders, even when it can be shown that the municipality was not the cause of the environmental contamination. Accordingly, the majority's interpretation imposes strict liability on municipalities that I believe is unsupported by the text of the statute.

In this case, the DEQ submitted documentary evidence that private residences and commercial buildings in Worth Township were discharging raw human sew-

[29] Indeed, the fine imposed by the circuit court may be up to "$25,000.00 per day of violation" pursuant to MCL 324.3115(1)(a).

[30] Fosdick, *Living Under Tension* (New York: Harper & Brothers, 1941), p 111.

age into state waters. Pursuant to MCL 324.3109(2), these discharges were prima facie evidence of a violation of part 31. However, Worth Township challenged the claim that the violation occurred "by the municipality," arguing that the discharges did not occur as a result of its actions, but were caused by the private residences and commercial buildings, as indicated in the DEQ's documentation. In fact, at oral argument, the DEQ's counsel admitted that if Worth Township were permitted to rebut the statutory presumption by showing that the discharges were "caused by failing private septic systems," then Worth Township should prevail. In light of the DEQ's evidence and the Attorney General's concession, I do not believe that a genuine issue of material fact exists regarding whether Worth Township is liable pursuant to MCL 324.3109(2).

Because the majority fails to give meaning to the plain and unambiguous language of MCL 324.3109(2), I dissent. I would reverse the Court of Appeals' decision in part[31] and remand this case to the circuit court to determine whether there is a basis to impose liability under the DEQ's alternative theory of liability pursuant to MCL 324.3112.

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[31] While the Court of Appeals correctly held that a municipality could rebut the statutory presumption by showing that it did not cause the discharges, the panel failed to recognize that the presumption could *also* be rebutted by showing that the discharges did not constitute a violation of part 31.

PEOPLE v RAO

Docket No. 142537. Argued January 11, 2012. Decided May 17, 2012. Rehearing denied, 491 Mich 949.

Malini Rao was convicted by a jury in the Oakland Circuit Court, Joan E. Young, J., of second-degree child abuse after x-rays indicated that her adopted daughter, RS, had suffered multiple rib fractures. Defendant moved for a new trial, relying in part on "newly discovered evidence" from x-rays taken after the trial. Attached to the motion was a report from a physician who stated that the new x-rays indicated that RS had likely suffered from metabolic bone disease before she was adopted. In response to the motion, the prosecution submitted a letter from a physician who opined that the x-rays suggested past trauma and not metabolic bone disease. The court denied defendant's motion, and defendant appealed. In a divided opinion, the Court of Appeals, DONOFRIO and GLEICHER, JJ. (MURRAY, P.J., dissenting), concluded that the evidence was newly discovered and could not have been discovered with reasonable diligence, reversing the judgment of the trial court in an unpublished opinion per curiam, issued December 7, 2010 (Docket No. 289343). The Court of Appeals remanded the case for an evidentiary hearing to determine whether the evidence would have affected the outcome of the trial. The prosecution sought leave to appeal. The Supreme Court ordered and heard oral argument on whether to grant the application for leave to appeal or take other peremptory action. 489 Mich 983 (2011).

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

The trial court did not abuse its discretion by denying defendant's motion for a new trial based on newly discovered evidence. The evidence at issue was not newly discovered, but was instead newly available, and defendant failed to establish that she was reasonably diligent in attempting to obtain the evidence.

1. For a new trial to be granted on the basis of newly discovered evidence, a defendant must show that (1) the evidence itself, not merely its materiality, was newly discovered, (2) the newly discovered evidence was not cumulative, (3) the party could not, using reasonable diligence, have discovered and produced the

evidence at trial, and (4) the new evidence makes a different result probable on retrial. The defendant carries the burden of satisfying all four parts of this longstanding test, which was reiterated in *People v Cress*, 468 Mich 678 (2003).

2. The first and third parts of the test are interrelated. Evidence is not newly discovered if the defendant or defense counsel was aware of it at the time of trial. Thus, evidence may not be considered newly discovered simply because it was unavailable at the time of trial. When a defendant is aware of evidence before trial, he or she is charged with the burden of using reasonable diligence to make that evidence available and to produce it at trial. A defendant who fails to do so cannot satisfy the first or third parts of the *Cress* test.

3. What constitutes reasonable diligence in producing evidence at trial depends on the circumstances of the case. The law affords a defendant procedural avenues to secure and produce evidence. A defendant must employ those avenues in a timely manner because evidence that is known to the defendant, yet not produced until after trial without a showing of reasonable diligence, will not be considered newly discovered evidence providing grounds for a new trial.

4. It appears that defense counsel was aware of the possible significance of additional x-rays, but chose not to bring a motion to have such x-rays performed. This decision was reasonable trial strategy given that new x-rays might have further implicated defendant.

Reversed, trial court order denying defendant's motion for a new trial reinstated, and case remanded to the Court of Appeals for consideration of defendant's remaining issues.

Justice CAVANAGH concurred in the result only.

Justice HATHAWAY, joined by Justice MARILYN KELLY, dissenting, would have denied leave to appeal. The Court of Appeals correctly analyzed the four-part test from *Cress*. In particular, the Court of Appeals correctly determined that important factual issues remained concerning whether the new evidence likely would have affected the outcome of defendant's trial. Thus, the matter was not ripe for review.

1. CRIMINAL LAW — NEW TRIAL — NEWLY DISCOVERED EVIDENCE.

For a new trial to be granted on the basis of newly discovered evidence, a defendant must show that (1) the evidence itself, not merely its materiality, was newly discovered, (2) the newly discovered evidence was not cumulative, (3) the party could not, using

reasonable diligence, have discovered and produced the evidence at trial, and (4) the new evidence makes a different result probable on retrial; the defendant carries the burden of satisfying all four parts of this test.

2. CRIMINAL LAW — NEW TRIAL — NEWLY DISCOVERED EVIDENCE — UNAVAILABLE EVIDENCE — REASONABLE DILIGENCE.

Evidence may not be considered newly discovered for purposes of a motion for a new trial simply because it was unavailable at the time of trial; when a defendant is aware of evidence before trial, he or she is charged with the burden of using reasonable diligence to make that evidence available and to produce it at trial; what constitutes reasonable diligence to produce evidence at trial depends on the circumstances of the case; the law affords a defendant procedural avenues to secure and produce evidence, and a defendant must employ those avenues in a timely manner because evidence that is known to the defendant, yet not produced until after trial, will not be considered grounds for a new trial.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Jessica R. Cooper*, Prosecuting Attorney, *Thomas R. Grden*, Chief of the Appellate Division, and *Marilyn J. Day*, Assistant Prosecuting Attorney, for the people.

Frank D. Eaman PLLC (by *Frank D. Eaman*) for defendant.

MARKMAN, J. In *People v Cress*, 468 Mich 678, 692; 664 NW2d 174 (2003), this Court reiterated the four-part test that has governed motions for a new trial based on newly discovered evidence for well over a century. This case requires us to elucidate, and reemphasize, several aspects of this test. We begin with the unremarkable observation that when the defendant possesses knowledge of evidence at the time of trial, that evidence cannot be characterized as "newly discovered" under the first part of the *Cress* test. In addition, we clarify that knowledge of evidence at the time of trial necessarily implicates the third part of the *Cress* test, which

requires the defendant to undertake "reasonable diligence" to discover and produce the evidence at trial. Finally, we emphasize that the defendant carries the burden of making the requisite showing regarding each of the four parts of the *Cress* test. Adherence to these principles—each of which is discernable from our caselaw—is necessary to maintain the balance between generally upholding the finality of criminal judgments, and unsettling such judgments in the unusual case in which justice under the law requires a new trial.

The Court of Appeals strayed from these principles, in our judgment, by overlooking that defendant and defense counsel were both well aware at the time of trial that the alleged newly discovered evidence could have supported the defense and impermissibly relieved defendant of her burden of showing that she could not, through the exercise of reasonable diligence, have discovered and produced the evidence at trial. Accordingly, we reverse the judgment of the Court of Appeals, reinstate the trial court's order denying defendant's motion for a new trial, and remand to the Court of Appeals for consideration of defendant's remaining issues.

I. FACTS AND HISTORY

Defendant, Malini Rao, was convicted of abusing her daughter, RS, who was 3½ years old at the time of trial. Defendant and her husband had adopted RS from an orphanage in India in August 2006 when she was 21 months old, and defendant is the child's primary caregiver. At a 10-day jury trial, Child Protective Services (CPS) worker Michelle Sparks testified that she had visited defendant's home on October 11, 2007, after CPS received a referral alleging that RS had facial bruising and was not verbal. Sparks observed that the

child had "a lot of facial bruising," including a "goose egg" over her left eyebrow, a blackened left eye, a bruise on the left check, a large bump on her right cheekbone, a cut across the bridge of her nose, and several splits in her lower lip. When Sparks asked defendant about how she disciplined the child, defendant said that she used time-outs and spankings. However, when Sparks specifically asked about the bruises on the child's face, defendant told her that she "does beat [RS] about the face" and demonstrated her technique by hitting the seat of a chair, using a forceful swing from the shoulder with an open hand. Sparks testified that, in her opinion, defendant's demonstration was more than just a slap.

On the basis of her interview and observations, Sparks determined that a medical examination of the child was necessary and accompanied defendant to the emergency room, where the child was examined by Dr. Robert Cohen. Dr. Cohen observed that the child had multiple bruises, cuts, and scratches on her face and upper body. He ordered a "babygram," a head-to-toe x-ray of every bone in the body to assess any fractures, which indicated multiple bilateral rib fractures. Dr. Cohen concluded that while any of the child's injuries, if viewed individually, could have been caused by an accident, the sheer number of injuries made him suspicious that they were caused by "nonaccidental trauma" or child abuse. Following the medical examination, Sparks concluded that the allegations of abuse and neglect had been substantiated and categorized the case as "Category 1," which CPS uses to designate a case presenting the highest level of risk. Both of defendant's children were removed from her home that night and placed with friends of the family the following day.

Defendant testified in her own defense. She admitted striking the child on the face once or twice, but denied

ever using the word "beat" in her interview with Sparks. In addition to Sparks, defendant, and other lay witnesses, nine medical expert witnesses testified at trial about their opinions regarding the child's injuries. The central disagreement between the prosecutor's and defendant's experts concerned the cause of the injuries. The prosecutor's experts concluded that nonaccidental trauma was the only possible explanation for the injuries. These experts included Dr. Wilbur Smith (a pediatric radiologist) and Dr. Marcus DeGraw (a pediatrician, board-eligible in child abuse pediatrics), who examined the child in November 2007. At his examination, Dr. DeGraw ordered a skeletal survey and a host of tests that could possibly provide an explanation for the child's injuries other than abuse. The skeletal survey revealed no new fractures since the child's removal from defendant's home and also showed no evidence of genetic or metabolic disease. After reviewing these results and considering "not just the rib fractures, but all injuries," Dr. DeGraw concluded that "there was no other explanation" for the child's injuries than abuse. He found further support for his conclusion in the child's "tremendous" weight gain after being removed from defendant's home, when her growth increased from below the 3d percentile in September 2007 to the 55th to 60th percentile in June 2008.

The defense called several medical experts, none of whom were qualified as pediatricians, board-eligible in child abuse pediatrics, and all of whom disagreed with the prosecutor's experts that the cause of the child's injuries was abuse. These experts offered various theories to explain the child's injuries, in particular that they were attributable to anomalies the child had suffered at birth, metabolic abnormalities, accidental trauma, a "failure to thrive," or a combination of these issues. Specifically, Dr. Robert Rothfeder, a physician

who practices emergency medicine, testified that the abnormalities shown on the x-rays "relate to a number of disease issues that [RS] had suffered." And Dr. David Kellam, a pediatric radiologist, opined that the child had faulty bone structure caused by metabolic abnormality, disease, malnutrition or a combination thereof such that the "ordinary activity of the child and everyday existence" caused the fractures.

It is particularly significant to note that defense counsel asked Drs. Kellam, Smith, and DeGraw whether additional x-rays of the child's ribs performed after November 14, 2007, the date that her last x-rays were taken, might have affected their opinions. The lengthy exchanges at trial concerning the potential effect of additional x-rays indicate that the three experts agreed that additional x-rays would only have assisted in their evaluation if new fractures were identified. However, they disagreed concerning the risk that additional x-rays would have posed to the child. Dr. DeGraw was of the opinion that additional x-rays would be "dangerous" because of the increased exposure to radiation. Dr. Smith testified that additional x-rays "certainly wouldn't hurt her, but that's still probably not medically necessary." And Dr. Kellam testified that the risk to the child "is zero."

The jury convicted defendant of second-degree child abuse, MCL 750.136b(3), and the trial court sentenced her to 5 years' probation, with 90 days in jail. Subsequently, 10 months after her conviction, defendant moved for a new trial, asserting that newly discovered evidence warranted that this motion be granted. Specifically, she submitted x-rays of RS performed in May 2009 and a radiology report from Dr. Donald Gibson, which identified "irregularities" on several ribs and asserted that such irregularities "may be due to old

fractures." Defendant also attached a supplemental report from Dr. Rothfeder, in which he contended that the new radiology report confirmed that "[RS] most likely suffered from metabolic bone disease when she came to this country." In response to defendant's motion, the prosecutor submitted a letter from Dr. Gibson, which stated, "The changes in the ribs described in my report could be accounted for on the basis of past trauma. I did not, in my opinion, see any evidence on the films to suggest metabolic bone disease." (Emphasis omitted.)

The trial court denied defendant's motion in a lengthy opinion and order, concluding that it could not find that the evidence "is in fact newly discovered, that the evidence is not cumulative, that the evidence would likely produce a different result at trial, or that Defendant could not, using reasonable diligence, have discovered and produced said evidence at trial." In a divided opinion, the Court of Appeals disagreed, reasoning in relevant part that the proffered evidence was newly discovered and could not have been previously discovered with reasonable diligence. *People v Rao*, unpublished opinion per curiam of the Court of Appeals, issued December 7, 2010 (Docket No. 289343), pp 8-9, 11. Given these determinations, the Court of Appeals reversed the trial court and remanded for an evidentiary hearing "to address whether the new evidence likely would have affected the outcome of defendant's trial." *Id*. at 12. Judge MURRAY, in dissent, argued that the trial court did not abuse its discretion by concluding that the evidence was not newly discovered and that, even if it were, it would not have made a different result probable on retrial. *Id.* at 2, 4 (MURRAY, J., dissenting). The prosecutor appealed, and this Court ordered that oral argument be heard on the application for leave to

appeal. *People v Rao*, 489 Mich 983 (2011). Argument was heard on January 11, 2012.

II. STANDARD OF REVIEW

This Court reviews for an abuse of discretion a trial court's decision to grant or deny a motion for a new trial. *People v Lemmon*, 456 Mich 625, 648 n 27; 576 NW2d 129 (1998). An abuse of discretion occurs when the trial court renders a decision falling outside the range of principled decisions. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231(2003).

III. ANALYSIS

A. *CRESS* TEST

This Court has long held that a new trial may be granted on the basis of newly discovered evidence and has applied the same four-part test for ruling on such motions for over a century. See, e.g., *Canfield v City of Jackson*, 112 Mich 120, 123; 70 NW 444 (1897); *People v Johnson*, 451 Mich 115, 118 n 6; 545 NW2d 637 (1996). This test was most recently reaffirmed in *Cress*, 468 Mich at 692, in which we stated:

> For a new trial to be granted on the basis of newly discovered evidence, a defendant must show that: (1) "the evidence itself, not merely its materiality, was newly discovered"; (2) "the newly discovered evidence was not cumulative"; (3) "the party could not, using reasonable diligence, have discovered and produced the evidence at trial"; and (4) the new evidence makes a different result probable on retrial. [Citations omitted.]

The defendant carries the burden of satisfying all four parts of this test. *Id*.

It is equally well established that "motions for a new trial on the ground of newly-discovered evidence are

looked upon with disfavor, and the cases where this court has held that there was an abuse of discretion in denying a motion based on such grounds are few and far between." *Webert v Maser*, 247 Mich 245, 246; 225 NW 635 (1929). The rationales underlying this proposition are apparent. "A motion for a new trial, upon the ground of newly-discovered evidence, is not regarded with favor . . . [because] [t]he policy of the law is to require of parties care, diligence, and vigilance in securing and presenting evidence." *Canfield*, 112 Mich at 123 (quotation marks and citation omitted); see also 58 Am Jur 2d, New Trial, § 322, p 320 ("Such applications are entertained with reluctance and granted with caution . . . because of the manifest injustice in allowing a party to allege that which may be the consequence of his or her own neglect in order to defeat an adverse verdict.").

Further, this proposition respects "[t]he principle of finality [that] is essential to the operation of our criminal justice system." *People v Maxson*, 482 Mich 385, 398; 759 NW2d 817 (2008) (quotation marks and citation omitted). That is, in fairness to both parties and the overall justice system, the law requires that parties secure evidence and prepare for trial with the full understanding that, absent unusual circumstances, the trial will be the one and only opportunity to present their case. It is the obligation of the parties to undertake all reasonable efforts to marshal *all* the relevant evidence for that trial. Evidence will not ordinarily be allowed in installments. *Cress* set forth the showing that a defendant must make in order to satisfy the exception to this rule and struck a balance between upholding the finality of judgments and unsettling judgments in the unusual case in which justice under the law requires a new trial. See also MCR 6.431(B) (providing that the trial court "may order a new

trial . . . because it believes that the verdict has resulted in a miscarriage of justice").

Whether defendant is entitled to a new trial on the basis of her proffered evidence is governed by *Cress*, and specifically her case is resolved by applying the interrelated first and third parts of the *Cress* test, which require that defendant demonstrate that the evidence is "newly discovered" and that she "could not, using reasonable diligence, have discovered and produced the evidence at trial[.]" *Cress*, 468 Mich at 692. After applying the *Cress* test, we conclude that defendant did not carry her burden of satisfying this test and thus is not entitled to a new trial.

B. REASONABLE DILIGENCE

Michigan caselaw makes clear that evidence is not newly discovered if the defendant or defense counsel was aware of the evidence at the time of trial. See, e.g., *People v Purman*, 216 Mich 430, 438-439; 185 NW 725 (1921) ("This evidence was not newly-discovered. The defendant had known, according to his own showing, of this evidence . . . ."); *People v Lewis*, 31 Mich App 433, 437; 188 NW2d 107 (1971) ("[T]his sworn statement . . . admits that defendant was well aware of [the] information prior to trial. This information cannot be classified as newly discovered."); *People v Burton*, 74 Mich App 215, 222-223; 253 NW2d 710 (1977) ("[E]vidence is newly discovered if it can be shown to have been unknown to the defendant or his counsel at the time of trial."). Indeed, because "[o]ne does not 'discover' evidence after trial that one was aware of prior to trial," this is the only reasonable understanding of "newly discovered evidence." *People v Terrell*, 289 Mich App 553, 563; 797 NW2d 684 (2010) (emphasis, quotation marks, and citation omitted). "To hold oth-

erwise stretches the meaning of the word 'discover' beyond its common understanding. *See Webster's Third New Int'l Dictionary* 647 (2002) (defining 'discover' as 'to make known (something secret, hidden, unknown, or previously unnoticed)')." *Id*. (quotation marks and citation omitted).

Further, Michigan courts have held that a defendant's awareness of the evidence at the time of trial precludes a finding that the evidence is newly discovered, even if the evidence is claimed to have been "unavailable" at the time of trial. This rule has been applied in various circumstances giving rise to the evidence's claimed "unavailability." In *Purman*, 216 Mich at 438-439, we explained that a "new trial will not be granted because of newly-discovered evidence where the witness who was to give it was known to the accused, although he could not be found at the time of the trial, where no continuance or postponement was requested." In *People v Newhouse*, 104 Mich App 380, 386; 304 NW2d 590 (1981), the Court of Appeals rejected a defendant's claim that his evidence was newly discovered because "trial strategy" prevented him from producing the evidence at trial. *Newhouse* explained that the "[d]efendant could have, with reasonable diligence, produced [the witness] to testify at trial. Defendant *chose* not to produce [the witness]." *Id*. (emphasis added). And in *Terrell*, 289 Mich App at 559-560, a codefendant invoked his Fifth Amendment right not to testify at trial, but then, after trial, came forward with exculpatory testimony. *Terrell* held that the evidence was not newly discovered, but was instead "newly available," explaining:

> [W]hen a defendant knew or should have known that a codefendant could provide exculpatory testimony, but did not obtain that testimony because the codefendant invoked the privilege against self-incrimination, the codefendant's

> posttrial statements do not constitute newly discovered evidence, but are merely newly available evidence. [*Id*. at 555.][1]

These cases—each of which involved evidence that was known to the defendant at the time of trial, but was claimed to have been unavailable for various reasons—illustrate the connection between the "newly discovered" and "reasonable diligence" requirements in parts one and three, respectively, of the *Cress* test. The first part of the *Cress* test focuses on whether the evidence is "newly discovered," i.e., was "unknown to the defendant or his counsel at the time of trial." *Burton*, 74 Mich App at 222-223. When evidence is known to the defendant at the time of trial, but is claimed to have been unavailable, the third part of the *Cress* test is necessarily implicated because it requires a showing that the defendant "could not, using reasonable diligence, have discovered and produced the evidence at trial[.]" *Cress*, 468 Mich at 692. In other words, under *Cress*, when a defendant is *aware* of evidence before trial, he or she is charged with the burden of using *reasonable diligence* to make that evidence available and produce it at trial. A defendant who fails to do so cannot satisfy the first and third parts of the *Cress* test.

We note that what constitutes reasonable diligence in producing evidence at trial depends on the circum-

[1] Federal courts have likewise held that evidence that was unavailable at trial cannot be deemed newly discovered if the defendant was aware of the evidence before trial. For cases applying the rule in the context of the Fifth Amendment privilege, for example, see *United States v Glover*, 21 F3d 133, 138-139 (CA 6, 1994); *United States v Owen*, 500 F3d 83, 88 (CA 2, 2007); *United States v DiBernardo*, 880 F2d 1216, 1224 (CA 11, 1989). See also *United States v Turns*, 198 F3d 584, 587 (CA 6, 2000) (applying the same rule in a case in which the defendant asserted that the evidence was unavailable because the witness who was to provide the evidence had threatened to perjure herself at trial).

stances of the case. When the evidence is claimed to be unavailable because a witness cannot be found, reasonable diligence may include requesting a continuance or postponement. See *Purman*, 216 Mich at 439. When the evidence is claimed to be unavailable because of a witness's threat of perjury, reasonable diligence may include subpoenaing and questioning the witness under penalties of perjury. See *United States v Turns*, 198 F3d 584, 587 (CA 6, 2000). When the evidence is claimed to be unavailable because of its incompatibility with the defendant's trial strategy, reasonable diligence requires the defendant to choose between that strategy and the evidence. See *Newhouse*, 104 Mich App at 386. And when the evidence is claimed to be unavailable because of a codefendant's assertion of the Fifth Amendment privilege, reasonable diligence might include requesting a severance or pursuing other procedural remedies to admit the testimony. See *Terrell*, 289 Mich App at 568-569. The point is that the law affords a defendant procedural avenues to secure and produce evidence and, under *Cress*, a defendant must employ these avenues in a timely manner because evidence that is known to the defendant, yet not produced until after trial, will not be considered grounds for a new trial.

This rule is dictated by *Cress* and is consistent with the principles underlying our decision in that case. "The policy of the law is to require of parties care, diligence, and vigilance in securing and presenting evidence," *Canfield*, 112 Mich at 123, and "[t]he principle of finality is essential to the operation of our criminal justice system," *Maxson*, 482 Mich at 398 (quotation marks and citation omitted). If evidence that was known to the defendant before trial, but not produced until after trial because the defendant failed to exercise reasonable diligence, is deemed newly discovered and sufficient to warrant a new trial, this would

contravene both the principles of fairness and finality on which *Cress* is grounded. Specifically, as the Court of Appeals explained in *Terrell*, it would permit defendants to engage in "judicial sandbagging":

> [The defendant's] evidence is not newly discovered because allowing criminal defendants to raise such allegations [i.e., that an uncalled witness's proposed testimony is newly discovered evidence] after a judgment of conviction has been entered . . . would permit them to "sandbag" the fairness of the trial by withholding or failing to seek material, probative evidence and later attempting to collaterally attack their convictions . . . . [*Terrell*, 289 Mich App at 566 (second alteration in original) (quotation marks and citations omitted).]

If such evidence were deemed newly discovered, it would reward carelessness, neglect, and gamesmanship, at the expense of thorough trial preparation and the finality of criminal judgments.

C. APPLICATION

The Court of Appeals did not dispute the understanding that to be characterized as newly discovered, evidence must be " 'shown to have been unknown to the defendant or his counsel at the time of trial.' " *Rao*, unpub op at 8, quoting *Burton*, 74 Mich App at 222-223.[2] Yet it nevertheless determined that defendant's

[2] However, the majority did disagree with its dissenting colleague that defendant's proffered evidence was not newly discovered "because the evidence did not exist at the time of trial." *Rao*, unpub op at 3 (MURRAY, J., dissenting). It is unnecessary for us to address whether newly discovered evidence must actually have been in existence at the time of trial because we find it clear that defendant was aware of the *potential availability* of the evidence at that time, and thus the evidence is not newly discovered. See, e.g., *Purman*, 216 Mich at 438-439; *Burton*, 74 Mich App at 222-223.

proffered evidence was newly discovered, a determination that we cannot reconcile with the trial record.

The evidence at issue consists of additional x-rays of the child's ribs performed after her last skeletal survey in November 2007 and two doctors' interpretive reports of these x-rays. The trial record leads inescapably to the conclusion that defendant and defense counsel were aware of this evidence at the time of trial because counsel repeatedly questioned medical experts at length about this exact evidence. Specifically, defense counsel asked Dr. Smith whether performing x-rays "once every couple of months" might have been prudent in order to "tell whether or not there were any more fractures from November 14th to the present time[.]" Similarly, counsel asked Dr. DeGraw whether additional x-rays "could have substantiated the fact that this child has continuous rib fractures in normal activity[.]" And defense counsel pointedly asked his own expert, Dr. Kellam, "If the additional x-rays had been taken at any time between November 14 and the present time, what additional information would you or any other radiologist -- how could that have helped as far as evaluating this child?"

These questions are mere excerpts from lengthy exchanges between defense counsel and the testifying experts concerning how additional x-rays of the child's ribs performed after November 14, 2007, *could* have affected their medical opinions, and specifically about the possibility that such x-rays "*could* have substantiated the fact that this child has continuous rib fractures in normal activity" and thus *could* have assisted the defense. (Emphasis added.) It is not clear that the Court of Appeals was fully cognizant of the multiple and extensive discussions at trial about additional rib x-rays. However, the majority was undisputedly aware

of Dr. Kellam's testimony on the subject, having explicitly addressed it in its opinion. Dr. Kellam's testimony alone is sufficient to establish that defendant was well aware of the potential effect of the evidence she now offers as newly discovered evidence.

The Court of Appeals reached a contrary conclusion because it framed the issue in terms of whether defendant had been aware at the time of trial of the *actual* medical information revealed in the May 2009 x-rays. That is, the majority asked whether at the time defendant had been aware of the "current x-ray appearance of [RS's] ribs" and concluded that she "undeniably lacked any awareness" of this information. *Rao*, unpub op at 8. This conclusion, however, begs the question *why* defendant lacked awareness at the time of trial of the "current x-ray appearance" of the child's ribs. As the trial record makes clear, it is not because defendant was unaware of the medical technology needed to obtain this information (x-rays); it is not because defendant was unaware of which body part to submit to x-rays (ribs); it is not because defendant was unaware of the relevant period in which those x-rays needed to be performed (after November 14, 2007); and it is not because defendant was unaware that the results of the x-rays "could" have supported her defense.

Rather, defendant claims that the reason she was unaware of the appearance of the child's ribs at the time of trial is that such x-rays had been unavailable to her. Specifically, in her brief to this Court, defendant asserts that additional x-rays were not taken before trial "because the prosecution expert, Dr. DeGraw, considered any further x-rays of [RS] to impose an unnecessary cancer risk to [the child]." The Court of Appeals further observed that "[RS] had been placed in the custody of the Department of Human Services, thus precluding

defendant and her counsel from having the ability to obtain current radiologic evidence." *Rao*, unpub op at 8.

As these arguments make evident, defendant's claim of newly discovered evidence is more accurately characterized as a claim of newly available evidence, which implicates *Cress*'s reasonable-diligence requirement. In its very brief analysis of reasonable diligence, the Court of Appeals stated that "[g]iven defendant's lack of access to [RS] and the prosecution's unwillingness to submit the child to another set of films, we conclude that, employing reasonable diligence, defendant could not have discovered and produced the recent skeletal survey at trial." *Id*. at 11. In further support of this conclusion, both defendant and the Court of Appeals rely heavily on the fact that the prosecutor has not "advanced" the view that defendant could have obtained additional x-rays at trial. *Id*.

These arguments are flawed for several reasons. First, to the extent that defendant argues that the prosecutor has somehow waived the issue of reasonable diligence, this argument lacks merit.[3] The prosecutor opposed defendant's motion for a new trial, citing *Cress*. The trial court then denied defendant's motion, determining that defendant had not satisfied any part of the *Cress* test, including the reasonable-diligence requirement. The Court of Appeals then considered all parts of the *Cress* test, including the reasonable-diligence requirement. And in her briefs to this Court, the prosecutor continues to cite the entirety of the *Cress* test, with the matter of reasonable diligence having been amply

[3] After oral argument in this Court, defendant moved to file a second supplemental brief, arguing that the prosecutor "never claimed that the condition of [RS's] ribs as demonstrated by the 2009 X-rays should have been discovered . . . through the exercise of due diligence" and suggesting that the issue is waived. We granted defendant's motion and have considered the arguments therein.

discussed at oral argument. Thus, the issue of reasonable diligence has not been waived, and the fact that the prosecutor may have focused on other parts of the *Cress* test does not limit our review of the entirety of a test whose applicability to this case has been fully preserved.[4]

Second, the Court of Appeals' assertion that the prosecutor did not "advance" the view that defendant could have obtained additional x-rays at trial reveals a fundamental misapprehension about *Cress*. Because defendant bears the burden on all parts of the *Cress* test, defendant is required to make an affirmative showing that she "could not, using reasonable diligence, have discovered and produced the evidence at trial[.]" *Cress*, 468 Mich at 692 (quotation marks and citations omitted). The prosecutor's emphasis on other interconnected parts of the test does not relieve defendant of this burden.

Third, when the issue of reasonable diligence is considered against the backdrop of the proper burden of proof, the Court of Appeals' conclusion cannot be sustained. To begin with, the rationales that defendant offers, and that the Court of Appeals accepted, for why she could not have produced additional x-rays at trial are not entirely supported by the record. While it is true that the child was in the custody of the Department of

[4] Moreover, while an appellate court will not ordinarily review an issue that has been abandoned or waived, such review is allowed when it is "necessary to a proper determination of a case . . . ." *Dation v Ford Motor Co*, 314 Mich 152, 160-161; 22 NW2d 252 (1946). Given the inextricable connection between the "newly discovered" and "reasonable diligence" requirements in parts one and three of the *Cress* test, even if the prosecutor *had* waived the issue of reasonable diligence—which, in our judgment, she did not—this exception may well be applicable. "[A]ddressing a controlling legal issue despite the failure of the parties to properly frame the issue is a well understood judicial principle." *Mack v Detroit*, 467 Mich 186, 207; 649 NW2d 47 (2002).

Human Services, it is also true that an attorney for defendant nonetheless arranged medical examinations of the child after removal.[5] In addition, it is not clear that the alleged cancer risk posed by additional x-rays imposed an absolute bar on defendant's ability to secure the evidence. The medical experts offered varied testimony on this issue, and although the only expert cited by defendant in support of this proposition, Dr. DeGraw, indicated that additional x-rays would be "dangerous," two other defense experts, Dr. Smith and Dr. Kellam, who are uncited in this appeal, testified to the contrary.

More importantly, the Court of Appeals' conclusion on reasonable diligence is unsupportable because defendant has not shown that she did the one thing that reasonable diligence would, at a minimum, have required in these circumstances: move in the trial court for an order permitting additional x-rays of the child's ribs to be taken.[6] That is, even assuming that defendant did not have access to the child, and even assuming that the prosecutor opposed additional x-rays, the obvious course for a defendant who wanted to offer this evidence at trial would have been to bring a motion before the court for the obtaining or production of that evidence.

Moreover, we believe that defense counsel's decision not to bring such a motion does not appear to have been inadvertent, nor does it appear to have been unreasonable. Indeed, several weeks before trial, counsel brought a motion for additional discovery, which expressly re-

[5] After being removed from defendant's home, RS was taken to several medical appointments that were arranged by the family's lawyer in the neglect proceeding, Arthur Greenstone.

[6] "[I]n a criminal case, a trial court has the discretion to grant additional discovery." *People v Valeck*, 223 Mich App 48, 50; 566 NW2d 26 (1997).

quested any "post-placement medical records, *including X-rays*" that had not previously been provided by the prosecutor or the Department of Human Services. (Emphasis added.) Thus, it is apparent that defense counsel was well aware of the possible significance of additional x-rays and desired to review those x-rays if they had been performed. However, he chose not to bring a motion to obtain or produce the x-rays. It appears to us that this decision was well within the range of reasonable trial strategy. As defense counsel's questioning of the medical experts makes clear, additional x-rays could have revealed, not evidence that was *exonerating*, but no new fractures and thus evidence that was further *implicating*. By choosing not to obtain additional x-rays, counsel may well have preferred to leave open the possibility that additional x-rays would have supported the defense, so that he could repeatedly make the following argument to the jury, as he did in his closing:

> [If] [s]omewhere between November and now she would have been given just another set of x-rays just like what Dr. DeGraw did. And let's say that there were new separations or fractures or cracks different than November 14. That would be a certainly very, very good proof that this was a metabolic bone disease and it wasn't done by Malini Rao . . . ."

In light of the obvious strategic reasons for defendant's choice not to obtain additional x-rays, we have little difficulty concluding that she has not satisfied parts one and three of the *Cress* test, i.e., its "newly discovered" and "reasonable diligence" requirements.[7]

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[7] Because defendant must satisfy all four parts of the *Cress* test, our determination that defendant has not satisfied parts one and three makes it unnecessary to consider the remaining parts. Accordingly, contrary to the dissent's contention, this case is fully "ripe" for our review, and there is no need for an evidentiary hearing to address asserted factual questions pertaining to part four.

IV. CONCLUSION

Defendant was aware at the time of trial of the allegedly newly discovered evidence and did not carry her burden of showing that she used reasonable diligence to produce the evidence at trial. Consequently, defendant has failed to satisfy the first and third parts of the *Cress* test. We reverse the judgment of the Court of Appeals, reinstate the trial court's order denying defendant's motion for a new trial, and remand to the Court of Appeals for consideration of defendant's remaining issues.

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

CAVANAGH, J. I concur in the result only.

HATHAWAY, J. (*dissenting*). I respectfully dissent from the majority's decision in this matter. I would deny leave to appeal because, unlike the majority, I believe that the Court of Appeals correctly analyzed the four-part test from *People v Cress*, 468 Mich 678; 664 NW2d 174 (2003). I find the Court of Appeals' analysis of part four of the test particularly persuasive. Significant questions of fact remain regarding whether defendant has met the fourth part of the test. As the Court of Appeals stated:

> Defendant has set forth substantial evidence supporting her position that a jury made aware of (1) [the child's] nonhealing ribs and femur, and (2) the child's possible suffering of a new fracture of rib 10 while outside defendant's custody, would have reached a different verdict. Because important factual questions remain unanswered concerning the significance of the 2009 skeletal survey, we remand this case to the trial court for an evidentiary

hearing to address whether the new evidence likely would have affected the outcome of defendant's trial.[1]

Because there are important factual questions remaining concerning whether the new evidence likely would have affected the outcome of defendant's trial, this matter is not ripe for this Court's review. Therefore, I would deny leave to appeal, allow the trial court to conduct the evidentiary hearing, and allow the Court of Appeals to review the trial court's findings and conclusions regarding the probability of a different result on retrial. Accordingly, I dissent.

MARILYN KELLY, J., concurred with HATHAWAY, J.

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[1] *People v Rao*, unpublished opinion per curiam of the Court of Appeals, issued December 7, 2010 (Docket No. 289343), p 12.

PEOPLE v BUIE

Docket No. 142698. Argued November 10, 2011 (Calendar No. 11). Decided May 24, 2012.

A Kent Circuit Court jury, Dennis B. Leiber, J., convicted James H. Buie of two counts of first-degree criminal sexual conduct involving a victim under the age of 13, three counts of first-degree criminal sexual conduct involving the use of a weapon, and possession of a firearm during the commission of a felony. Defendant appealed, alleging, in part, that he was deprived of his constitutional right to confront the witnesses against him when two prosecution witnesses who were not victims were allowed to testify by means of two-way, interactive video technology. The testimony concerned, in part, DNA evidence. The Court of Appeals, BECKERING, P.J., and WHITBECK and M. J. KELLY, JJ., retained jurisdiction and remanded the case to the trial court to assess whether permitting the video testimony had been necessary to further an important public policy or state interest pursuant to *Maryland v Craig*, 497 US 836 (1990). 285 Mich App 401 (2009). The prosecution applied for leave to appeal and defendant applied for leave to cross-appeal in the Supreme Court, which denied both applications but instructed the trial court to make additional findings regarding the application of MCR 6.006(C), which allows the use of two-way, interactive video technology at trials upon a showing of good cause if the parties consent. 485 Mich 1105 (2010). After a hearing, the trial court found that defendant had consented to the video testimony through his counsel and ruled that there had been no constitutional error in allowing it. The Court of Appeals reversed the trial court and vacated defendant's convictions and sentences, concluding that defendant had objected to the video procedure, that the testimony violated defendant's right of confrontation and MCR 6.006(C), and that the resultant error amounted to plain error. 291 Mich App 259 (2011). The Supreme Court granted the prosecution's application for leave to appeal. 489 Mich 938 (2011).

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

A defendant's constitutional right to be confronted with the witnesses against him or her may be waived by defense counsel as long as counsel's decision constitutes reasonable trial strategy, which is presumed, and the defendant does not object on the record.

1. The Confrontation Clauses of the Michigan and United States Constitutions provide that in all criminal prosecutions, the accused has the right to be confronted with the witnesses against him or her. This right may be waived by a defendant personally, or it may be waived by defense counsel as long as counsel's decision constitutes reasonable trial strategy, which is presumed, and the defendant does not object on the record. To the extent that *People v Lawson*, 124 Mich App 371 (1983), stated otherwise, it is overruled.

2. The trial court did not clearly err by concluding that defendant had consented to the video testimony through his defense counsel. Because an objection must be made on the record, the focus of the reviewing court should be not on an evidentiary hearing such as that conducted in this case but on what transpired at trial and whether the trial court should reasonably have concluded that defense counsel objected to the use of the video technology. In this case, defense counsel stated that it was her understanding that this would be the trial court's first attempt at using the video technology at issue and that defendant had wanted to question the veracity of the proceedings, so she would leave it to the court's discretion. This statement did not constitute an objection because it was not phrased as an objection, it expressly left the matter to the court's discretion, the trial court interpreted it as a request for further information about the operation of the video equipment, and both witnesses testified by video with no further statement from defense counsel. That defense counsel's decision constituted reasonable trial strategy is a presumption that was never addressed, much less rebutted. Accordingly, defendant, through defense counsel, waived his right of confrontation and extinguished any error that may have been committed.

3. The trial court did not abuse its discretion by allowing the video testimony under MCR 6.006(C), which permits the use of two-way, interactive video technology at trials upon a showing of good cause if the parties consent. Defense counsel effectively consented to the use of the video technology, and defendant did not object on the record. Contrary to defendant's argument, the good cause need not be that the use of video technology is necessary to further an important public policy or state interest; any sound reason is sufficient. The trial court did not choose an outcome

falling outside the range of principled outcomes by concluding that convenience, cost, and efficiency were sound reasons for using video testimony.

Reversed and case remanded to the Court of Appeals for consideration of remaining issues.

Justice HATHAWAY, concurring in the result only, noted that this case was factually unique.

Justice CAVANAGH, joined by Justice MARILYN KELLY, dissenting, would have held that the public policies or state interests that the trial court relied on to justify allowing the video testimony, which included cost savings, efficiency, convenience of the witnesses, and avoiding delay, did not outweigh defendant's constitutional right of confrontation. He would have held that there can be no effective waiver of the right of confrontation when, as in this case, the record clearly shows that defense counsel's purported waiver was in direct contravention of defendant's express objection, which also indicated a lack of consent under MCR 6.006(C). He would have held that the error affected the outcome of the proceedings because the chain of evidence for the DNA could not have been established without the foundation provided by the video testimony.

1. CONSTITUTIONAL LAW — CONFRONTATION CLAUSE — TRIAL — WITNESSES — TWO-WAY, INTERACTIVE VIDEO TECHNOLOGY — CONSENT — WAIVER.

A defendant has the constitutional right to be confronted with the witnesses against him or her; this right may be waived by the defendant personally, or it may be waived by defense counsel as long as counsel's decision constitutes reasonable trial strategy, which is presumed, and the defendant does not object on the record (US Const, Am VI; Const 1963, art 1, § 20).

2. WITNESSES — TESTIMONY — TWO-WAY, INTERACTIVE VIDEO TECHNOLOGY — GOOD-CAUSE REQUIREMENT.

MCR 6.006(C) allows the use of two-way, interactive video technology at trials upon a showing of good cause if the parties consent; the use of the technology need not be necessary to further an important public policy or state interest to satisfy the good-cause requirement; any sound reason is sufficient.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *William A. Forsyth*, Prosecuting Attorney, and *Timothy K. McMorrow*, Chief Appellate Attorney, for the people.

State Appellate Defender (by *Jonathan Sacks*) for defendant.

MARKMAN, J. We granted leave to appeal to consider whether witness testimony taken by two-way, interactive video was properly admitted during defendant's trial. Our consideration implicates two issues: (1) whether defendant's constitutional right to be confronted with the witnesses against him was violated by the admission of video testimony, US Const, Am VI; Const 1963, art 1, § 20, and (2) whether the admission of video testimony violated MCR 6.006(C). Because we conclude that defendant waived his right of confrontation under the United States and Michigan Constitutions and that the court rule was not violated, we reverse the Court of Appeals' judgment and remand to that Court for consideration of defendant's remaining issues.

I. FACTS AND HISTORY

Defendant was convicted of sexually assaulting BS and two female minors: LS, age 13, and DS, age 9. The assaults occurred on June 27, 2001, after BS, seeking to trade sex for cocaine, invited defendant into the apartment where she was babysitting LS and DS. In lieu of the desired bargain, defendant held BS at gunpoint and raped her, LS, and DS. LS and DS were unable to identify the man who assaulted them, but at trial BS identified defendant as the perpetrator of the crimes.

Within hours of the assault, Dr. Vincent Palusci examined LS and DS. He found evidence " 'indicative of sexual conduct of direct trauma to the genitals, and in the case of [LS], also her anus, which were not explainable in any other manner than the histories provided' " by the children. *People v Buie*, 285 Mich App 401, 404; 775 NW2d 817 (2009) (*Buie I*). Palusci collected vaginal

and rectal swabs during the examinations and placed the swabs into rape kits. The kits were then sealed and released to the appropriate law enforcement agencies. An employee of the Michigan State Police's Forensic Biology Unit, Rodney Wolfarth, conducted DNA testing on the swabs and on other objects found at the scene of the crime. Wolfarth found sperm cells in the swabs and designated their originator "Donor 1."

Wolfarth was unable to identify Donor 1 at the time but entered his results into a DNA database known as CODIS, an acronym for "Combined DNA Indexing System." On February 1, 2005, CODIS matched defendant's DNA to Donor 1, and he was arrested and charged with the crimes. Before trial, defense counsel consented to the use of video testimony by Palusci and Wolfarth, and at trial, they were permitted to testify by this method. *People v Buie (After Remand)*, 291 Mich App 259, 267; 804 NW2d 790 (2011) (*Buie II*). However, immediately before Palusci testified, defense counsel stated that defendant " 'wanted to question the veracity of these proceedings, so I'll leave that to the Court's discretion.' " *Id*.

After a brief discussion between the court and the information technology staff concerning how the video equipment would operate, Palusci testified. Defendant was eventually convicted by a jury of two counts of first-degree criminal sexual conduct (CSC) involving a victim under the age of 13, MCL 750.520b(1)(a); three counts of first-degree CSC involving the use of a weapon, MCL 750.520b(1)(e); and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant appealed, arguing that the video testimony violated his constitutional right of confrontation and was not properly admitted under any statute or court rule.

The Court of Appeals adopted the test articulated in *Maryland v Craig*, 497 US 836; 110 S Ct 3157; 111 L Ed

2d 666 (1990), to determine whether the admission of the video testimony had violated defendant's right of confrontation. *Buie I*, 285 Mich App at 415. Pursuant to that test, the Court of Appeals then remanded the case to the trial court and ordered it to assess whether permitting the video testimony had been "necessary to further an important public policy or state interest." *Id.* at 418. The prosecutor applied for leave to appeal here, and defendant applied to cross-appeal. This Court denied both applications but instructed the trial court to "make [additional] findings regarding good cause and consent pursuant to MCR 6.006(C)." *People v Buie*, 485 Mich 1105, 1106 (2010). Dissenting in part from the order, Justice CORRIGAN explained:

> In light of defense counsel's complete statement, I cannot conclude that "the nature" of that statement manifested anything other than consent. As a threshold matter, the complete statement of defense counsel is "consent" under the Court of Appeals own analysis of the dictionary definition of the term. When defense counsel stated "I'll leave that to the Court's discretion," defendant essentially acquiesced to the taking of testimony using two-way interactive video technology. Defense counsel cannot acquiesce to the court's handling of a matter at trial, only to later raise the issue as an error on appeal. A contrary result would run afoul of the well-established legal principle that a defendant must "raise objections at a time when the trial court has an opportunity to correct the error" and cannot "harbor error as an appellate parachute." [*Id.* at 1107 (citations omitted).]

On remand, the trial court held an evidentiary hearing. At that hearing, the prosecutor was asked:

> *Q*. Now, do you recall specifically any conversation you may have had with defense counsel or the Court concerning the use of the video technology from these witnesses from remote locations?

> *A*. I don't recall specifically what was said between [defense counsel] and myself. I do know, you know, thinking about that, that regarding Dr. Palusci's testimony, that I don't believe she objected to it being the video feed because she wanted--she knew the testimony--
>
> * * *
>
> I don't remember [defense counsel's] exact words, but she had indicated that Dr. Palusci--she believed Dr. Palusci's testimony was going to be damaging, so she wanted him, whether it be live or on the screen, done with as quickly as possible.

Defense counsel agreed that she had discussed the use of video testimony before trial. When asked whether she was "agreeable" to the use of video testimony by Palusci and Wolfarth, defense counsel explained:

> Understanding that [the witnesses were not local] and the nature of this particular case and the fact that it had been dragging out for quite a while by this time, I felt--I was in agreement that this would be the best way to have [Palusci and Wolfarth] testify without subjecting them to being here physically.

When asked whether there was "a benefit to having the testimony by video rather than having testimony live," defense counsel responded:

> I didn't think there was any problem. I wouldn't call it a benefit or a burden. It was just two individuals testifying on a tele--on a big screen rather than sitting here. They were sworn as I was this afternoon. They were asked questions by the prosecution. They were cross-examined by me. There was some redirection. I believe I even re-crossed on at least one of the witnesses. And it was done.

Although defense counsel stated that "every conversation [she] had with [defendant] throughout [her] representation was done either in the lock-up area here

at the--at the courthouse or with him sitting at the defense table," when asked whether she would have "discussed with [defendant] this--the testimony--the video procedures beforehand," she answered that "[d]espite [defendant's] contentiousness, [she] discussed everything with him" and that "[defendant] was well aware of the prosecutor's desire to have [the witnesses] testify via video."

Defense counsel was then asked whether defendant himself had responded when informed that Palusci and Wolfarth would testify by video. She answered:

> Oh, yeah, of course. [Defendant] objected to everything. It was--you know, it was classic Buie from beginning to end, "This is wrong. That is wrong." But, you know, yeah. And I believe I made a statement on the record indicating [defendant's] disdain for the two individuals testifying via video.

She was then asked:

> *Q*. Okay. And where you said, "I understand this is this particular courtroom's first attempt at this type of technological proceeding and my client is wanting to question the veracity of these proceedings, so I'll leave that to the Court's discretion," is it fair to say then that that statement is you expressing [defendant's] objection to the procedure?
>
> *A*. Absolutely.

However, when questioned further about that statement, defense counsel explained:

> *A*. [Defendant] was questioning the veracity of everything. It was just--it was a blanket James Buie, this is a farce, and that was pretty much his attitude from beginning to end.
>
> *Q*. Okay. Was that specifically as regarding the use of the video testimony itself, or was this about everything?

A. I didn't take it as that. I took it as he had a problem with every piece of this case, every--from beginning to end up until the point that he was too cowardly to come into the courtroom at sentencing. So, no, I didn't take it as specifically he had a problem with the--the--I mean I can't get into his mind, but this was what I was dealing with from the—from the beginning to the end of this case, so I didn't specifically take it as he had a problem with the videotape. It's just he had a problem with the fact that he was on trial for raping two little girls.

At this point, the trial court had defense counsel read this Court's order, *Buie*, 485 Mich 1105, explaining that the court would be asking defense counsel to address a conclusion reached in Justice CORRIGAN's separate statement "so that as clearly as possible, there be no question about what [defense counsel] intended or--or what happened." After defense counsel had done so, the court asked defense counsel:

Q. According to Justice Corrigan, you never objected to the use of a two-way, interactive video technology for taking Dr. Palusci and Dr. Wolfarth's testimony. Is that true or false?

A. I never--I never objected.

Q. So the statement of Justice Corrigan is true?

A. It is.

Defendant also testified at the evidentiary hearing. He explained that he and defense counsel did not get along and that he had requested a new attorney. He further claimed that he had no knowledge of the video testimony until it was about to happen. With regard to the video testimony, defendant explained:

A. I told [defense counsel] that I just didn't--it just didn't feel right. I said, "Shouldn't they be in the witness chair?"

Q. And what did [defense counsel] do after you told her that?

A. No, I told her--I told her I didn't feel right about it, they should be in the witness chair, and she said, "Everything is going to be all right." I said, "Well, I want you to get up and object to it because it just don't seem right."

Q. Okay. And did she get up and say something?

A. Yes.

Q. And what did she say?

A. She didn't say the word object like I told her. She--

Q. But this statement that we've read at this hearing today about questioning the veracity of the proceedings, is that when she made that statement?

A. Yes.

Following this hearing, the trial court issued a written opinion and order holding that there was no error in permitting the video testimony. After hearing the witnesses' testimony and evaluating their demeanor and credibility, the court found that "Defendant consented to the taking of testimony by video when his counsel stated on the record that Defendant wanted to question the veracity [of the] proceedings but left it to [the] trial court's discretion whether to proceed" and "according to [defense counsel], Defendant did not object to the video testimony. His intent was to object to the proceedings in general because he disliked being prosecuted." Because the Court of Appeals had retained jurisdiction, this case then returned to it. With the benefit of the supplemental record, the Court of Appeals concluded that (1) contrary to the trial court's factual findings, defendant had objected to the video procedure, (2) the testimony had violated both the Confrontation Clause and MCR 6.006(C), and (3) the resultant error amounted to plain error. *Buie II*, 291 Mich App at 274-276. Accordingly, it reversed the trial

court and vacated defendant's convictions and sentences. The prosecutor sought leave to appeal, and we granted leave. *People v Buie*, 489 Mich 938 (2011).

II. STANDARD OF REVIEW

We review the trial court's factual findings for clear error. *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003). We review de novo questions of constitutional law and issues of statutory interpretation, *City of Taylor v Detroit Edison Co*, 475 Mich 109, 115; 715 NW2d 28 (2006), and we interpret court rules using the "same principles that govern the interpretation of statutes," *Ligons v Crittenton Hosp*, 490 Mich 61, 70; 803 NW2d 271 (2011).

III. ANALYSIS

At issue in this case is how the waiver of the rights allowed defendants under the Confrontation Clauses of our state and federal constitutions is to be effected and whether the use of video testimony satisfied the requirements of MCR 6.006(C).

A. CONFRONTATION CLAUSE

The Confrontation Clauses of our state and federal constitutions provide that in all criminal prosecutions, the accused has the right to be confronted with the witnesses against him. US Const, Am VI; Const 1963, art 1, § 20. The United States Supreme Court has held "that the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact," *Coy v Iowa*, 487 US 1012, 1016; 108 S Ct 2798; 101 L Ed 2d 857 (1988), but has also held that "the face-to-face confrontation requirement is not absolute," *Craig*, 497 US at 850. In *Craig*, the Court

articulated a two-part test for dispensing with face-to-face confrontation: first, the denial of such confrontation must be "necessary to further an important public policy" or state interest and, second, denial is permitted "only where the reliability of the testimony is otherwise assured." *Id*. at 850, 852. Whether the second prong has been satisfied is assessed by three indicators: (1) the taking of an oath, (2) the availability of cross-examination, and (3) the observation of the witness by the jury. *Id*. at 845-846, 851, citing *California v Green*, 399 US 149, 158; 90 S Ct 1930; 26 L Ed 2d 489 (1970).

B. GENERAL WAIVER PRINCIPLES

"Waiver is the 'intentional relinquishment or abandonment of a known right.' " *People v Carines*, 460 Mich 750, 762-763 n 7; 597 NW2d 130 (1999), quoting *United States v Olano*, 507 US 725, 733; 113 S Ct 1770; 123 L Ed 2d 508 (1993) (quotation marks omitted). The United States Supreme Court explained in *Olano*:

> Whether a particular right is waivable; whether the defendant must participate personally in the waiver; whether certain procedures are required for waiver; and whether the defendant's choice must be particularly informed or voluntary, all depend on the right at stake. See, *e.g.*, 2 W. LaFave & J. Israel, Criminal Procedure § 11.6 (1984) (allocation of authority between defendant and counsel); Dix, Waiver in Criminal Procedure: A Brief for More Careful Analysis, 55 Texas L. Rev. 193 (1977) (waivability and standards for waiver). [*Olano*, 507 US at 733.]

This Court has recognized that "[w]hile the defendant must personally make an informed waiver for certain fundamental rights such as the right to counsel or the right to plead not guilty, for other rights, waiver may be effected by action of counsel." *People v Carter*, 462 Mich 206, 218; 612 NW2d 144 (2000). In *New York v Hill*, 528

US 110, 114-115; 120 S Ct 659; 145 L Ed 2d 560 (2000), the United States Supreme Court explained at greater length:

> "Although there are basic rights that the attorney cannot waive without the fully informed and publicly acknowledged consent of the client, the lawyer has—and must have—full authority to manage the conduct of the trial." *Taylor* v. *Illinois*, 484 U.S. 400, 417-418 [108 S Ct 646; 98 L Ed 2d 798] (1988). As to many decisions pertaining to the conduct of the trial, the defendant is "deemed bound by the acts of his lawyer-agent and is considered to have 'notice of all facts, notice of which can be charged upon the attorney.' " *Link* v. *Wabash R. Co.*, 370 U.S. 626, 634 [82 S Ct 1386; 8 L Ed 2d 734] (1962) (quoting *Smith* v. *Ayer*, 101 U.S. 320, 326 [25 L Ed 955] (1880)). Thus, decisions by counsel are generally given effect as to what arguments to pursue, see *Jones* v. *Barnes*, 463 U.S. 745, 751 [103 S Ct 3308; 77 L Ed 2d 987] (1983), what evidentiary objections to raise, see *Henry* v. *Mississippi*, 379 U.S. 443, 451 [85 S Ct 564; 13 L Ed 2d 408] (1965), and what agreements to conclude regarding the admission of evidence, see *United States* v. *McGill*, 11 F. 3d 223, 226-227 (CA1 1993). Absent a demonstration of ineffectiveness, counsel's word on such matters is the last.

Additionally, we asserted in *Carter*, 462 Mich at 215:

> "One who waives his rights under a rule may not then seek appellate review of a claimed deprivation of those rights, for his waiver has extinguished any error." *United States v Griffin*, 84 F3d 912, 924 (CA 7, 1996), citing *Olano*, [507 US] at 733-734.

C. CONFRONTATION CLAUSE WAIVER

There is no doubt that the right of confrontation may be waived and that waiver may be accomplished by counsel. This fact was recently reaffirmed in *Melendez-Diaz v Massachusetts*, 557 US 305, 314 n 3; 129 S Ct 2527; 174 L Ed 2d 314 (2009) (stating that "[t]he right

to confrontation may, of course, be waived, including by failure to object to the offending evidence"), but was also recognized a century ago in *Diaz v United States*, 223 US 442; 32 S Ct 250; 56 L Ed 500 (1912).[1] In *Diaz*, a defendant was convicted of homicide, in part on the basis of testimony from an earlier trial[2] that had been introduced by defense counsel. *Diaz*, 223 US at 449, 444. The Court considered whether *counsel's* introduction of the prior record waived the *defendant's* right of confrontation and explained that a defendant is "free to assert [his right of confrontation] or to waive it, as to him may seem advantageous." *Id*. at 450. The Court concluded that because "the accused, by his voluntary act, placed in evidence the testimony disclosed by the record in question, and thereby sought to obtain an advantage from it, he waived his right of confrontation . . . ." *Id*. at 452-453. Thus, the Court made clear that defense counsel may waive the right of confrontation on a defendant's behalf.

Among the cases cited in support of this conclusion, our decision in *People v Murray*, 52 Mich 288; 17 NW 843 (1883), was given particular emphasis. *Diaz*, 223 US at 451-452. In *Murray*, defense counsel at trial stipulated the admission of witness depositions. After the defendant was convicted of murder, the defendant

[1] *Diaz* involved crimes committed in the Philippine Islands while the United States was its sovereign. Thus, the right of confrontation at issue arose under the Philippine Civil Government Act, which provided defendants the right " 'to meet the witnesses face to face.' " *Diaz*, 223 US at 449. However, the Supreme Court decided the relevant issue by considering "cases relating to the *like right secured by the constitutions of the several States and the Constitution of the United States*." *Id.* at 450-451 (emphasis added).

[2] That earlier trial involved an assault and battery that caused injuries to which the victim had succumbed by the time of the conviction at issue in *Diaz*.

argued on appeal that these stipulations had violated his right of confrontation. Justice COOLEY responded for the Court:

> A chief ground of error relied upon is that the prosecution was allowed to put in evidence certain depositions taken out of court of witnesses not present at the trial. The facts seem to be that the attorneys for the respective parties stipulated to put in certain depositions on both sides, and they were put in accordingly. This, it is said, was in violation of the respondent's constitutional right to be confronted with his witnesses. But the court made no ruling in the matter; what was done was voluntarily done by the parties; the defendant had the benefit of the stipulation, and, for aught we can know, it may have been made chiefly in his interest. But however that may be, when the court has made no ruling we can have nothing to review. This Court cannot relieve a party from a criminal conviction because of his own voluntary action on the trial.
>
> It is said the counsel for respondent was counsel assigned to him by the court and may not have been counsel of his choice. We do not know how the fact was, but we know it is customary to allow the respondent to choose for himself. But however that may be, the counsel acted for the respondent without objection, and without complaint that he did not do the best he could for him.
>
> The defendant undoubtedly had a constitutional right to be confronted with his witnesses. He waived that right in this case, apparently for his own supposed advantage and to obtain evidence on his own behalf. It would have been a mere impertinence for the court to have interfered and precluded this stipulation being acted upon. But it would have been more than an impertinence; it would have been gross error. And it would be palpable usurpation of power for us now to set aside a judgment for a neglect of the court not at the time complained of, but in respect to something where any other course would have been plain error.
>
> Under the view taken by the respondent it would seem that when the evidence had been obtained under his stipulation, the court was put in position where it was

> impossible to avoid error; for if the evidence was received, he might complain, as he does now, that his constitutional right was violated, and if the court refused to receive it when he was consenting, the respondent would be entitled to have the conviction set aside for that error.
>
> I shall always be ready to preserve in its integrity every constitutional right; but I do not understand that the Constitution is an instrument to play fast and loose with in criminal cases any more than in any other, or that it is the business of courts to be astute in the discovery of technical difficulties in the punishment of parties for their criminal conduct. [*Murray*, 52 Mich at 290-291.]

For more than a century *Murray* has stood for two propositions in this state: (1) the right of confrontation may be waived[3] and (2) that waiver may be effected by counsel.[4] Michigan has not been alone in accepting these propositions. See part III(D) of this opinion.

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[3] See, e.g., *People v Miller*, 121 Mich App 691, 702 n 6; 329 NW2d 460 (1982), citing *Murray*, 52 Mich 288 ("Among the rights which an accused may waive are: right to confront witnesses . . . ."). In *United States v Aptt*, 354 F3d 1269 (CA 10, 2004), the court stated:

> A defendant is free to waive objections to evidence by stipulation, perhaps "to obtain evidence on his own behalf" or in return for other concessions from the prosecution. *Diaz*, [223 US at 451] (quoting [*Murray*, 52 Mich at 290]). In such contexts, admitting the stipulated evidence is so far from being error that it would be an "impertinence" and "gross error" for a court to interfere with the stipulation. [*Diaz*, 223 US] at 452.

See also *Belt v United States*, 4 App DC 25, 31 (1894) (citing *Murray* for the same proposition).

[4] See, e.g., *People v Baker*, 7 Mich App 7, 11; 151 NW2d 217 (1967):

> Defense counsel, after the prosecutor made this statement here complained of, corroborated the prosecutor's statement by replying: 'That's correct.' Defense counsel is an able and experienced practitioner who has tried many cases in the criminal courts in this jurisdiction. He was undoubtedly aware that his client had a constitutional right to be confronted with the witnesses. There is no reversible error present in this second issue. Cf. [*Murray*] 52 Mich 288.

D. CONFRONTATION CLAUSE WAIVER BY COUNSEL

The majority of courts that have addressed this issue have concluded that the right of confrontation may be waived, and that the waiver may be effected by counsel, as long as counsel's decision constitutes reasonable trial strategy and the defendant does not object to the waiver.[5] Indeed, these concerns were also present in

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See also *People v Garcia*, 51 Mich App 109, 114-115; 214 NW2d 544 (1974):

> [S]ince the statute limiting the use of testimony taken at a former hearing is designed to protect defendant's right to confrontation, and this right may be waived, [*Murray*, 52 Mich 288], it inexorably follows that the stipulation by defendant's counsel to allow the trial judge to read the transcript could constitute a conscious choice of trial strategy on the part of defendant's attorney . . . .

[5] Regarding federal courts, see, e.g., *Janosky v St Amand*, 594 F3d 39, 48 (CA 1, 2010), citing *Cruzado v Puerto Rico*, 210 F2d 789, 791 (CA 1, 1954); *United States v Plitman*, 194 F3d 59, 63 (CA 2, 1999); *United States v Stephens*, 609 F2d 230, 232-233 (CA 5, 1980); *United States v Reveles*, 190 F3d 678, 683 n 6 (CA 5, 1999); *United States v Joseph*, 333 F2d 1012, 1013 (CA 6, 1964); *United States v Cooper*, 243 F3d 411, 418 (CA 7, 2001) ("The majority of circuits that have addressed this question have held or stated that a defendant's attorney can waive his client's . . . confrontation right 'so long as the defendant does not dissent from his attorney's decision, and so long as it can be said that the attorney's decision was a legitimate trial tactic or part of a prudent trial strategy.' "); *United States v Robinson*, 617 F3d 984, 989-990 (CA 8, 2010); *United States v Gamba*, 541 F3d 895, 900-901 (CA 9, 2008), citing *Wilson v Gray*, 345 F2d 282, 287-288 (CA 9, 1965); and *Hawkins v Hannigan*, 185 F3d 1146, 1155-1156 (CA 10, 1999).

Regarding state courts, see, e.g., *People v Campbell*, 208 Ill 2d 203, 217; 802 NE2d 1205 (2005) (adopting the majority view that "counsel may waive a defendant's right of confrontation as long as the defendant does not object and the decision to stipulate is a matter of trial tactics and strategy"); *Lee v State*, 266 Ark 870, 876-877; 587 SW2d 78 (Ark App, 1979); *State v Oyama*, 64 Hawaii 187, 188; 637 P2d 778 (1981); *Waldon v State*, 749 So 2d 262, 266 (Miss App, 1999); *State v Bromwich*, 213 Neb 827, 830; 331 NW2d 537 (1983); *Ludlow v State*, 761 P2d 1293, 1295

Murray. Regarding trial strategy, it was implicit in *Murray* that counsel's waiver would have been in the defendant's interest.[6] That aim is presumed, as shown by the Court's comment that "for aught we can know, it may have been made chiefly in his interest." *Murray*, 52 Mich at 290. This presumption is in line with recent caselaw. "[A] defendant must overcome the strong presumption that his counsel's action constituted sound trial strategy under the circumstances." *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000), citing *People v Mitchell*, 454 Mich 145, 156; 560 NW2d 600 (1997); see also *People v Carbin*, 463 Mich 590, 601; 623 NW2d 884 (2001). It is also in line with *Hill*'s explanation that "decisions by counsel are generally given effect as to . . . what evidentiary objections to raise . . . . Absent a demonstration of ineffectiveness, counsel's word on such matters is the last." *Hill*, 528 US at 115.

It is also implicit in *Murray* that any objection a defendant may have must be made on the record. This is supported by Justice COOLEY's statement that "when the court has made no ruling we can have nothing to review," *Murray*, 52 Mich at 290, which suggests that a defendant must object in such a way that the trial court must respond with a ruling. As *Murray* stated, it is not "the business of courts to be astute in the discovery of technical difficulty," and in fact "it would be palpable usurpation of power for us now to set aside a judgment for a neglect of the court *not at the time complained of* . . . ." *Id.* at 290-291 (emphasis added). Rather, those

(Okla Crim App, 1988); *State v Harper*, 33 Wash App 507, 510; 655 P2d 1199 (1982); *Bilokur v Commonwealth*, 221 Va 467, 473; 270 SE2d 747 (1980).

[6] *Murray*, 52 Mich at 290 (noting that the defendant "waived that right in this case, *apparently for his own supposed advantage and to obtain evidence on his own behalf*") (emphasis added).

difficulties must be brought to the court's attention by the parties. Again, as Justice CORRIGAN articulated:

> Defense counsel cannot acquiesce to the court's handling of a matter at trial, only to later raise the issue as an error on appeal. A contrary result would run afoul of the well-established legal principle that a defendant must "raise objections at a time when the trial court has an opportunity to correct the error" [*People v Grant*, 445 Mich 535, 551; 520 NW2d 124 (1994)] and cannot "harbor error as an appellate parachute." [*People v Carter*, 462 Mich 206, 214; 612 NW2d 144 (2000).] [*Buie*, 485 Mich at 1107 (CORRIGAN, J., concurring in part and dissenting in part) (citation omitted).]

Other courts have indicated that objections must be made on the record. For instance, they have found waiver where the defendant failed to "manifest" dissent,[7] where there was no "evidence" that the defendant disagreed with counsel's objection,[8] and where the defendant "indicated" no dissent.[9] In addition, courts have held that "[w]here the defendant is 'aware of the stipulation . . . [and does] not object to the stipulation in court,' we presume that he has acquiesced in his counsel's stipulation." *United States v Robinson*, 617

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[7] See *Cruzado*, 210 F2d at 791 ("When an accused is represented by counsel, it is generally to be assumed that counsel adapts his trial tactics to what in his judgment is for the best interests of the accused. If the accused, being present, manifests no dissent, it is usually fair to assume that he approves of, or at least acquiesces in, the decisions taken in open court in his behalf by his counsel.").

[8] See *Hawkins*, 185 F3d at 1155-1156 (holding that defense counsel effectively waived the defendant's right of confrontation where counsel's decision to stipulate to testimony was a matter of prudent trial strategy and "there [wa]s no evidence that [the defendant] disagreed with or objected to his counsel's decision").

[9] See *Joseph*, 333 F2d at 1013 (holding that the right to confrontation "may be effectively waived by counsel in open court in the presence of an accused who indicates no dissent").

F3d 984, 989-990 (CA 8, 2010), quoting *United States v Lee*, 374 F3d 637, 650 (CA 8, 2006).

Further, *Murray* itself underscored the practical concern that allowing a defendant to object to defense counsel's consent off the record provides a defendant with "an appellate parachute." Under such a rule, a defendant might acquiesce in or even expressly agree with defense counsel's waiver outside of court and then claim to have objected behind closed doors, or even in his own mind, when he does not enjoy the outcome he desires. In light of the obvious impracticalities of such a rule, we reaffirm the rule applied in *Murray*, and consonant with the rule applied in a majority of state and federal courts, that where the decision constitutes reasonable trial strategy, which is presumed, the right of confrontation may be waived by defense counsel as long as the defendant does not object on the record.[10]

In reaffirming this rule, we also clarify that the right of confrontation is not a right that must be personally waived by the defendant in Michigan, despite our Court of Appeals' decision in *People v Lawson*, 124 Mich App 371, 376; 335 NW2d 43 (1983), in which the Court asserted:

> The res gestae rule in Michigan strengthens the confrontation clause's guarantees. However, it is not as integral a part as cross-examination, the oath, and demeanor. As such, a defense counsel can waive this particular right for a defendant. On the other hand, the more integral rights of the confrontation clause must be personally waived by the defendant. In *Brookhart* [*v Janis*, 384 US 1; 86 S Ct 1245; 16 L Ed 2d 314 (1966)], the Supreme Court

[10] This rule is largely in agreement with the rule articulated by the Court of Appeals below that "defense counsel may only waive a defendant's right of confrontation if the waiver is a legitimate trial tactic or strategy *and* the defendant does not object to the decision." *Buie II*, 291 Mich App at 272.

> reversed the defendant's conviction because the record did not clearly show that the defendant himself (rather than defense counsel) waived his confrontation right to cross-examine the witnesses against him.

Lawson's conclusion that "the more integral rights of the confrontation clause must be personally waived by the defendant" is incompatible with *Murray* and with the widely accepted rule that counsel may waive the right of confrontation. Further, *Lawson* misread *Brookhart*, its primary authority for the personal-waiver requirement. Although *Brookhart* discussed confrontation, the dispositive issue in that case concerned

> whether counsel has power to enter a plea which is inconsistent with his client's expressed desire and thereby waive his client's constitutional right to plead not guilty and have a trial in which he can confront and cross-examine the witnesses against him. [*Brookhart*, 384 US at 7.]

Thus, *Brookhart* merely dealt with waiver of the right to plead not guilty, not waiver of the right of confrontation. Accordingly, *Brookhart* does not stand for the proposition that a defendant must personally waive the right of confrontation.

As the Court of Appeals below correctly indicated, "the personal waiver rule articulated by [*Lawson*] is dictum and is, therefore, not binding." *Buie II*, 291 Mich App at 272. Still, *Lawson* has been cited in a number of other cases, including *Buie I*,[11] as well as by

[11] See, e.g., *People v Farquharson*, 274 Mich App 268, 277; 731 NW2d 797 (2007). Several Court of Appeals decisions have also cited *Lawson* for the general proposition that waiver must be made by a defendant, but concluded that "[t]he right of confrontation is not of such moment that it requires waiver by the defendant personally when he is represented by counsel." *People v Johnson*, 70 Mich App 349, 350; 247 NW2d 310 (1976). See, e.g., *People v Bartley*, unpublished opinion per curiam of the Court of Appeals, issued December 16, 2010 (Docket No. 294149), p 6; *People v*

defendant,[12] for the proposition that personal waiver of the "integral elements of the Confrontation Clause" is required. *Buie I*, 285 Mich App at 418. For the reasons we have set forth, this is not a correct statement of law, and we take this opportunity to overrule that portion of *Lawson*.

In sum, we adopt the following rule to govern the waiver of the right of confrontation by counsel in Michigan: if the decision constitutes reasonable trial strategy, which is presumed, the right of confrontation may be waived by defense counsel as long as the defendant does not object on the record.[13]

E. APPLICATION OF WAIVER

Clear error is present when the reviewing court is left with a "definite and firm conviction" that an error

Powe, unpublished opinion per curiam of the Court of Appeals, issued November 17, 2009 (Docket No. 286175), p 3.

[12] Defendant claims that *People v Saffold*, 465 Mich 268, 281; 631 NW2d 320 (2001), requires personal waiver of the right of confrontation because confrontation is among the rights of which a defendant must be advised before a valid guilty plea may be entered. Though it is true that a defendant must be advised of the right of confrontation before pleading guilty, *People v Jaworski*, 387 Mich 21; 194 NW2d 868 (1972), that does not suggest that the right itself must be personally waived. Rather, the purpose of the articulation of that right in *Jaworski*, not unlike in *Brookhart*, was to ensure that a defendant *knowingly* pleads guilty—that is, that the defendant is aware of the rights that are waived by pleading guilty.

[13] Although the dissent concedes that "defense counsel failed to communicate a cognizable objection" at trial, it takes issue with our requirement that a defendant's objection must be "on the record." *Post* at 322-323. The dissent concludes that our opinion "allows a defense attorney to waive a criminal defendant's right of confrontation despite the defendant's unequivocal objection to the attorney" if an attorney "fails to voice a proper objection . . . ." *Post* at 323. However, a counsel's failure to object may result in the waiver of a defendant's rights in many instances. The dissent overlooks that a defendant may seek relief in such instances by establishing that defense counsel rendered ineffective assistance. *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

occurred. *Tuttle v Dep't of State Hwys*, 397 Mich 44, 46; 243 NW2d 244 (1976). Because an objection must be on the record, the focus should be on what transpired at trial and whether the trial court should reasonably have concluded that defense counsel objected to the use of the video technology. In this case, the trial court implicitly determined that there had been no objection to the video testimony because it never ruled on any such objection.

Immediately before Palusci testified, defense counsel stated:

> I understand this is this particular courtroom's first attempt at this type of technological proceeding, and my client has--wanted to question the veracity of these proceedings, so I'll leave that to the Court's discretion.

A review of the record indicates that this statement did not constitute an objection for several obvious reasons. First, the statement is not phrased as an objection, and indeed the word "objection" is altogether missing. Second, as Justice CORRIGAN explained, "When defense counsel stated 'I'll leave that to the Court's discretion,' defendant essentially acquiesced to the taking of testimony using two-way interactive video technology." *Buie*, 485 Mich at 1107 (CORRIGAN, J., concurring in part and dissenting in part). Third, in the immediate aftermath of counsel's statement, the trial court had a member of its information technology staff explain *how* the video equipment worked, which clearly suggests that the court believed that the statement did not constitute an objection but constituted a request for further information about the operation of the video equipment. Fourth, immediately after the discussion regarding the equipment, Palusci testified without further complaint by counsel. If counsel's statement had been intended as an objection, we would expect that she

might have questioned the trial court's response of having the staff explain how the equipment would work, since that response would have been entirely unresponsive to an objection. Fifth, no statement or complaint was made before the video testimony of Wolfarth. The record strongly suggests that the trial court concluded, and did so correctly, that defense counsel's statement had not constituted an objection to the procedures the court adopted. Nevertheless, the Court of Appeals overlooked this record and focused entirely on the evidentiary hearing, reasoning:

> Given the testimony of both defendant and defense counsel at the evidentiary hearing on remand, we cannot conclude that defendant consented to the video procedure through counsel. To the contrary, defendant objected to the use of the technology and had counsel place his objection on the record. Because defendant expressly objected to the use of the technology, defense counsel's agreement with its use does not qualify as a waiver . . . . [*Buie II*, 291 Mich App at 274.][14]

Although the Court of Appeals disagreed with the trial court's factual findings, it failed to articulate how those findings constituted clear error. That is, it did not explain how it was left with a "definite and firm conviction" that an error had occurred. *Tuttle*, 397 Mich at 46. We are certainly not left with such a conviction. Therefore, we must defer to the trial court's findings of fact—specifically, that defendant did not object to the use of the video testimony. That this decision consti-

[14] When the Court of Appeals stated earlier in its opinion that "defendant failed to object to the use of the video technology on the grounds he raises on appeal," it was presumably indicating that defendant did not object on the record. *Buie II*, 291 Mich App at 268. If this presumption is correct, it alone is a sufficient basis to reverse the Court of Appeals because a defendant's objection must be on the record, as discussed earlier.

tuted reasonable trial strategy is a presumption that was never addressed, much less rebutted. Indeed, at the evidentiary hearing, defense counsel stated that she did not have any problem with Palusci and Wolfarth testifying by video. Accordingly, the trial court's findings were not clearly erroneous, and we believe that defendant, through his counsel, waived his right of confrontation and "extinguished any error" that may have been committed. *Carter*, 462 Mich at 215.

F. MCR 6.006(C)

Defendant also challenges the admission of the video testimony on the basis that it occurred in violation of MCR 6.006(C), which governs the use of video and audio technology in judicial proceedings. MCR 6.006(C) provides, in pertinent part:

> Defendant in the Courtroom—Other Proceedings. As long as the defendant is either present in the courtroom or has waived the right to be present, upon a showing of *good cause*, district and circuit courts *may* use two-way interactive video technology to take testimony from a person at another location in the following proceedings:
>
> (1) evidentiary hearings, competency hearings, sentencings, probation revocation proceedings, and proceedings to revoke a sentence that does not entail an adjudication of guilt, such as youthful trainee status;
>
> (2) with the *consent of the parties, trials*. A party who does not consent to the use of two-way interactive video technology to take testimony from a person at trial shall not be required to articulate any reason for not consenting. [Emphasis added.]

MCR 6.006(C)(2) only allows video testimony "with the consent of the parties." MCR 6.003(1) defines "party," as it applies in MCR 6.006, to include the "lawyer representing the party." Thus, "parties" in MCR

6.006(C)(2) encompasses both the lawyer and the client, and the lawyer may consent on behalf of his or her client. Still, it does not follow that this consent *overrides* an objection by the defendant because *both* the defendant and defense counsel comprise the "party." Thus, if either the defendant or counsel objects, the "party" cannot be said to have consented. However, as with the Confrontation Clause, for the defendant's objection to be valid, it must be made on the record. Otherwise, the trial court has no way of discerning that an error may have been committed. Accordingly, for the reasons stated in our analysis of Confrontation Clause waiver, we also conclude that defense counsel consented to the use of the video technology and that defendant did not object on the record.

Defendant also argues that the use of "good cause" in MCR 6.006(C) imports the constitutional standard from *Craig* for dispensing with confrontation, to wit, that the "cause" be "necessary to further an important public policy" or "state interest." We reject this argument. The court rule does not refer to *Craig* or its standard. There is a substantive distinction between "good cause" and "necessary to further an important state interest," and we have adopted only the former language. "Good cause" simply means a "satisfactory," "sound or valid" "reason," whereas "necessary" means "essential" or "indispensible." *Random House Webster's College Dictionary* (1997). Moreover, under the court rule there is no need to identify a corresponding state interest; any sound reason is sufficient.

Because a trial court "*may* use two-way interactive video technology to take testimony from a person at another location," MCR 6.006(C) (emphasis added), the decision to do so is reviewed for an abuse of discretion. The use of the word "may" makes clear that the decision

is "a matter left to the discretion of the trial court," *Warda v Flushing City Council*, 472 Mich 326, 332; 696 NW2d 671 (2005), and discretionary decisions are reviewed for abuse of discretion, see *Detroit Tug & Wrecking Co v Gartner*, 75 Mich 360, 361; 42 NW 968 (1889). An abuse of discretion occurs when the trial court chooses an outcome falling outside the range of principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). In this case, in which both parties apparently consented to the use of video testimony, the trial court did not choose an outcome falling outside the range of principled outcomes by concluding that convenience, cost, and efficiency were sound reasons for using video testimony. That is, the trial court did not abuse its discretion by concluding that good cause for using video testimony was shown. Thus, MCR 6.006(C) was satisfied, and the use of video testimony was proper.

IV. CONCLUSION

This case presents two issues: (1) whether defendant's constitutional right to be confronted with the witnesses against him was violated by the admission of video testimony and (2) whether the admission of video testimony violated MCR 6.006(C). Because we conclude that defendant waived his right of confrontation under the United States and Michigan Constitutions and that the court rule was not violated, we reverse the Court of Appeals' judgment and remand to that Court for consideration of defendant's remaining issues.

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

HATHAWAY, J. (*concurring in the result*). I concur in the result only in this factually unique case.

CAVANAGH, J. (*dissenting*). I respectfully dissent and would affirm the judgment of the Court of Appeals, which vacated defendant's convictions and remanded for a new trial.

I would hold first that the public policies or state interests that the trial court relied on to justify allowing the two-way, interactive video testimony did not outweigh defendant's right of confrontation, as guaranteed by the United States and Michigan Constitutions. US Const, Am VI; Const 1963, art 1, § 20. Pursuant to *Maryland v Craig*, 497 US 836, 850, 852; 110 S Ct 3157; 111 L Ed 2d 666 (1990), a trial court may only employ a procedure that infringes on a defendant's right of confrontation if the court has made an individualized finding that the "denial of such confrontation is necessary to further an important public policy" or "important state interest."[1] On remand, the trial court in this case cited cost savings, efficiency, convenience of the witnesses, and avoiding delay as the public policies or state interests justifying the video testimony, yet failed to explain how these interests were important enough to outweigh defendant's right of confrontation. I would hold that cost savings, efficiency, convenience of the witnesses, and avoiding delay are not sufficiently important state interests to justify the abrogation of a defendant's right of confrontation.

In my view, the majority improperly avoids the aforementioned issue under *Craig* by concluding that defen-

[1] Because both Dr. Vincent Palusci and Rodney Wolfarth took the oath to testify truthfully, were subject to cross-examination, and could be observed by the jury when testifying, I agree that the use of the two-way, interactive video technology in this case implicates only the "physical presence" requirement of the Confrontation Clause. See *Craig*, 497 US at 845-846 (noting that the right of confrontation includes four elements: "physical presence, oath, cross-examination, and observation of demeanor by the trier of fact").

dant waived his right of confrontation through his attorney when the attorney stated, "I understand this is this particular courtroom's first attempt at this type of technological proceeding, and my client has--wanted to question the veracity of these proceedings, so I'll leave that to the Court's discretion."[2] Assuming arguendo that defense counsel's statement that she would leave the matter to the discretion of the trial court constituted an attorney's waiver, I disagree with the majority's conclusion that defense counsel's statement effected a valid waiver of defendant's right of confrontation. Rather, I would hold that there can be no effective waiver of that right by an attorney when the record clearly shows that the attorney's purported waiver was in direct contravention of the defendant's express objection. As the majority notes, defense counsel admitted on remand that her statement to the trial court that her client wanted "to question the veracity of these proceedings" was "[a]bsolutely" her expression of defendant's objection to the use of two-way video testimony. Defense counsel later admitted, however, that she never actually objected. Consistently with defense counsel's testimony, defendant testified on remand that he instructed his attorney to object and that she stood and made the "veracity of the proceedings" statement, but never used the word "object." Thus, it is clear that defendant objected, voiced his objection to his attorney, and instructed her to object, yet defense counsel failed to communicate a cognizable objection despite her client's instruction.

The majority acknowledges that an attorney cannot waive a client's core constitutional right of confronta-

[2] In my view, the meaning of this statement is so inscrutable that the trial court should have inquired further to determine whether defendant was objecting.

tion over the client's objection. Yet the majority's opinion condones an attorney's decision to make no cognizable objection, even though the attorney is aware that her client wishes to object. By holding that "the right of confrontation may be waived by defense counsel as long as the defendant does not object on the record," *ante* at 315, the majority essentially charges criminal defendants with the legal knowledge and skill of an attorney. Under the majority's new rule, when an attorney fails to voice a proper objection to a procedure that implicates a core constitutional right, the defendant will be required to know the legal basis for the objection, override his attorney, and make the objection on the record himself. It is the attorney's duty to object, not the client's. In my view, the majority opinion allows a defense attorney to waive a criminal defendant's right of confrontation despite the defendant's unequivocal objection to the attorney.

Additionally, while I agree with the majority opinion that the good-cause standard for use of two-way video testimony in MCR 6.006(C) is not synonymous with the *Craig* standard of "necessary to further an important public policy" or "state interest," I do not agree with the majority that defendant consented under MCR 6.006(C)(2). The same facts that support my conclusion that defendant did not waive his right of confrontation support my conclusion that defendant did not consent to the video testimony. Therefore, I would affirm the Court of Appeals' judgment and hold that the video testimony was not properly admitted under MCR 6.006(C).

Finally, I agree with the Court of Appeals that the error affected the outcome of the proceedings because the chain of evidence for the DNA could not have been established without the foundational testimony provided by Palusci and Wolfarth.

Therefore, I respectfully dissent and would affirm the Court of Appeals' decision to vacate defendant's convictions and sentences and remand for a new trial. The right of confrontation is too important for a court to condone an attorney's waiver or consent over the unequivocal objection of a criminal defendant.

MARILYN KELLY, J., concurred with CAVANAGH, J.

PEOPLE v COLE

Docket No. 143046. Argued March 6, 2012 (Calendar No. 3). Decided May 25, 2012.

David M. Cole pleaded no-contest in the Muskegon Circuit Court to two counts of second-degree criminal sexual conduct involving a victim under 13 years of age. The court, William C. Marietti, J., sentenced defendant, in accordance with an agreement reached under *People v Cobbs*, 443 Mich 276 (1993), to concurrent terms of 5 to 15 years in prison on each count. In addition, pursuant to MCL 750.520c(2)(b), the court ordered that defendant be placed on lifetime electronic monitoring following his release from prison. Defendant moved to amend the judgment of sentence or permit the withdrawal of his plea, arguing in part that the court's failure to advise him of the mandatory penalty of lifetime electronic monitoring rendered his plea involuntary. The court denied the motion. After granting defendant's delayed application for leave to appeal, the Court of Appeals, CAVANAGH, P.J., and STEPHENS, J. (RONAYNE KRAUSE, J., dissenting), concluded in an unpublished opinion per curiam, issued March 15, 2011 (Docket No. 298893), that mandatory lifetime electronic monitoring was not a collateral consequence of the plea or sentence but part of defendant's sentence itself and that because the trial court had not advised defendant that his sentence would include the monitoring, he had not entered a knowing, intelligent, and understanding plea. The Court of Appeals reversed the decision of the trial court and remanded the case to afford defendant an opportunity to withdraw his plea. The Supreme Court granted the prosecution's application for leave to appeal. 490 Mich 869 (2011).

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

At the time a defendant enters a guilty or no-contest plea to a charge of first- or second-degree criminal sexual conduct, if MCL 750.520b(2)(d) or MCL 750.520c(2)(b) mandates lifetime electronic monitoring, the trial court must inform the defendant that he or she will be subject to mandatory lifetime electronic monitoring if sentenced to prison.

1. Guilty and no-contest plea proceedings are governed by MCR 6.302. MCR 6.302(B) through (E) impose explicit requirements on trial courts conducting plea hearings, but the broader directive of MCR 6.302(A) that a plea must be understanding, voluntary, and accurate is premised on the requirements of constitutional due process, which might not be entirely satisfied by compliance with subrules (B) through (D).

2. For a plea to constitute an effective waiver of a defendant's constitutional rights, the Due Process Clause of the Fourteenth Amendment requires that the plea be voluntary and knowing. For the plea to be voluntary, the defendant must be fully aware of the direct consequences of the plea. The penalty to be imposed is a direct consequence of the plea. Thus, a defendant must be apprised of the sentence that he or she will be forced to serve. The plain text of the relevant statutes indicates that mandatory lifetime electronic monitoring is a part of the sentence. Thus, if mandatory lifetime electronic monitoring is required by MCL 750.520b(2)(d) or MCL 750.520c(2)(b) and a defendant is sentenced to prison, lifetime electronic monitoring is a direct consequence of a guilty or no-contest plea to a charge of first- or second-degree criminal sexual conduct, and due process requires that the trial court inform the defendant at the time of the plea hearing that he or she will be subject to lifetime electronic monitoring.

Affirmed and remanded to trial court to allow defendant the opportunity to withdraw his plea.

1. CRIMINAL LAW — PLEA PROCEEDINGS — PLEADING GUILTY OR NO CONTEST — DUE PROCESS — UNDERSTANDING, VOLUNTARY, AND ACCURATE PLEAS.

Guilty and no-contest plea proceedings are governed by MCR 6.302; subrules (B) through (E) impose explicit requirements on trial courts conducting plea hearings, but the broader directive of MCR 6.302(A) that a plea must be understanding, voluntary, and accurate is premised on the requirements of constitutional due process and might not be entirely satisfied by mere compliance with subrules (B) through (D) in specific cases.

2. SENTENCES — FIRST-DEGREE CRIMINAL SEXUAL CONDUCT — SECOND-DEGREE CRIMINAL SEXUAL CONDUCT INVOLVING A VICTIM UNDER AGE 13 AND A DEFENDANT 17 OR OLDER — LIFETIME ELECTRONIC MONITORING.

If mandatory lifetime electronic monitoring is required by the statutory provisions prescribing the punishment for first- or second-degree criminal sexual conduct and the defendant is sentenced to prison, lifetime electronic monitoring is a direct consequence of a guilty or no-contest plea to a charge of first- or second-degree criminal sexual conduct, and due process requires

> that the trial court inform the defendant at the time of the plea hearing that he or she will be subject to lifetime electronic monitoring (MCL 750.520b[2][d], MCL 750.520c[2][b], MCL 750.520n).

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Tony Tague*, Prosecuting Attorney, and *Charles F. Justian*, Chief Appellate Attorney, for the people.

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

Amici Curiae:

Miriam J. Aukerman, *Michael J. Steinberg*, *Kary L. Moss*, and *Cramer & Minock, PLC* (by *John R. Minock*), on behalf of the American Civil Liberties Union Fund of Michigan and the Criminal Defense Attorneys of Michigan.

CAVANAGH, J. This case requires us to determine whether MCR 6.302 and constitutional due process require a trial court to inform a defendant pleading guilty or no contest to first-degree criminal sexual conduct (CSC-I) or second-degree criminal sexual conduct (CSC-II) that he or she will be sentenced to mandatory lifetime electronic monitoring, if required by MCL 750.520b(2)(d) or MCL 750.520c(2)(b). We answer this question in the affirmative and hold that mandatory lifetime electronic monitoring is part of the sentence itself. Therefore, at the time a defendant enters a guilty or no-contest plea, the trial court must inform the defendant if he or she will be subject to mandatory lifetime electronic monitoring. In the absence of this information about a direct and automatic consequence of a defendant's decision to enter a plea and forgo his or her right to a trial, no defendant could

be said to have entered an understanding and voluntary plea. Accordingly, we affirm the judgment of the Court of Appeals on this issue.[1]

I. FACTS AND PROCEEDINGS

Defendant was charged with two counts of CSC-II under MCL 750.520c(1)(a), for sexual acts involving one of his stepdaughters, who was under the age of 13 at the time of the offenses. Pursuant to an evaluation under *People v Cobbs*, 443 Mich 276; 505 NW2d 208 (1993), the trial court agreed not to exceed a five-year minimum term of imprisonment for each charge, with the sentences to run concurrently.[2] At the June 2, 2009 plea hearing, the prosecution read both CSC-II counts and described them as being punishable by up to 15 years in prison and requiring mandatory testing for sexually transmitted diseases. Defendant indicated to the trial court that he understood the CSC-II charges and that he faced a maximum penalty of 15 years' imprisonment. The trial court stated that it had agreed to a five-year concurrent cap on the minimum sentence, but that it had made no other agreement with regard to the plea or the sentence. The trial court never informed defendant

[1] We also granted leave to appeal to examine whether information about mandatory lifetime electronic monitoring must be included in the terms of a sentence evaluation rendered by a trial court under *People v Cobbs*, 443 Mich 276; 505 NW2d 208 (1993). The Court of Appeals answered this question in the affirmative, as an alternative ground for the panel's decision to remand. Because of our resolution of the primary issue, we need not decide at this time whether a trial court must advise a defendant that his sentence will include mandatory lifetime electronic monitoring at the time the trial court renders a sentence evaluation under *Cobbs*.

[2] Defendant was also charged in a separate file with two counts of possessing child sexually abusive material and two counts of using a computer to commit a crime after police found child pornography on his computer. Defendant's no-contest plea was to all charges in both files, but only defendant's CSC-II convictions are at issue in this appeal.

that, if sentenced to prison, he would be subject to mandatory lifetime electronic monitoring.

On June 30, 2009, the trial court imposed concurrent sentences of 5 to 15 years on each count, in accordance with the *Cobbs* evaluation. In addition—and as required by MCL 750.520c(2)(b)—the court ordered that defendant be placed on lifetime electronic monitoring following his release from prison.[3]

Defendant moved to amend the judgment of sentence or permit withdrawal of his plea, arguing in part that the failure to advise him of the mandatory penalty of lifetime electronic monitoring rendered his plea involuntary. The trial court denied the motion, and defendant sought leave to appeal. In a split opinion, the Court of Appeals reversed the trial court and remanded to allow defendant the opportunity to withdraw his plea. *People v Cole*, unpublished opinion per curiam of the Court of Appeals, issued March 15, 2011 (Docket No. 298893). The majority held that mandatory lifetime monitoring was not a collateral consequence of the plea or sentence, but was part of the sentence itself. We granted the prosecution's application for leave to appeal. 490 Mich 869 (2011).

II. STANDARD OF REVIEW AND RULES OF STATUTORY INTERPRETATION

A trial court's decision on a motion to withdraw a plea is reviewed for an abuse of discretion. *People v*

[3] Subsection (2)(b) of the CSC-II statute, MCL 750.520c(2)(b), provides that, in addition to the prescribed term of imprisonment, "the court shall sentence the defendant to lifetime electronic monitoring under [MCL 750.520n] if the violation involved sexual contact committed by an individual 17 years of age or older against an individual less than 13 years of age." MCL 750.520n similarly provides that a defendant who commits CSC-I or CSC-II against a person under age 13 when the defendant was 17 or older must be sentenced to lifetime electronic monitoring and prescribes penalties for violations of the monitoring program.

Lang, 381 Mich 393, 398-399; 162 NW2d 143 (1968). The proper interpretation and application of a court rule is a question of law that is reviewed de novo. *Haliw v Sterling Hts*, 471 Mich 700, 704; 691 NW2d 753 (2005). To the extent that this case implicates constitutional issues, they are likewise reviewed de novo. *People v Armstrong*, 490 Mich 281, 289; 806 NW2d 676 (2011).

We also review de novo issues of statutory interpretation. *Klooster v City of Charlevoix*, 488 Mich 289, 295; 795 NW2d 578 (2011). Our primary task when interpreting statutes is to "give effect to the Legislature's intent, focusing first on the statute's plain language." *Id.* at 296. If the statutory language is unambiguous, we must conclude that the Legislature "intended the meaning clearly expressed" and "[n]o further judicial construction is required or permitted." *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999).

III. ANALYSIS

A. MCR 6.302

Guilty- and no-contest-plea proceedings are governed by MCR 6.302.[4] The first sentence of subrule (A) provides that a "court may not accept a plea of guilty or

[4] MCR 6.302 provides, in relevant part:

> (A) Plea Requirements. The court may not accept a plea of guilty or nolo contendere unless it is convinced that the plea is understanding, voluntary, and accurate. Before accepting a plea of guilty or nolo contendere, the court must place the defendant or defendants under oath and personally carry out subrules (B)-(E).
>
> (B) An Understanding Plea. Speaking directly to the defendant or defendants, the court must advise the defendant or defendants of the following and determine that each defendant understands:
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> * * *

nolo contendere unless it is convinced that the plea is understanding, voluntary, and accurate." MCR 6.302(A). The second sentence mandates that the court "place the defendant or defendants under oath and personally carry out subrules (B)-(E)." *Id.* Subrules (B) through (D), in turn, individually address the "understanding, voluntary, and accurate" requirements of subrule (A), and subrule (E) addresses "Additional Inquiries," including the requirement that the court ask the attorneys "whether the court has complied with subrules (B)-(D) . . . ."

The prosecution argues that a trial court's compliance with subrules (B) through (D) equates to full compliance with the "understanding, voluntary, and accurate" requirements of subrule (A). In regard to whether a trial court must inform a defendant at a plea hearing that he or she will be subject to mandatory lifetime electronic monitoring, the prosecution argues that because subrule (B)(2) only requires that the court inform the defendant of "the maximum possible prison sentence for the offense and any mandatory minimum sentence required by law," MCR 6.302(B)(2), the trial court did not err when it informed defendant at the plea hearing of only the statutory maximum term of imprisonment and the minimum term the court had previously agreed to, yet did not inform defendant that he would be subject to mandatory lifetime electronic monitoring.[5]

> (2) the maximum possible prison sentence for the offense and any mandatory minimum sentence required by law . . . .

[5] The prosecution reasonably argues that the use in MCR 6.302(B)(2) of the term "maximum possible prison sentence" means that "any mandatory minimum sentence required by law" refers only to a mandatory minimum *prison* sentence. Although it is not necessary to conclusively opine on the prosecution's argument, the mandatory lifetime electronic monitoring requirement of the CSC-I and CSC-II statutes could also

While we agree that MCR 6.302(B) through (E) constitute explicit requirements imposed on a trial court conducting a plea hearing, the broader directive of MCR 6.302(A) that the plea must be "understanding, voluntary, and accurate" might, in a given proceeding, encompass more than the explicit requirements of the remainder of the court rule. Specifically, the "understanding, voluntary, and accurate" components of subrule (A) are premised on the requirements of constitutional due process, which might not be entirely satisfied by compliance with subrules (B) through (D). Therefore, regardless of the explicit wording of the subrules, a court may be required by the Due Process Clause of the Fourteenth Amendment to inform a defendant that mandatory lifetime electronic monitoring is a consequence of his or her guilty or no-contest plea.

B. THE REQUIREMENTS OF CONSTITUTIONAL DUE PROCESS

A no-contest or a guilty plea constitutes a waiver of several constitutional rights, including the privilege against compulsory self-incrimination, the right to a trial by jury, and the right to confront one's accusers. *Boykin v Alabama*, 395 US 238, 243; 89 S Ct 1709; 23 L Ed 2d 274 (1969); *People v Jaworski*, 387 Mich 21, 28-29; 194 NW2d 868 (1972).[6] For a plea to constitute

reasonably be encompassed by the term "mandatory minimum sentence required by law." As explained further in this opinion, lifetime electronic monitoring is a "sentence" because the Legislature intended it to be an additional punishment. And because a trial court sentencing a defendant to prison has no discretion and must impose lifetime monitoring when required by the CSC-I or CSC-II statutes, it is also "mandatory" and "required by law." Finally, by requiring that defendants be subject to electronic monitoring for the rest of their lives, the electronic monitoring provisions include a durational component consistent with the use in MCR 6.302(B)(2) of the term "minimum."

[6] No-contest pleas are essentially admissions of all the elements of the charged offense and are treated the same as guilty pleas for purposes of

an effective waiver of these rights, the Due Process Clause of the Fourteenth Amendment requires that the plea be voluntary and knowing. *McCarthy v United States*, 394 US 459, 466; 89 S Ct 1166; 22 L Ed 2d 418 (1969); see also *North Carolina v Alford*, 400 US 25, 31; 91 S Ct 160; 27 L Ed 2d 162 (1970) (noting that a plea must be "a voluntary and intelligent choice among the alternative courses of action open to the defendant"). In *Brady v United States*, 397 US 742, 748; 90 S Ct 1463; 25 L Ed 2d 747 (1970), the United States Supreme Court held that "[w]aivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." In assessing voluntariness, the Court stated that a defendant entering a plea must be "fully aware of the direct consequences" of the plea. *Id.* at 755, quoting *Shelton v United States*, 246 F2d 571, 572 n 2 (CA 5, 1957) (citation and quotation marks omitted).

Given the difficulty of determining which of the numerous consequences of a conviction are encompassed within the meaning of "direct consequences," a distinction has developed in the post-*Brady* caselaw between "direct" and "collateral" consequences of a plea. See, e.g., *Meyer v Branker*, 506 F3d 358, 367-368 (CA 4, 2007) ("For a guilty plea to be constitutionally valid, a defendant must be made aware of all the direct, but not the collateral, consequences of his plea."); *Steele v Murphy*, 365 F3d 14, 17 (CA 1, 2004). While courts

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the case in which the no-contest plea is entered. See *Lott v United States*, 367 US 421, 426; 81 S Ct 1563; 6 L Ed 2d 940 (1961); *People v New*, 427 Mich 482, 493 n 10; 398 NW2d 358 (1986). Indeed, other than the means by which a court determines the accuracy of the plea under subrule (D)(2), MCR 6.302 recognizes no distinction between no-contest and guilty pleas for purposes of the plea hearing. Therefore, for purposes of this opinion, we discuss no-contest and guilty pleas synonymously.

have relied on different tests to distinguish direct from collateral consequences, the prevailing distinction relied on by a majority of courts "turns on whether the result represents a definite, immediate and largely automatic effect on the range of the defendant's punishment." *Cuthrell v Patuxent Institution Director*, 475 F2d 1364, 1366 (CA 4, 1973); see also Roberts, *The mythical divide between collateral and direct consequences of criminal convictions: Involuntary commitment of "sexually violent predators,"* 93 Minn L R 670, 689-693 (2008) (discussing the three main tests and listing relevant cases).

"The most obvious 'direct consequence' of a conviction is the penalty to be imposed. It is, therefore, well-recognized that the defendant must be apprised of the sentence that he will be forced to serve as the result of his guilty plea and conviction." *Blankenship v State*, 858 SW2d 897, 905 (Tenn, 1993). In determining whether a statute imposes punishment or is nonpunitive, the United States Supreme Court has applied a well-established framework:

> If the intention of the legislature was to impose punishment, that ends the inquiry. If, however, the intention was to enact a regulatory scheme that is civil and nonpunitive, we must further examine whether the statutory scheme is " 'so punitive either in purpose or effect as to negate [the State's] intention' to deem it 'civil.' " [*Smith v Doe*, 538 US 84, 92; 123 S Ct 1140; 155 L Ed 2d 164 (2003) (alteration in original; citations omitted).]

C. APPLICATION

While there is considerable debate about the exact placement of the dividing line between the collateral and direct consequences of a plea, see *Padilla v Kentucky*, 559 US 356, ___ n 8; 130 S Ct 1473, 1481 n 8; 176 L Ed 2d

284 (2010), we need not explore this oft-nuanced distinction because we agree with the Court of Appeals that mandatory lifetime electronic monitoring is *part of the sentence itself*. Because lifetime electronic monitoring is part of the sentence itself, it is a direct consequence of a guilty or no-contest plea to a charge of CSC-I—or CSC-II involving a victim under age 13 and a defendant 17 or older—when the defendant is sentenced to prison.[7]

Our conclusion that mandatory lifetime electronic monitoring is part of the sentence itself rests on the plain text of the relevant statutes. First, we note that our Legislature chose to include the mandatory lifetime electronic monitoring requirement in the penalty sections of the CSC-I and CSC-II statutes, and that both statutes can be found in the Michigan Penal Code, which describes criminal offenses and prescribes penalties.

Second, both electronic-monitoring provisions provide that "the court *shall sentence* the defendant to lifetime

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[7] As previously noted, MCL 750.520c(2)(b)—the provision setting forth the punishment for CSC-II—only requires mandatory lifetime electronic monitoring when the victim is under 13 years of age and the defendant is 17 or older. MCL 750.520b(2)(d)—the provision setting forth the punishment for CSC-I—appears, however, to require mandatory lifetime electronic monitoring for all defendants, regardless of the ages of the victim and the defendant. We recognize that a conflict may exist between the text of MCL 750.520b(2)(d) and MCL 750.520n(1), which arguably imposes the under-13 and 17-or-older age conditions on the lifetime electronic monitoring requirement of the CSC-I statute. However, we need not resolve the possible conflict at this time because the case before us does not involve a CSC-I charge and we recently remanded a case to the Court of Appeals for consideration as on leave granted to address this precise issue. See *People v Sword*, 490 Mich 871 (2011). It would be improvident for us to address this issue without the benefit of the Court of Appeals' resolution in *Sword*.

Pursuant to *People v Kern*, 288 Mich App 513, 522-523; 794 NW2d 362 (2010), only defendants sentenced to prison—not those sentenced to probation or jail—are subject to lifetime electronic monitoring.

electronic monitoring . . . ." MCL 750.520b(2)(d) and MCL 750.520c(2)(b) (emphasis added). The use of the directive "shall sentence" indicates that the Legislature intended to make lifetime electronic monitoring part of the sentence itself. Third, the CSC-II statute provides that the sentence of lifetime electronic monitoring is "[i]n addition to the penalty specified in subdivision (a)," MCL 750.520c(2)(b), and the CSC-I statute provides similarly that lifetime electronic monitoring is "[i]n addition to any other penalty imposed under subdivision (a) or (b)," MCL 750.520b(2)(d). The language "in addition to" indicates that the Legislature intended that lifetime electronic monitoring would itself be a penalty, in addition to the term of imprisonment imposed by the court.

Finally, our conclusion that the Legislature intended to make lifetime electronic monitoring a punishment and part of the sentence itself is reinforced by MCL 750.520n(1), which likewise includes the language "shall be sentenced," and MCL 791.285(1) and (2), which use the language "individuals . . . who are sentenced . . . to lifetime electronic monitoring" and "[a]n individual who is sentenced to lifetime electronic monitoring . . . ."[8]

Accordingly, a plain reading of the relevant statutory text compels our conclusion that the Legislature intended mandatory lifetime electronic monitoring to be an additional punishment and part of the sentence itself when required by the CSC-I or CSC-II statutes. Thus, under *Smith*'s framework, our analysis ends. *Smith*, 538 US at 92 ("If the intention of the legislature was to impose punishment, that ends the inquiry."). When a defendant pleads guilty or no-contest and is sentenced

[8] MCL 791.285 prescribes the duties of the Department of Corrections in establishing and administering the lifetime electronic monitoring program.

to prison for a charge of CSC-I or CSC-II, and the controlling statute mandates lifetime electronic monitoring, the sentence of mandatory lifetime electronic monitoring constitutes a result of the plea that has "a definite, immediate and largely automatic effect on the range of the defendant's punishment." *Cuthrell*, 475 F2d at 1366.

We hold, therefore, that mandatory lifetime electronic monitoring is a direct consequence of a plea. Accordingly, when the governing criminal statute mandates that a trial court sentence a defendant to lifetime electronic monitoring, due process requires the trial court to inform the defendant entering the plea that he or she will be subject to mandatory lifetime electronic monitoring. And because MCR 6.302 is premised on constitutional due-process requirements, a defendant who will be subject to mandatory lifetime electronic monitoring must be so advised by the trial court at the time of the plea hearing in order to satisfy the court rule's requirement that the plea be understanding and voluntary.

To hold otherwise would not only offend due process, but would be inconsonant with the practical rationale underlying the requirement that a plea be knowing and voluntary. When a defendant agrees to plead guilty, he or she is making a bargain, giving up trial rights in exchange for some perceived benefit. In order for a defendant to accurately assess the benefits of the bargain being considered, the defendant must be aware of the immediate consequences that will flow directly from his or her decision. Without information about a consequence of a sentence deemed by our Legislature to be punishment, which here entails having to wear a device and be electronically tracked "from the time the individual is released on parole or from prison until the

time of the individual's death," MCL 791.285(1)(a), it cannot be said that a defendant was aware of the critical information necessary to assess the bargain being considered.

IV. CONCLUSION

We hold that mandatory lifetime electronic monitoring for convictions of CSC-I and CSC-II is part of the sentence itself and is therefore a direct consequence of a defendant's guilty or no-contest plea. As a result, at the time a defendant enters a guilty or no-contest plea, the trial court must inform the defendant if he or she will be subject to lifetime electronic monitoring. Accordingly, we affirm the judgment of the Court of Appeals and remand this case to the trial court to allow defendant the opportunity to withdraw his plea.[9] We do not retain jurisdiction.

YOUNG, C.J., and MARILYN KELLY, MARKMAN, HATHAWAY, MARY BETH KELLY, and ZAHRA, JJ., concurred with CAVANAGH, J.

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[9] As stated in footnote 1 of this opinion, we decline to decide at this time whether information about mandatory lifetime electronic monitoring must be included in the terms of a sentence evaluation under *Cobbs*.

PEOPLE v LAIDLER

Docket Nos. 142442 and 142443. Argued December 7, 2011. Decided May 30, 2012.

Marteez D. Laidler was convicted of first-degree home invasion after a jury trial in the Wayne Circuit Court. Defendant and Dante Holmes had attempted to break into a home, but the home was occupied and the homeowner fatally shot Holmes. The court, Patricia Fresard, J., originally sentenced defendant to a prison term of 110 months to 20 years. After the court discovered that it had used an incorrect sentencing guidelines grid at defendant's original sentencing, defendant was resentenced to a lesser prison term of 48 months to 20 years. Defendant appealed both his conviction and his sentence. The Court of Appeals, BANDSTRA and MURRAY, JJ. (O'CONNELL, P.J., concurring in part and dissenting in part), affirmed defendant's conviction, but remanded for resentencing. 291 Mich App 199 (2010). The Court of Appeals reasoned that the trial court had improperly assessed 100 points under offense variable (OV) 3 (physical injury to a victim), MCL 777.33, because Holmes was not a victim of defendant's criminal activity; rather, the victim of the crime was the homeowner and he was not injured. The prosecution applied for leave to appeal. The Supreme Court ordered and heard oral argument on whether to grant the application or take other peremptory action. 489 Mich 903 (2011).

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

A coperpetrator of a crime is properly considered a "victim" for purposes of scoring OV 3 when he or she is harmed by the criminal actions of the charged party.

1. OV 3 considers physical injury to a victim and requires that 100 points be assessed when a victim was killed, the death resulted from the commission of a crime, and homicide is not the sentencing offense. Because OV 3 is defined as physical injury to a victim, it is manifest that a victim is required in all cases in which points are assessed for OV 3.

2. For the death to have resulted from the commission of a crime, the defendant's criminal actions must constitute a factual

cause of the death. The decisive question is, "but for" the defendant's commission of the crime, would the death have occurred? In this case, "but for" defendant's criminal actions—specifically, defendant's enabling Holmes to reach into the home being invaded—Holmes's death would not have occurred. The Court of Appeals erred by concluding otherwise. The fact that Holmes was shot by the homeowner was of little consequence in determining whether his death also resulted from defendant's conduct.

3. Pursuant to its common and relevant usage, the term "victim" means any person who is harmed by the defendant's criminal actions. Because Holmes was harmed by defendant's criminal actions, he was a "victim" for purposes of scoring OV 3. The trial court properly assessed 100 points under OV 3.

Reversed in part and sentence reinstated.

Justice CAVANAGH, joined by Justices MARILYN KELLY and HATHAWAY, dissenting, would have held that for purposes of scoring OV 3, a "victim" is any person other than the offender or a co-offender who was harmed by the offender's criminal actions. A victim is necessary in order to assess points for OV 3, and the term "victim" should not be limited to only the intended victim of the charged offense. A co-offender, however, is not a victim. Under the majority's analysis, an offender might be assessed points for his own injury. That result is inconsistent with the legislative intent as evidenced by the statutory language, which distinguishes between "a victim" and "the offender." The most applicable, commonly understood definition of "victim" is someone who is put to death or subjected to torture or suffering by another. Thus, because a "victim" is someone who suffers harm "by another," the "offender" cannot be a "victim."

SENTENCES — SENTENCING GUIDELINES — OFFENSE VARIABLE 3 — PHYSICAL INJURY TO VICTIM — FACTUAL CAUSE OF DEATH — PERPETRATOR AS VICTIM.

Offense variable (OV) 3 considers physical injury to a victim, and a victim is required in all cases in which points are assessed for OV 3; the term "victim" means any person who is harmed by the defendant's criminal actions, including a coperpetrator; 100 points must be assessed for OV 3 when a victim was killed, the death resulted from the commission of a crime, and homicide is not the sentencing offense; the defendant must have been the factual cause of the victim's death in order to assess 100 points for OV 3 (MCL 777.33).

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Kym L. Worthy*, Prosecuting Attor-

ney, *Timothy A. Baughman*, Chief of Research, Training, and Appeals, and *Toni Odette*, Assistant Prosecuting Attorney, for the people.

Jonathan B. D. Simon for defendant.

MARKMAN, J. The issue in this case is whether the death of a coperpetrator of a crime may be scored under offense variable (OV) 3, MCL 777.33, which concerns "physical injury to a victim." We conclude that a coperpetrator is properly considered a "victim" for purposes of OV 3 when he or she is harmed by the criminal actions of the charged party, in this case, defendant. Because we conclude that the coperpetrator's death constituted such a harm, we reverse in part the judgment of the Court of Appeals and reinstate defendant's sentence. The trial court properly assessed 100 points for OV 3 because the coperpetrator was harmed by the criminal actions of defendant.

I. FACTS AND HISTORY

During the early morning hours of May 5, 2009, defendant and Dante Holmes attempted to break into a home owned by Matthew Richmond. Upon hearing the sound of breaking glass, Richmond instructed another occupant of the home to call the police, and proceeded to arm himself. As he approached the room from which the sound had originated, Richmond saw the window shades moving and a hand extend inside the window. He fired two shots, and one of these hit Holmes. A police officer responding to the call placed by the other occupant found Holmes suffering from a gunshot wound, with defendant standing next to him. Defendant admitted that he had been with Holmes when Holmes broke into the home. Holmes died the same day as a result of his wound.

Defendant was charged with first-degree home invasion, MCL 750.110a(2), and tried before a jury. At trial, the prosecutor argued that defendant had boosted Holmes up to the window, which was six feet off the ground. Defendant was convicted as charged, and the trial court sentenced defendant to a prison term of 48 months to 20 years. In arriving at that sentence, the trial court assessed 100 points under OV 3 for "injury to a victim."

Defendant appealed, arguing that Holmes, his coperpetrator, should not be considered a "victim" for purposes of OV 3. Although it affirmed defendant's conviction, the Court of Appeals agreed with defendant that OV 3 had been improperly scored and remanded for resentencing. *People v Laidler*, 291 Mich App 199, 204; 804 NW2d 866 (2010). Judge O'CONNELL concurred with the majority's decision to affirm defendant's conviction, but dissented with regard to the scoring of OV 3 and would have also affirmed defendant's sentence. *Id.* at 205 (O'CONNELL, P.J., concurring in part and dissenting in part). The prosecutor sought leave to appeal and we ordered oral argument on the application for leave. *People v Laidler*, 489 Mich 903 (2011).

II. STANDARD OF REVIEW

The interpretation and application of the sentencing guidelines present questions of law that we review de novo. *People v Cannon*, 481 Mich 152, 156; 749 NW2d 257 (2008).

III. ANALYSIS

At issue is whether the death of a coperpetrator of a crime may be used to score OV 3. In this regard, MCL 777.33 provides in relevant part:

(1) Offense variable 3 is physical injury to a victim. Score offense variable 3 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:

(a) A victim was killed ..... 100 points

* * *

(2) All of the following apply to scoring offense variable 3:

* * *

(b) Score 100 points if death results from the commission of a crime and homicide is not the sentencing offense.

Accordingly, determining whether 100 points were properly assessed for OV 3 implicates three issues: (a) whether a "victim" is required, (b) whether the coperpetrator's death "resulted" from defendant's criminal actions, and (c) whether a coperpetrator can constitute a "victim."

A. REQUIREMENT OF A "VICTIM"

Because OV 3 is defined as "physical injury to a victim," it is manifest that a "victim" is required in all cases in which OV 3 is scored. Although MCL 777.33(2)(b) instructs the court to assess "100 points if death results from the commission of a crime and homicide is not the sentencing offense," that subdivision is part of subsection (2), which provides that "[a]ll of the following [including subdivision (b)] apply to scoring offense variable 3[.]" Therefore, MCL 777.33(2)(b) does not expand the scope of MCL 777.33 to permit OV 3 to be scored absent "physical injury to a victim."

The trial court, however, reasoned to the contrary:

"[I]t doesn't have to be the victim" who was killed to warrant [assessing 100 points under OV 3] . . . 100 points

> could be assessed whenever "someone died as a result of the commission of [the] crime," because subsection (2)(b) does not specifically refer to a victim. [*Laidler*, 291 Mich App at 202-203 (third alteration in original).]

This reasoning met with the following response from the Court of Appeals:

> [S]ubsection (2)(b) does not expand the applicability of this offense variable. Instead, it limits the offenses for which 100 points can be assessed. A 100-point score can only be imposed for non-homicide sentencing offenses where the death results from the commission of a crime. Neither of those limiting conditions can enlarge OV 3 so that it would authorize the imposition of points where there is no physical injury to a "victim" as required by subsection (1). [*Id.* at 203.]

We are in agreement with the Court of Appeals that the trial court incorrectly interpreted MCL 777.33(2)(b) to expand the scope of OV 3 beyond "injury to a victim." As we have indicated, we believe that the presence of a victim is a necessary condition to the assessment of points under OV 3.[1]

B. DEATH "RESULTING" FROM DEFENDANT'S CONDUCT

We also conclude that Holmes's death "resulted" from defendant's criminal actions. When a "victim was killed," MCL 777.33(2)(b) instructs the court to "[s]core 100 points if death *results* from the commission of a crime . . . ." (Emphasis added.) This language contem-

[1] This is true with regard to OV 3, not only when a victim has been "killed," MCL 777.33(1)(a) and (b), but also with regard to the other covered harms that might befall a victim and justify scoring under this variable, i.e., "[l]ife threatening or permanent incapacitating injury," MCL 777.33(1)(c), or other "[b]odily injury," MCL 777.33(1)(d) and (e). The introductory language of MCL 777.33(1) refers generally to a "victim," as does the specific language in each of its subdivisions (a) through (f), describing the range of covered harms.

plates factual causation, a conclusion supported by this Court's decision in *People v Schaefer*, 473 Mich 418, 439 n 67; 703 NW2d 774 (2005) (subsequently reversed on other grounds), in which we explained in the course of our interpretation of a former version of MCL 257.625(4) (operating a motor vehicle while under the influence of liquor and causing death) that "[h]ad the Legislature intended to require only factual causation and not proximate causation as well, the Legislature would have instead used the words '*results* in death' rather than '*causes* the death.' " Because the Legislature in MCL 777.33(2)(b) used the phrase "*results* from the commission of a crime," it is clear that the defendant's criminal actions must constitute a factual cause of a death for purposes of OV 3. "In determining whether a defendant's conduct is a factual cause of the result, one must ask, 'but for' the defendant's conduct, would the result have occurred?" *Id.* at 435-436 (citations omitted). Specifically, "but for" defendant's commission of a crime, would his coperpetrator's death have occurred?

The answer, in our judgment, is straightforward. But for defendant's commission of a crime, Holmes's death here would *not* have occurred. But for the instant criminal activity that defendant coperpetrated, and but for defendant's specific assistance in enabling his coperpetrator to reach into the window of the home being invaded, there would have been no need for the homeowner to respond to the invasion of his home, as he reasonably did, by exercising force in self-defense, in the defense of others, and in the defense of his property. That is, but for defendant's commission of a crime, his coperpetrator would not have been placed in the position in which he was shot and killed. We thus have no difficulty concluding that defendant's criminal actions

constituted a factual cause of Holmes's death and that his death "resulted" from defendant's criminal actions.

The Court of Appeals, in our judgment, incorrectly concluded otherwise in holding that

> the requirement of MCL 777.33(2)(b), that a death result from the commission of a crime, was not satisfied here. Even if Holmes might properly be considered a "victim," his death resulted from the actions of the homeowner, not from the commission of a crime. [*Laidler*, 291 Mich App at 203 n 2.]

However, the obvious fact that Holmes died of a wound caused by a gunshot from the homeowner is of little moment in determining whether his death may also be said to have resulted from defendant's conduct. There is nothing in MCL 777.33 that suggests that there may be only a single cause of a death. Cf. *Robinson v Detroit*, 462 Mich 439, 458-459; 613 NW2d 307 (2000) (holding that the use in a statute of the article "the" before "proximate cause" "clearly evinces an intent to focus on one cause"). In this case, MCL 777.33(2)(b) merely requires that a victim's death result from the commission of a crime. Thus, even if the homeowner's actions constituted the immediate, or most direct, cause of Holmes's death, defendant's criminal actions are not precluded from constituting *another* cause of death. As we have observed, but for defendant's commission of the instant crime, Holmes would never have been placed in a position of being shot at and killed by the homeowner. Defendant was therefore a factual cause of his coperpetrator's death.[2]

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[2] Even if proximate cause were required, defendant's actions would *still* satisfy such a requirement. "For a defendant's conduct to be regarded as a proximate cause, the victim's injury must be a 'direct and natural result' of the defendant's actions," and an intervening cause must not sever the causal link. *Schaefer*, 473 Mich at 436-437. "The

C. COPERPETRATOR AS A "VICTIM"

We finally conclude that coperpetrator Holmes was a "victim" for purposes of scoring OV 3.[3] MCL 777.33 does not define "victim," and this Court has never addressed the meaning of "victim" for the purposes of OV 3.[4] When interpreting a statute, all undefined "words and phrases shall be construed and understood according to the common and approved usage of the language[.]" MCL 8.3a. "To determine the ordinary meaning of undefined words in the statute, a court may consult a dictionary." *People v Tennyson*, 487 Mich 730, 738; 790 NW2d 354 (2010), citing *People v Stone*, 463 Mich 558, 563; 621 NW2d 702 (2001). One representative definition provides that a "victim" is "a person who suffers from a destructive or

standard by which to gauge whether an intervening cause supersedes, and thus severs the causal link, is generally one of reasonable foreseeability." *Id.* at 437. Here, Holmes's death was a direct and natural result of defendant's criminal action in seeking to invade a home. Criminal home invasion is a hostile and dangerous undertaking and can reasonably be anticipated to provoke an aggressive response by the homeowner. Such a response may properly include even the exercise of deadly force. See *People v Riddle*, 467 Mich 116, 134; 649 NW2d 30 (2002); CJI2d 7.16 (concerning the duty to retreat to avoid using deadly force).

[3] Our conclusion that Holmes was a "victim" is limited to the scoring of OV 3 under MCL 777.33. Though Holmes may be a victim for these purposes, we do not hold that he is a victim for the purposes of any other statute. Moreover, although he may have been victimized by defendant, he was not victimized by, or the victim of, the homeowner, who, unlike defendant, was not engaged in the commission of any crime when Holmes was shot and killed.

[4] Elsewhere in the Code of Criminal Procedure, other OV provisions address "victim." Specifically, OVs 1, 7, and 8 instruct the court to count "each person who was placed in danger of injury or loss of life as a victim." MCL 777.31(2)(a) (OV 1, aggravated use of a weapon); MCL 777.37(2) (OV 7, aggravated physical abuse); MCL 777.38(2)(a) (OV 8, victim asportation or captivity). Similarly, OV 9 instructs the court to count "each person who was placed in danger of *physical* injury or loss of life or property as a victim." MCL 777.39(2)(a) (OV 9, number of victims) (emphasis added). Contrary to the dissent's contention that we import OV 9's definition of "victim" into OV 3, we only refer to the foregoing provisions in order to underscore that these OVs define "victim," while OV 3 does not.

injurious action or agency[.]"[5] *Random House Webster's College Dictionary* (1997). Because OV 3 is concerned with criminal punishment, and because MCL 777.33(2)(b) instructs the court to "[s]core 100 points if death results from the commission of a crime," the injurious action must be criminal and the action must be that of the party whose punishment is at issue, in this case, defendant. Thus, pursuant to common, and relevant, usage, a "victim" is any person who is harmed by the defendant's criminal actions.

This understanding is consistent with the Court of Appeals' opinion in *People v Albers*, 258 Mich App 578, 593; 672 NW2d 336 (2003), which held that for purposes of OV 3, "the term 'victim' includes any person harmed by the criminal actions of the charged party." In *Albers*, the defendant was convicted of involuntary manslaughter after her young son set fire to their apartment, resulting in the death of a child in the building. The defendant was assessed 25 points under OV 3 for "[l]ife threatening or permanent incapacitating injury occurred to a victim," MCL 777.33(1)(c), because another child in the building was seriously injured in the fire. The defendant challenged that score, arguing that OV 3 only applies to the victim of the charged offense—manslaughter—and that the surviving child was not a victim specifically of the manslaughter. Rather, the defendant argued, the only victim of the manslaughter was

[5] While the dissent cites a definition of "victim" that requires the suffering to be caused "by another," *post* at 357 (emphasis omitted), it also acknowledges that "dictionaries provide other definitions . . . that could include one who suffers self-inflicted harm," *post* at 357, and indeed cites one such definition, see *post* at 357 n 2. The dictionary from which that definition was taken includes as an illustrative example, "*a victim of his own scheming*." *The American Heritage Dictionary of the English Language, New College Edition* (1981). In our judgment, the more general and relevant definition—cited herein—does not limit the source of harm and does not preclude self-inflicted harm.

the child who died. *Albers* rejected this argument and upheld the scoring of OV 3, stating that the child who was burned in the fire

> clearly was, in a fundamental sense, a victim of the conduct underlying defendant's conviction because he was seriously harmed as a result of the fire. . . .
>
> . . . [I]f the Legislature had intended to limit the application of OV 3 to the victim of the charged offense, it could have expressly included such a provision in the statute. . . . Because we find no authority indicating otherwise, we conclude that, for purposes of OV 3, the term "victim" includes any person harmed by the criminal actions of the charged party. [*Albers*, 258 Mich App at 592-593.]

For the reasons discussed, we adopt the *Albers* definition of "victim." Accordingly, in our judgment, Holmes was unequivocally a person "harmed by the criminal actions" of defendant and therefore constituted a "victim" for purposes of OV 3.[6]

In summary, we believe that to score OV 3 at 100 points, (a) a "victim" is required and (b) the defendant must have been a factual cause of the victim's death. We further believe (c) that a coperpetrator can constitute a "victim."

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[6] In this case, the Court of Appeals further determined that for the purposes of OV 3, a "victim" must be an expected victim of the charged offense. *Laidler*, 291 Mich App at 203 (concluding that the " 'victim' of the crime here was the homeowner" because the charged offense was home invasion). However, nothing in MCL 777.33, nor in any other relevant definition of "victim" of which we are aware, indicates that "victim" is so limited. Rather, *any person* harmed by the criminal actions of the defendant constitutes a victim. Moreover, if "victim" was so limited, innocent bystanders would be excluded as victims. For example, under the Court of Appeals' interpretation, if one of the homeowner's bullets had missed Holmes and injured an innocent bystander, that injury would not be considered an "injury to a victim," because innocent bystanders are not the *expected* victims of home invasion, either in terms of being occupants of the invaded home or being the perpetrators injured as a result of the reasonably anticipated conduct of a homeowner acting in self-defense.

IV. APPLICATION

In this case, Holmes was killed while committing a home invasion with defendant. But for defendant's commission of the crime, Holmes would not have been killed. Thus, defendant's conduct was a factual cause of Holmes's death. Because Holmes was killed as a result of the home invasion perpetrated jointly with defendant, he was clearly "harmed by the criminal actions" of defendant. *Albers*, 258 Mich App at 593. Therefore, he was a "victim" for purposes of OV 3. Accordingly, the trial court properly assessed 100 points for this variable.

V. RESPONSE TO THE DISSENT

In contrast to our definition of "victim," the dissent contends that a "victim" is "any person *other than the offender or a co-offender* who is harmed by the offender's criminal actions." *Post* at 358. The dissent argues that our definition "ignores the important distinction between a 'victim' and an 'offender' that is established by the language of OV 3." *Post* at 355. It concludes that because the language of MCL 777.33 refers to "a victim," "the offender," and "multiple offenders," it is implied that there is a distinction between "victims" and "offenders," such that the two groups are mutually exclusive. Although we respect the dissent's efforts to undertake a close reading of the statute, in our judgment its argument fails for three reasons.

First, that MCL 777.33 employs different terms does not suggest that "offenders" and "victims" are mutually exclusive. Indeed, the terms are never juxtaposed. The closest "offender" and "victim" come to being contrasted is through silent implication in MCL 777.33(2)(a), which provides:

> In multiple offender cases, if 1 offender is assessed points for death or physical injury, all offenders shall be assessed the same number of points.

Notably, this provision omits reference to a "victim." If the dissent were correct, we would expect the Legislature to have provided "points for death or physical injury *of a victim*." Yet it did not. That the Legislature never juxtaposed "victims" and "offenders" in the statute belies the dissent's conclusion that a victim and an offender "cannot be the same person." *Post* at 355.

Although the dissent is correct that we hold it is manifest that a victim is required in all cases in which OV 3 is scored, the dissent is incorrect that it flows from that holding that "offender" and "victim" are juxtaposed—let alone juxtaposed in such a way that a victim and an offender cannot be the same person. For these reasons, the dissent's contention that our interpretation is inconsistent with *Robinson v City of Lansing*, 486 Mich 1, 16; 782 NW2d 171 (2010), is unavailing. While we do not deny that "a victim is *implied* throughout MCL 777.33," *post* at 356, the dissent takes this implication several steps too far and concludes that the terms "are juxtaposed by implication," such that "victim" cannot include an "offender," *post* at 356. It is one thing to conclude, for the reasons set forth in part III(A) of this opinion, that the presence of a victim is a necessary condition to the scoring of points under OV 3. It is quite another, however, after adopting that conclusion, to read the term "victim" into MCL 777.33(2)(b), to opine that the terms "victim" and "offender" are set apart, to infer from this that the terms are somehow juxtaposed, to also infer that a victim and an offender cannot be the same person, and as a result to adopt a definition of "victim" that excludes offenders and co-offenders.

Second, the dissent contends that "[i]f the Legislature had intended for OV 3 to be scored when an offender or co-offender was killed or injured, it would have chosen to use the word 'person' rather than 'victim.' " *Post* at 356. The dissent asserts that OV 9 does just that by defining "victim" as "each *person* who was placed in danger of physical injury or loss of life or property . . . ."[7] MCL 777.39(2)(a) (emphasis added). However, the flaw in this argument is that OV 9 defines "victim," while OV 3 does not. Thus, the argument begs the question whether "victim" may include an "offender" for purposes of scoring OV 3. Precisely because OV 3 does not define "victim," we cannot read "person" into, or out of, that definition on the basis of different OV provisions that *do* define "victim."[8]

Third, the dissent argues that our definition of "victim" gives rise to a "paradoxical result," whereby an offender can be scored points for his own injury under OV 3. *Post* at 354-355. While the dissent is correct regarding this result, we do not think it renders our definition unreasonable or untenable. One purpose of criminal punishment is to hold individuals accountable for the fullest range of social harms they cause, and it is consistent with this purpose to consider *all* physical harms caused by the perpetrator. The state has a generalized interest in minimizing physical harms to all persons, and, all else being equal, the commission of a

[7] OVs 1, 7, and 8 also refer to "victims" as "each person." See footnote 4 of this opinion.

[8] The dissent claims that our analysis "imports into OV 3 the definition of 'victim' from OV 9." *Post* at 356. However, the preceding paragraph and footnote 4 of this opinion suggest otherwise. We distinguish OV 3 from OV 9 (as well as from OVs 1, 7, and 8) only because OV 3 does not define "victim," while the other OVs do. Accordingly, the dissent's reference to *People v Monaco*, 474 Mich 48, 58; 710 NW2d 46 (2006), is misplaced.

crime that results in physical harm, even when the harm is to the perpetrator himself, might be deemed more serious than the commission of the same crime that does not result in such harm. Although it would not be unreasonable for the Legislature to exclude harms caused to the perpetrator in the scoring of the offense variables, it is also not unreasonable to hold a perpetrator accountable for those harms.

VI. CONCLUSION

The issue here concerns whether the death of a coperpetrator of a crime may be scored under OV 3, MCL 777.33, which concerns "physical injury to a victim." We conclude that a coperpetrator is properly considered a "victim" for purposes of OV 3 when he or she is harmed by the criminal actions of the charged party, in this case defendant. Because we conclude that the coperpetrator's death constituted such a harm, we reverse in part the judgment of the Court of Appeals and reinstate defendant's sentence. The trial court properly assessed 100 points for OV 3 because the coperpetrator was harmed by the criminal actions of defendant.

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

CAVANAGH, J. (*dissenting*). I dissent from the majority's conclusion that the death of a co-offender permits scoring offense variable (OV) 3, MCL 777.33, for "physical injury to a victim." I would hold that a "victim" is any person other than the offender or a co-offender who is harmed by the offender's criminal actions for purposes of scoring OV 3.

Although I agree with the majority's conclusion that a "victim" is necessary in order to assess points for OV

3, and that a "victim" should not be limited to only the intended victim of the charged offense, I disagree with the majority that a co-offender can be considered a victim. In my view, the majority's interpretation is contrary to the legislative intent in enacting OV 3, particularly when taken to its logical conclusion.[1]

The majority concludes that, for purposes of scoring OV 3, "a 'victim' is any person who is harmed by the defendant's criminal actions." *Ante* at 348; see, also, *People v Albers*, 258 Mich App 578, 593; 672 NW2d 336 (2003). Although this simple definition may have initial appeal, problems emerge when it is considered in more detail and in conjunction with the other provisions found in OV 3.

To begin with, MCL 777.33(2)(a) requires that "[i]n multiple offender cases, if 1 offender is assessed points for death or physical injury, all offenders shall be assessed the same number of points." Thus, as the prosecution in this case conceded at oral argument, if defendant's co-offender had survived being shot by the homeowner and was subsequently convicted of home invasion, the co-offender would have had points assessed for OV 3 *for his own injury* because defendant had points assessed for OV 3.

This paradoxical result of the majority's overly broad interpretation of "victim" in OV 3 cannot be limited to multiple-offender cases. Rather, under the majority's analysis, even an offender in a single-offender case must have points assessed under OV 3 for injuries that the offender causes to himself. This is because OV 3 requires that a varying number of points be scored

[1] Because in my view a co-offender cannot be a victim for purposes of scoring OV 3, it is unnecessary to determine whether defendant's co-offender was "harmed by the criminal actions of the charged party." Accordingly, I will not address part III(B) of the majority opinion.

when a "[l]ife threatening or permanent incapacitating injury occurred to a victim," a "[b]odily injury requiring medical treatment occurred to a victim," or a "[b]odily injury not requiring medical treatment occurred to a victim." MCL 777.33(1)(c) through (e). Thus, because the majority defines "victim" to include *any person* harmed by the *criminal actions* of the charged party, a defendant could be assessed points for OV 3 if, for example, the defendant suffered a severe cut on a window that he broke in order to commit a home invasion. Specifically, the defendant would have, at a minimum, suffered a bodily injury and, because the majority determines that a victim includes "*any* person" that is "harmed by the criminal actions of the charged party," the defendant would be the victim of his own criminal action of breaking the window to complete the home invasion.

In my view, this result is inconsistent with the legislative intent as evidenced by the statutory language. Specifically, the majority's broad definition of "victim" ignores the important distinction between a "victim" and an "offender" that is established by the language of OV 3. Throughout OV 3, the statute refers to "a victim" and "the offender" or "multiple offenders." Thus, the statutory language strongly implies a distinction between "the victim" and "the offender"; they cannot be the same person. The majority contends that the Legislature did not intend to distinguish between "a victim" and "the offender" because the two are not directly juxtaposed within the statute and that if my interpretation were correct, the Legislature would have stated in MCL 777.33(2)(a) that points are to be assessed "for death or physical injury *of a victim*," rather than merely "for death or physical injury." However, as Justice MARKMAN wisely explained in *Robinson v City of Lansing*, 486 Mich 1, 16; 782 NW2d 171

(2010), "the Legislature is not required to be overly repetitive in its choice of language." Consistently with that premise, the majority correctly states that "it is manifest that a 'victim' is required in all cases in which OV 3 is scored." *Ante* at 343. Accordingly, the majority correctly concludes that it was unnecessary for the Legislature to refer to "the victim" in MCL 777.33(2)(b) because "a victim" is a "necessary condition to the assessment of points under OV 3." *Ante* at 344. However, the majority fails to realize that this analysis is equally applicable throughout MCL 777.33(2) because the term "the victim" is implied in all the subdivisions of subsection (2), including subdivision (a). Thus, although "the victim" and "the offender" are never *directly* juxtaposed in the express language of the statute, because the need for a victim is *implied* throughout MCL 777.33, "the victim" and "the offender" are juxtaposed by implication.

If the Legislature had intended for OV 3 to be scored when an offender or co-offender was killed or injured, it would have chosen to use the word "person" rather than "victim." For example, OV 9 instructs the court to "[c]ount *each person* who was placed in danger of physical injury or loss of life or property *as a victim*." MCL 777.39(2)(a) (emphasis added). Accordingly, because OV 9 defines "victim" as "each *person*" affected by a defendant's conduct, the definition of "victim" in OV 9 could include a co-offender. OV 3, however, never uses the word "person" in relation to "victim." Rather, as previously discussed, OV 3 carefully distinguishes between the "offender" or "co-offender" and the "victim." The majority's analysis, however, essentially imports into OV 3 the definition of "victim" from OV 9. See *ante* at 348-349. As a result, the majority fails to give the different language used in the two OVs meaning, contrary to the rules of statutory interpretation.

See *People v Monaco*, 474 Mich 48, 58; 710 NW2d 46 (2006) ("Courts cannot assume that the Legislature inadvertently omitted from one statute the language that it placed in another statute . . . .") (quotation marks and citation omitted).

Although dictionaries provide other definitions of "victim" that could include one who suffers self-inflicted harm,[2] those definitions are not the most applicable in the context of OV 3, given the distinction OV 3 creates between a "victim" and the "offender." Instead, when "victim" is interpreted in context with the remainder of OV 3, the most applicable, commonly understood definition is "[s]omeone who is put to death or subjected to torture or suffering *by another*," i.e., the offender. *The American Heritage Dictionary of the English Language, New College Edition* (1981) (emphasis added).

Finally, the majority's reliance on the broad policy considerations supporting criminal punishment in order to conclude that its result is "reasonable" is not persuasive. Regardless of whether the majority's result may be subjectively reasonable to some, its result is contrary to the Legislature's intent as communicated by the plain language of OV 3, and thus runs afoul of this Court's primary goal when engaging in statutory interpretation. *Klooster v City of Charlevoix*, 488 Mich 289, 296; 795 NW2d 578 (2011) ("The primary goal of statutory interpretation is to give effect to the Legislature's intent, focusing first on the statute's plain language.") (citation omitted).

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[2] See, e.g., *The American Heritage Dictionary of the English Language, New College Edition* (1981) (alternatively defining "victim" as "[a] person who suffers injury, loss, or death as a result of a voluntary undertaking").

Therefore, while I agree with the majority's conclusion that, for purposes of OV 3, "victim" should not be limited to only the intended victim of the charged offense, I would hold that a victim is any person *other than the offender or a co-offender* who is harmed by the offender's criminal actions.

Accordingly, I would affirm the Court of Appeals' result.

MARILYN KELLY and HATHAWAY, JJ., concurred with CAVANAGH, J.

DeFRAIN v STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

Docket No. 142956. Argued January 12, 2012. Decided May 30, 2012.

Nancy J. DeFrain, personal representative of the estate of William DeFrain, deceased, brought an action in the Wayne Circuit Court against State Farm Mutual Automobile Insurance Company, seeking uninsured-motorist coverage through an insurance policy with State Farm for injuries William received when, while a pedestrian, he was struck by a hit-and-run driver. The accident occurred on May 31, 2008. William notified State Farm of the accident on August 25, 2008. On November 11, 2008, William died as a result of his injuries. State Farm brought a motion for summary disposition, alleging that it was relieved from contractual liability under the policy because of William's failure to timely comply with the provision in the policy that required an insured to report an accident involving a hit-and-run motor vehicle to State Farm within 30 days of the accident. The court, Gershwin A. Drain, J., denied the motion for summary disposition on the basis that State Farm had failed to show prejudice resulting from William's failure to comply with the notice provision. State Farm appealed by leave granted. The Court of Appeals, MURPHY, C.J., and STEPHENS and M. J. KELLY, JJ., affirmed, concluding that an insurer that seeks to cut off responsibility on the ground that its insured failed to comply with a contractual provision requiring notice within 30 days must establish actual prejudice to its position. 291 Mich App 713 (2011). State Farm applied for leave to appeal. The Supreme Court ordered and heard oral argument on whether to grant the application or take other peremptory action. 490 Mich 870 (2011).

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

An unambiguous notice-of-claim provision in an insurance contract setting forth a specified period within which notice of a claim must be provided to the insurer is enforceable without a showing that the failure to comply with the provision prejudiced the insurer.

1. An order of the Michigan Supreme Court is binding precedent if it constitutes a final disposition of an application for leave to appeal and contains a concise statement of the applicable facts and reasons for the decision. These requirements can be satisfied by an order referring to another opinion. In *Jackson v State Farm Mut Auto Ins Co*, 472 Mich 942 (2005), the Supreme Court issued an order vacating the judgment of the Court of Appeals for the reasons stated in the Court of Appeals dissent. That case addressed a notice-of-claim provision virtually identical to the provision in the policy at issue in this case. The Court of Appeals dissent in *Jackson* set forth the facts and analysis necessary to dispose of the matter and concluded that the notice-of-claim provision was unambiguous and enforceable without a showing of prejudice to the insurer. By referring to the Court of Appeals dissent in *Jackson*, the Supreme Court adopted the applicable facts and reasons supplied by the dissenting judge. Because the Supreme Court's order in *Jackson* thus contained a concise statement of the applicable facts and reasons for the decision and was a final disposition of an application, it was binding precedent and the Court of Appeals erred by disregarding it in this case.

2. An unambiguous contractual provision must be enforced as written unless the provision would violate law or public policy or a traditional defense to the provision's enforcement exists. A lack of prejudice is not among the traditional defenses to enforcement of a contractual provision, and plaintiff failed to establish that enforcement of the notice-of-claim provision violated law or public policy.

3. *Koski v Allstate Ins Co*, 456 Mich 439 (1998), which imposed a prejudice requirement only on the enforcement of temporally imprecise contractual provisions requiring notice immediately or within a reasonable time, was distinguishable given that this case involved a clear time limit for notice.

4. Because uninsured-motorist coverage is optional and not statutorily mandated under the no-fault act, the policy language alone controls the circumstances entitling a claimant to an award of benefits. The unambiguous notice-of-claim provision at issue in this case was enforceable without a showing that the failure to comply with the provision prejudiced the insurer. When a court abrogates unambiguous contractual provisions on the basis of its own assessment of reasonableness, the court undermines the parties' freedom of contract. The Court of Appeals erred by affirming the trial court's denial of State Farm's motion for

summary disposition. State Farm was entitled to summary disposition because a condition precedent to the policy's enforcement had not been satisfied.

Reversed and remanded for entry of summary disposition in favor of State Farm.

Justice CAVANAGH, joined by Justices MARILYN KELLY and HATHAWAY, dissenting, agreed with the Court of Appeals that *Koski* was controlling and would have held that an insurer that seeks to relieve itself from responsibility on the ground that its insured did not strictly comply with a contractual notice provision must establish actual prejudice to its position. Because defendant failed to explain how it was prejudiced by plaintiff's untimely notice, the judgment of the Court of Appeals should have been affirmed. There was no persuasive reason to conclude that *Koski* should not apply simply because this case involved a specific notice period rather than a temporally imprecise notice period. The purpose of requiring notice is to give the insurance company knowledge of the accident so that it can protect itself from prejudice. It follows that if the insurance company has not been prejudiced by untimely notice, there is no rationale for enforcing the provision. An insurance policy, while in the form of a contract, is actually a product prepared and packaged by the insurer. The majority's analysis concerning freedom of contract ignores the reality of how insurance contracts come into existence and encourages insurers to include technical escape hatches to preclude coverage at the expense of unwary injured citizens.

1. COURTS — ORDERS OF THE SUPREME COURT- BINDING PRECEDENT.

An order of the Michigan Supreme Court is binding precedent if it constitutes a final disposition of an application for leave to appeal and contains a concise statement of the applicable facts and reasons for the decision; these requirements can be satisfied by referring in the order to another opinion (Const 1963, art 6, § 6).

2. INSURANCE — UNINSURED-MOTORIST BENEFITS — NOTICE-OF-CLAIM PROVISIONS — PREJUDICE.

Because uninsured-motorist coverage is optional and not statutorily mandated, the policy language alone controls the circumstances entitling a claimant to an award of benefits; an unambiguous notice-of-claim provision requiring notice of the claim to the insurer within a specific period as a condition precedent to the provision of uninsured-motorist benefits is enforceable without a showing that the insured's failure to comply with the provision prejudiced the insurer.

Drazin & Associates (by *Robert S. Drazin*) and *Leonard B. Schwartz* for plaintiff.

Conlin, McKenney & Philbrick, P.C. (by *Andrew D. Sugerman* and *W. Daniel Troyka*), for defendant.

ZAHRA, J. This case involves a policy for uninsured-motorist (UM) coverage issued by defendant, State Farm Mutual Automobile Insurance Company, containing a 30-day notice provision regarding hit-and-run motor vehicle claims. We hold that an unambiguous notice-of-claim provision setting forth a specified period within which notice must be provided is enforceable without a showing that the failure to comply with the provision prejudiced the insurer. Therefore, State Farm properly denied the claim for UM benefits sought in the instant case because it did not receive timely notice, a condition precedent to the policy's enforcement. This conclusion is consistent with our decisions in *Jackson v State Farm Mutual Automobile Insurance Company*[1] and *Rory v Continental Insurance Company*,[2] both of which the Court of Appeals was bound to follow. The Court of Appeals erred by disregarding this controlling authority in favor of an earlier decision, *Koski v Allstate Insurance Company*,[3] wherein this Court held that a claimant's failure to comply with a notice-of-suit provision contained in a homeowner's insurance policy requiring notice immediately or within a reasonable time precluded an award of UM benefits only if the insurer established actual prejudice to its position. The Court of Appeals failed to recognize the critical ways in which *Koski* is distinguishable from the instant case. Accordingly, we reverse the judgment of the Court of Appeals

[1] *Jackson v State Farm Mut Auto Ins Co*, 472 Mich 942 (2005).

[2] *Rory v Continental Ins Co*, 473 Mich 457; 703 NW2d 23 (2005).

[3] *Koski v Allstate Ins Co*, 456 Mich 439, 444; 572 NW2d 636 (1998).

and remand the case to the trial court for entry of summary disposition in favor of State Farm.

I. FACTS AND PROCEDURAL HISTORY

On May 31, 2008, a hit-and-run driver ran his vehicle into a pedestrian, William DeFrain (DeFrain), who sustained severe head injuries as a result of the collision. At the time, DeFrain maintained an insurance policy for UM coverage with State Farm. The policy required a claimant to notify State Farm of a claim for UM benefits and provide "all the details about the death, injury, treatment, and other information that [State Farm] may need *as soon as reasonably possible* after the injured insured is first examined or treated for the injury."[4] The policy also contained a provision pertaining specifically to hit-and-run accidents, requiring a claimant seeking UM benefits to report the accident "to the police within 24 hours and to [State Farm] within 30 days[.]" It is undisputed that State Farm did not receive notice that DeFrain had been the victim of a hit-and-run accident until August 25, 2008, which was after the 30-day notice period had lapsed.

DeFrain filed a complaint seeking UM benefits on October 8, 2008. Tragically, DeFrain died from his injuries on November 11, 2008, at which time plaintiff Nancy DeFrain (plaintiff) became the personal representative of his estate. On March 30, 2009, plaintiff filed an amended complaint. State Farm moved for summary disposition on July 15, 2009, arguing that the failure to comply with the 30-day notice provision applicable to hit-and-run cases required dismissal of plaintiff's complaint. State Farm relied on this Court's order in *Jackson*, which had vacated the judgment of the Court

[4] Emphasis altered.

of Appeals and reinstated the order of the trial court "for the reasons stated in the Court of Appeals dissent" in a case addressing a notice-of-claim provision virtually identical to the provision in the instant policy.[5] Specifically, the Court of Appeals dissent in *Jackson* had concluded that the notice-of-claim provision was unambiguous and enforceable without a showing of prejudice to the insurer.

Despite *Jackson*, plaintiff maintained that the notice-of-claim provision in the instant policy was ambiguous regarding when and from whom notice was required and was enforceable only upon a showing that the failure to comply with the provision prejudiced State Farm. The trial court agreed with plaintiff. It denied State Farm's motion for summary disposition because it concluded that the 30-day notice provision contained an ambiguity and there was no evidence that the failure to comply with the provision prejudiced State Farm.

State Farm filed an interlocutory application for leave to appeal in the Court of Appeals, as well as a motion for preemptory reversal, again relying on this Court's order in *Jackson*. The Court of Appeals granted the application and subsequently stayed further proceedings.

The Court of Appeals issued an opinion affirming the trial court's order denying State Farm's motion for summary disposition.[6] According to the panel, the 30-day notice provision did not preclude plaintiff's claim because there had been no showing that the failure to comply with the provision prejudiced State Farm.[7] Al-

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[5] *Jackson*, 472 Mich 942.

[6] *DeFrain v State Farm Mut Auto Ins Co*, 291 Mich App 713; 809 NW2d 601 (2011).

[7] *Id*. at 715-719.

though the panel acknowledged that this Court had rejected the prejudice requirement by order in *Jackson*, it relied on an earlier opinion, *Koski*, wherein this Court held that "an insurer who seeks to cut off responsibility on the ground that its insured did not comply with a contract provision requiring notice immediately or within a reasonable time *must establish actual prejudice to its position*."[8] Despite its recognition that "*Jackson* squarely stands in direct conflict with *Koski*,"[9] the Court of Appeals stated, "We find that *Jackson* is of questionable and limited value because it did not address *Koski*, which apparently was not argued there, and which constitutes binding precedent that we are not free to disregard."[10] It described *Koski* as "a fully developed and reasoned opinion on the subject of prejudice in the context of insurance law" and *Jackson* as "merely a cursory order."[11]

The panel also relied on the Court of Appeals' decision in *Bradley v State Farm Mutual Automobile Insurance Company*,[12] which had applied the prejudice requirement from *Koski* to conclude that the plaintiff's failure to comply with an insurance policy's joinder provision did not preclude an award of UM benefits. Although acknowledging *Rory* and the axiom that unambiguous contract provisions must be enforced as written, the *Bradley* panel took the position that "*Koski* carved out a narrow prejudice requirement relative to all insurance contracts, and *Rory* did not overrule the Supreme Court's earlier ruling in *Koski*, which we find

[8] *Koski*, 456 Mich at 444 (emphasis added).

[9] *DeFrain*, 291 Mich App at 717.

[10] *Id.* at 718.

[11] *Id*.

[12] *Bradley v State Farm Mut Auto Ins Co*, 290 Mich App 156; 810 NW2d 386 (2010).

controlling."[13] Relying on *Bradley*, the instant Court of Appeals panel stated, "Regardless of the order in *Jackson*, *Koski* demands that we affirm the trial court's order denying State Farm's motion for summary disposition."[14] The panel did not address whether the trial court erred by finding the notice provision ambiguous and affirmed solely on the basis that State Farm had failed to show that it suffered prejudice because of the claimant's failure to provide timely notice.[15]

State Farm applied for leave to appeal in this Court, seeking reversal of the Court of Appeals' decision and a remand to the trial court for dismissal of plaintiff's claim with prejudice. We ordered oral argument on whether to grant the application or take other action and instructed the parties to "address whether this case is controlled by *Jackson* . . . and whether the 30-day notice requirement regarding hit-and-run accidents in [State Farm's] policy is enforceable without a showing of prejudice to [State Farm] due to the claimant's failure to comply with the provision."[16]

II. STANDARD OF REVIEW

A trial court's decision on a motion for summary disposition is reviewed de novo.[17] In reviewing the motion, we view the pleadings, affidavits, depositions, admissions, and other admissible evidence in the light most favorable to the nonmoving party.[18] In addition, the proper interpretation of contracts and the legal

[13] *Id*. at 161.

[14] *DeFrain*, 291 Mich App at 719.

[15] *Id.* at 715-716.

[16] *DeFrain v State Farm Mut Auto Ins Co*, 490 Mich 870 (2011).

[17] *Rory*, 473 Mich at 464.

[18] *Id*.

effect of contractual provisions are questions of law subject to review de novo.[19] We construe an insurance policy in the same manner as any other species of contract,[20] giving its terms their "ordinary and plain meaning if such would be apparent to a reader of the instrument."[21]

III. ANALYSIS

The Court of Appeals' decision in this case necessitates clarification in the area of contract interpretation. The instant case requires us to interpret a policy for UM coverage issued by State Farm that includes a 30-day notice provision regarding hit-and-run motor vehicle claims.[22] Because providing UM coverage is optional and not statutorily mandated under the no-fault act, the policy language alone controls the circumstances entitling a claimant to an award of benefits.[23] Having reviewed the language of the instant policy, as well as the relevant authority, we hold that an unambiguous notice-of-claim provision setting forth a speci-

[19] *McDonald v Farm Bureau Ins Co*, 480 Mich 191, 197; 747 NW2d 811 (2008).

[20] *Rory*, 473 Mich at 461; *Auto-Owners Ins Co v Churchman*, 440 Mich 560, 566; 489 NW2d 431 (1992).

[21] *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 47; 664 NW2d 776 (2003).

[22] The policy also contains a more general provision requiring a claimant to notify State Farm of a claim for UM benefits and provide details concerning the incident "as soon as reasonably possible." The settled rule regarding statutory construction is that a specific statutory provision controls over a related but more general statutory provision. *In re Haley*, 476 Mich 180, 198; 720 NW2d 246 (2006). The same is true with regard to contract provisions. Because plaintiff is seeking benefits in connection with a hit-and-run accident, the specific provision pertaining to hit-and-run accidents that requires notice to State Farm within 30 days is controlling.

[23] *Rohlman v Hawkeye-Security Ins Co*, 442 Mich 520, 525; 502 NW2d 310 (1993).

fied time within which notice must be provided is enforceable without a showing that the failure to comply with the provision prejudiced the insurer. In reading a prejudice requirement into the notice provision where none existed, the Court of Appeals disregarded controlling authority laid down by this Court and frustrated the parties' right to contract freely.

A. *JACKSON v STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY* IS INDISTINGUISHABLE FROM THIS CASE

We begin our analysis with *Jackson*, a case involving a policy for UM coverage containing a provision requiring a claimant to report a hit-and-run accident to State Farm within 30 days as a condition precedent to the receipt of benefits, which is virtually identical to the provision in the instant policy.[24] As in this case, the parties in *Jackson* did not dispute the complainant's failure to provide timely notice. The Court of Appeals majority determined that the notice provision was unenforceable because it contained an ambiguity regarding who was responsible for providing the notice.[25] Accordingly, the majority found it unnecessary to address whether the notice provision was enforceable if State Farm could not prove actual prejudice.[26] Judge RICHARD ALLEN GRIFFIN dissented. Having first concluded that the notice provision contained no ambiguity, he rejected the argument that the notice provision was enforceable only if State Farm could prove actual

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[24] *Jackson v State Farm Mut Auto Ins Co*, unpublished opinion per curiam of the Court of Appeals, issued October 5, 2004 (Docket No. 246388). The policy in *Jackson* required a "person making [a] claim" under the UM coverage to "report a 'hit-and-run' accident to the police within 24-hours and to us within 30 days." *Id*. at 2-3 (emphasis omitted).

[25] *Id*. at 4.

[26] *Id*.

prejudice.[27] In his view, the plain and unambiguous terms of the contract precluded the claimant's request for UM benefits because she had failed to provide timely notice, a condition precedent to the contract's enforcement.[28] Subsequently, this Court issued an order vacating the judgment of the Court of Appeals and reinstating the order of the trial court "for the reasons stated in the Court of Appeals dissent."[29]

An order of this Court is binding precedent if it constitutes a final disposition of an application and contains a concise statement of the applicable facts and reasons for the decision.[30] These requirements derive from article 6, § 6, of our 1963 Constitution[31] and can be satisfied by referring to another opinion.[32] With regard to this Court's order in *Jackson*, the Court of Appeals dissent set forth the facts and legal analysis necessary to support the final disposition of the application. By referring to the Court of Appeals dissent, this Court adopted the applicable facts and reasons supplied by the dissenting judge as if they were its own. The order's reference to the Court of Appeals dissent was straightforward and clear, and the instant Court of Appeals panel had no difficulty understanding the order's direc-

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[27] *Id*. at 1-4 (GRIFFIN, J., dissenting).

[28] *Id*. at 4.

[29] *Jackson*, 472 Mich 942.

[30] *People v Crall*, 444 Mich 463, 464 n 8; 510 NW2d 182 (1993); *Dykes v William Beaumont Hosp*, 246 Mich App 471, 483; 633 NW2d 440 (2001).

[31] Const 1963, art 6, § 6 provides:

> Decisions of the supreme court, including all decisions on prerogative writs, shall be in writing and shall contain a concise statement of the facts and reasons for each decision and reasons for each denial of leave to appeal. When a judge dissents in whole or in part he shall give in writing the reasons for his dissent.

[32] See *Wechsler v Wayne Co Rd Comm*, 215 Mich App 579, 591 n 8; 546 NW2d 690 (1996), remanded on other grounds 455 Mich 863 (1997).

tive. Indeed, the Court of Appeals panel acknowledged that this Court's order in *Jackson* rejected a prejudice requirement because the "30-day hit-and-run notice provision was a condition precedent to liability" and liability was a matter of "contractual interpretation and not statutory obligations . . . ."[33] Because this Court's order in *Jackson* contained a concise statement of the facts and reasons supporting its decision and was a final disposition of an application, it constitutes binding precedent, and the Court of Appeals was not free to disregard the order in favor of an earlier opinion that it believed stood in direct conflict with *Jackson*.[34]

Having stated its belief that the *Jackson* order conflicted with an earlier opinion, the Court of Appeals erred by reasoning that it "should give more weight to a Supreme Court opinion than to a Supreme Court order" and that this proposition was somehow "reflected in how the Supreme Court itself has at times treated its own orders."[35] In support of this erroneous proposition, the instant panel relied on *Mullins v St Joseph Mercy Hospital*.[36] In *Mullins*, this Court did not give *Waltz v Wyse*[37] full retroactive effect[38] despite the fact that this Court had previously directed the Court of Appeals to give *Waltz* full retroactive effect in three consecutive orders.[39] While the Court of Appeals panel in the instant case was correct in its description of this

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[33] *DeFrain*, 291 Mich App at 717.

[34] As explained later in this opinion, the dissent in *Jackson*, which was ultimately adopted by this Court, merely distinguished *Koski* and cannot be interpreted as overruling *Koski*.

[35] *DeFrain*, 291 Mich App at 718.

[36] *Mullins v St Joseph Mercy Hosp*, 480 Mich 948 (2007).

[37] *Waltz v Wyse*, 469 Mich 642; 677 NW2d 813 (2004).

[38] *Mullins v St Joseph Mercy Hosp*, 480 Mich 948.

[39] *Wyatt v Oakwood Hosp & Med Ctrs*, 472 Mich 929 (2005); *Evans v Hallal*, 472 Mich 929 (2005); *Forsyth v Hopper*, 472 Mich 929 (2005).

Court's action in *Mullins*,[40] the panel failed to consider its own limited authority as an intermediate appellate court. Although *this Court* has the authority to recant its positions, which it exercises only with great caution, an intermediate appellate court does not share that authority. Put simply, "how the Supreme Court itself has at times treated its own orders" neither reflects nor informs how the Court of Appeals should treat Supreme Court orders.[41] As explained previously, an order of this Court is binding precedent on the Court of Appeals if it constitutes a final disposition of an application and contains a concise statement of the applicable facts and reasons for the decision.[42]

B. *RORY v CONTINENTAL INSURANCE COMPANY* GUIDES THE INTERPRETATION OF INSURANCE CONTRACTS

In addition to disregarding this Court's order in *Jackson*, the Court of Appeals also erred by failing to treat this Court's opinion in *Rory* as controlling. In *Rory*, the plaintiffs sought UM benefits pursuant to an automobile insurance policy with the defendant.[43] The defendant denied the claim because it had not been filed within one year after the accident, as the policy required.[44] The plaintiffs filed suit, contesting the denial of their claim.[45] The defendant moved for summary

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[40] This Court did, in fact, carve out part of *Waltz*'s retroactive effect after having issued three orders directing the Court of Appeals to give *Waltz* full retroactive effect. In *Waltz*, 469 Mich at 653-655, we expressly acknowledged that we had made a mistake in *Omelenchuk v City of Warren*, 461 Mich 567; 609 NW2d 177 (2000), which admission completely explains why we decided in *Mullins* not to give *Waltz* full retroactive effect.

[41] *DeFrain*, 291 Mich App at 718.

[42] *Crall*, 444 Mich at 464 n 8; *Dykes*, 246 Mich App at 483.

[43] *Rory*, 473 Mich at 461-462.

[44] *Id*. at 462.

[45] *Id*.

disposition, citing the provision in the policy precluding coverage of claims brought more than one year after the accident.[46] The trial court denied the defendant's motion, in part, because it determined that the one-year limitations period was "unreasonable" and its enforcement would be " 'totally and patently unfair.' "[47] The Court of Appeals affirmed.[48]

This Court reversed the judgment of the Court of Appeals and delineated the narrow circumstances under which courts may refuse to enforce an unambiguous contract provision:

> [W]e hold than an unambiguous contractual provision providing for a shortened period of limitations is to be enforced as written unless the provision would violate law or public policy. A mere judicial assessment of "reasonableness" is an invalid basis upon which to refuse to enforce contractual provisions. Only recognized traditional contract defenses may be used to avoid the enforcement of the contract provision.[49]

Central to this Court's rationale was the right to contract freely. "When a court abrogates unambiguous contractual provisions based on its own independent assessment of 'reasonableness,' the court undermines the parties' freedom of contract."[50]

The circumstances under which a contract provision can be said to violate law or public policy are likewise narrow. As we stated in *Rory*, "In ascertaining the parameters of our public policy, we must look to 'policies that, in fact, have been adopted by the public through our various legal processes, and are reflected in

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[46] *Id*.

[47] *Id*. at 462-463.

[48] *Id*. at 463.

[49] *Id*. at 470.

[50] *Id*. at 468-469.

our state and federal constitutions, our statutes, and the common law.' "[51] That a contract provision fails to comport with the personal predilections of the majority of the deciding tribunal about what is reasonable or fair does not make the provision violative of law or public policy.[52] Judicial notions of reasonableness are not " 'clearly rooted in the law' " and are therefore not a valid basis for refusing to enforce an unambiguous contract provision.[53]

As with the *Jackson* order, the Court of Appeals was bound by *Rory*, which required it to enforce the 30-day notice provision as written unless doing so would violate the law or public policy or a traditional defense to the provision's enforcement. In this case, imposing a prejudice requirement did not comport with *Rory*. The notice provision, as written, does not support a prejudice requirement, and a lack of prejudice is not among the traditional defenses to the enforcement of a contract provision.

Plaintiff has failed to present persuasive arguments that enforcement of the provision violates the law or public policy. Specifically, we reject plaintiff's assertion that the order issued by the Commissioner of the Office of Financial and Insurance Services on April 4, 2006, has any bearing on this case. The order was issued in response to *Rory* and, in particular, the portion of the decision upholding a one-year limitations period in a policy for UM coverage. The commissioner's order requires UM policies in Michigan to contain a three-year limitations period. However, because the order refers only to limitations periods

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[51] *Id*. at 471, quoting *Terrien v Zwit*, 467 Mich 56, 66-67; 648 NW2d 602 (2002).

[52] *Rory*, 473 Mich at 470-471.

[53] *Id*., quoting *Terrien*, 467 Mich at 67.

and says nothing about notice-of-claim provisions, the 30-day notice provision in the instant policy remains valid and enforceable.

We also reject plaintiff's assertion that enforcing the 30-day notice provision would violate MCL 500.3008. MCL 500.3008 requires liability insurance policies to provide that the failure to comply with a notice provision "shall not invalidate any claim made by the insured if it shall be shown not to have been reasonably possible to give such notice within the prescribed time and that notice was given as soon as was reasonably possible." Because, in our judgment, plaintiff has failed to show that it was not reasonably possible to provide notice within 30 days of the accident or that providing notice 86 days after the accident was as soon as reasonably possible, we believe that it is unnecessary to consider whether the instant policy contained a provision comporting with the statute.

C. *KOSKI v ALLSTATE INSURANCE COMPANY* IS DISTINGUISHABLE

The final issue we address is the Court of Appeals' reliance on *Koski*. In *Koski*, the plaintiff's minor daughter suffered serious injuries when her foot was caught under the wheels of the plaintiff's garden tractor.[54] The plaintiff's homeowner's insurance policy with the defendant contained a notice-of-suit provision requiring the plaintiff to immediately forward to the defendant any legal documents that he received concerning any accident or claim against him.[55] Nonetheless, when the plaintiff's daughter, through her mother, filed a tort action against the plaintiff, the plaintiff failed to promptly notify the defendant of the lawsuit.[56] In this case, the Court of Appeals panel

[54] *Koski*, 456 Mich at 441.

[55] *Id*. at 441-442.

[56] *Id*. at 442.

correctly stated the holding in *Kosksi* "that an insurer who seeks to cut off responsibility on the ground that its insured did not comply with a contract provision requiring notice immediately or within a reasonable time must establish actual prejudice to its position."[57] It failed, however, to recognize the critical ways in which *Koski* is distinguishable from the instant case. And although the court cited *Bradley* as authority for treating *Koski* as controlling, the *Bradley* decision was itself erroneous.

The critical distinction between this case and *Koski* lies in the language of the contractual provisions at issue. *Koski* involved a contractual provision that required the insured to "immediately forward [to the insurer] any legal papers" relating to the accident, whereas the instant case involves a contractual provision requiring the insured to notify State Farm within 30 days of the accident.[58] The holding in *Koski* imposed a prejudice requirement only on contractual provisions "requiring notice immediately or within a reasonable time."[59] The Court did not purport to impose a prejudice requirement on contractual provisions requiring notice within a specified time such as 30 days. There is an obvious distinction between a contract provision requiring notice "immediately" or "within a reasonable time," which are temporally imprecise terms, and one that requires notice "within 30 days," which could not be clearer. Thus, contrary to the suggestion in *Bradley*, and the rule preferred by the dissent, the prejudice requirement of *Koski* does not apply to *all* contracts.[60] To the extent that *Bradley* improperly extended *Koski*, it is hereby overruled.

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[57] *Id*. at 444.

[58] *Id*.

[59] *Id*.

[60] The dissent notes that "a vast majority of jurisdictions have imposed some form of a prejudice requirement in determining whether to enforce

IV. CONCLUSION

Not only is *Koski* distinguishable from the instant case, but imposing a prejudice requirement here would be inconsistent with this Court's ruling in *Rory*. Under *Rory*, "an unambiguous contractual provision . . . is to be enforced as written," and "[a] mere judicial assessment of 'reasonableness' is an invalid basis upon which to refuse to enforce contractual provisions."[61] Consistently with *Rory*, this Court's order in *Jackson* clearly applied to this action. In this case, the policy unambiguously required DeFrain or someone acting on his behalf to notify State Farm about the hit-and-run accident within 30 days of its occurrence. Whether the failure to comply with the provision prejudiced State Farm is irrelevant. Thus, the Court of Appeals erred by affirming the trial court's denial of State Farm's motion for summary disposition on the ground that "State Farm did not show any prejudice that resulted from the failure to comply with the 30-day notice provision."[62] State Farm was entitled to summary disposition because a condition precedent to the policy's enforcement was not satisfied. For the foregoing reasons, we reverse the judgment of the Court of Appeals and remand the case to the trial court for entry of summary disposition in favor of State Farm.

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a condition precedent in an insurance contract." *Post* at 378 n 1. If the dissent means to suggest that our position today places Michigan in the minority in this regard, then it is incorrect. Today, we do not disturb the holding in *Koski* that "an insurer who seeks to cut off responsibility on the ground that its insured did not comply with a contract provision requiring notice *immediately or within a reasonable time* must establish actual prejudice to its position." *Koski*, 456 Mich at 444 (emphasis added). We simply refuse to extend the prejudice requirement of *Koski* to notice provisions setting forth a specified time (e.g., 30 days) within which notice must be provided. Rather, we choose to enforce unambiguous contracts as written, pursuant to *Rory*.

[61] *Rory*, 473 Mich at 470.

[62] *DeFrain*, 291 Mich App at 715-716.

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

CAVANAGH, J. (*dissenting*). At issue in this case is whether a defendant-insurer may disclaim liability as a result of a plaintiff-insured's failure to timely comply with an uninsured-motorist insurance policy provision requiring notice within 30 days of an accident involving a hit-and-run motor vehicle. I agree with the Court of Appeals that *Koski v Allstate Ins Co*, 456 Mich 439; 572 NW2d 636 (1998), should control in this case. Specifically, I would hold that an insurer that seeks to relieve itself from responsibility on the ground that its insured did not strictly comply with a contractual notice provision must establish actual prejudice to its position. Because defendant has failed to explain how it was prejudiced by plaintiff's untimely notice as a matter of law, I would affirm the judgment of the Court of Appeals, which affirmed the trial court's order denying defendant's motion for summary disposition.

In *Koski*, this Court considered the analogous situation of whether a defendant-insurer could disclaim liability as a result of a plaintiff-insured's failure to comply with a notice-of-suit provision in a homeowner's policy. Specifically, *Koski* involved an insurance policy that required the insured, as a condition precedent to the insurer's liability, to "immediately" forward to the insurer any legal papers received concerning any accident or claim. *Id.* at 441 n 1, 444. This Court explained that "[o]rdinarily, one who sues for performance of a contractual obligation must prove that all contractual conditions prerequisite to performance have been satisfied." *Id.* at 444. Nevertheless, this Court unanimously reaffirmed the "well-established principle" of this state that "an insurer who seeks to cut off responsibility on the ground that its insured did not comply

with a contract provision requiring notice immediately or within a reasonable time must establish actual prejudice to its position." *Id.*, citing *Weller v Cummins*, 330 Mich 286; 47 NW2d 612 (1951), and *Wendel v Swanberg*, 384 Mich 468; 185 NW2d 348 (1971);[1] see, also, *Weller*, 330 Mich at 292-293 (explaining that in *Kennedy v Dashner*, 319 Mich 491; 30 NW2d 46 [1947], this Court applied the above principles in the context of an automobile insurance policy requiring notice of an accident or claim " 'as soon as practicable' ").

I agree with the Court of Appeals that there is no persuasive reason to conclude that *Koski* should not apply in this context simply because this case involves a specific period in which notice was required, rather than a provision requiring notice "immediately," "as soon as practicable," or within a "reasonable time." As *Koski* and other jurisdictions have recognized, a pur-

[1] Notably, *Koski*'s rule is not an outlier position, as a vast majority of jurisdictions have imposed some form of a prejudice requirement in determining whether to enforce a condition precedent in an insurance contract. See, e.g., *Arrowood Indemnity Co v King*, 304 Conn 179, 203; 39 A3d 712 (2012) (joining the "overwhelming majority" of jurisdictions that require insurers to establish prejudice); *PAJ, Inc v Hanover Ins Co*, 243 SW3d 630, 633-634 (Tex, 2008) (noting that most jurisdictions presented with the issue have adopted a "notice-prejudice rule" in some form, consistently with the modern trend); *Prince George's Co v Local Gov't Ins Trust*, 388 Md 162, 182-183; 879 A2d 81 (2005) (citing authorities that indicate that a vast majority of states have adopted a prejudice requirement and noting that 38 states, including Michigan, have adopted a "prejudice rule" whereas only 6 states have maintained a traditional "no prejudice rule"); *State Auto Mut Ins Co v Youler*, 183 W Va 556, 562; 396 SE2d 737 (1990) (explaining that the "majority of the precedents . . . do not allow a denial of uninsured or underinsured motorist coverage for delayed notice of the accident to the insurer unless the delay was unreasonable, considering, among other things, whether the insurer was prejudiced, and the insurer bears the burden of proving prejudice"); *Ouellette v Maine Bonding & Cas Co*, 495 A2d 1232, 1234-1235 (Me, 1985) (following the "modern trend" of requiring an insurer to show that it was prejudiced by an insured's delay in providing notice in order to escape liability).

pose of requiring notice of an accident is to " 'give the insurance company knowledge of the accident so that it can make a timely investigation in order to protect its interests.' " *Koski*, 456 Mich at 444, quoting *Weller*, 330 Mich at 293; see, also, *Brakeman v Potomac Ins Co*, 472 Pa 66, 74; 371 A2d 193 (1977); *State Auto Mut Ins Co v Youler*, 183 W Va 556, 561; 396 SE2d 737 (1990). Because the function of the notice provision is to protect the insurance company from prejudice, it follows that if the insurance company has not been harmed by untimely notice the rationale behind the notice condition in the policy is unsupported, regardless of whether the policy required notice within a specific amount of time or a reasonable time. See *Brakeman*, 472 Pa at 75.[2]

Accordingly, I agree with those jurisdictions that have concluded that, given the function of the notice provision, there is no persuasive justification for excusing an insurer from its obligations under an insurance policy in the absence of prejudice. See *Prince George's Co v Local Gov't Ins Trust*, 388 Md 162, 183-184; 879 A2d 81 (2005). I would apply that proposition in this context. To strictly enforce notice provisions in the

[2] Notably, I am not alone in reaching this conclusion. Other jurisdictions have mandated a showing of prejudice for similar provisions requiring notice or other action within a specific time, such as 30 days, to be enforceable. See, e.g., *Washington Ins Guaranty Ass'n v Hill*, 19 Wash App 195, 196-197; 574 P2d 405 (1978) (applying a prejudice requirement to an insurance policy requiring a statement under oath within 30 days, and noting precedent that applied a prejudice requirement to an insurance policy requiring notice of an accident within 60 days); *Colangelo v Bankers & Shippers Ins Co of New York*, 185 NJ Super 205, 210-211; 447 A2d 1356 (1982) (rejecting a defendant's claim that the insured's failure to file a statement under oath within the time provided in an insurance policy prohibited coverage as a matter of law, explaining that the question to be resolved was whether the insurer established that it had suffered appreciable prejudice).

absence of prejudice to the insurer would amount to a forfeiture for the insured and provide a windfall to the insurer by way of a "technical escape-hatch," contrary to the function of the contract's notice requirement. *Brakeman*, 472 Pa at 75, quoting *Miller v Marcantel*, 221 So 2d 557, 559 (La App, 1969); see, also, *Prince George's Co*, 388 Md at 186. Thus, I agree with those authorities that have opined that coverage should not be lost in cases in which there is a "dearth of evidence as to the effect of the late notice . . . ." *Youler*, 183 W Va at 563 (quotation marks and citation omitted). Accordingly, I would affirm the decision of the Court of Appeals to apply *Koski* in this context.[3]

Finally, it bears mentioning that I generally agree that clear and unambiguous insurance policies should be applied as written. *Rory v Continental Ins Co*, 473 Mich 457, 512-513; 703 NW2d 23 (2005) (CAVANAGH, J., dissenting). However, I decline to ignore the unique character of insurance policies, which, although in the form of a contract, are in actuality "a product prepared and packaged by the insurer" without "negotiation or explanation of the scope of the coverage." *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 68-69; 664 NW2d 776 (2003) (CAVANAGH, J., dissenting) (quotation marks and

[3] The majority spends a considerable amount of its analysis explaining why it believes the Court of Appeals erred by disregarding the majority's peremptory order in *Jackson v State Farm Mut Auto Ins Co*, 472 Mich 942 (2005), and failing to consider its "limited authority as an intermediate appellate court." *Ante* at 371. Regardless of whether *Jackson* is or is not binding precedent, I continue to disagree with the majority's decision in *Jackson* to reverse for the reasons stated by the Court of Appeals dissent—a dissent that, notably, did not even address, let alone "distinguish," *Koski*. Further, I question whether it is necessary to determine if *Jackson* is controlling, given the majority's conclusion that the Court of Appeals erred by failing to abide by the majority opinion in *Rory v Continental Ins Co*, 473 Mich 457; 703 NW2d 23 (2005).

citations omitted).[4] An approach requiring adherence to the parties' purported "freedom of contract" stems from, in my view, the fiction that the contractual term was truly bargained for and ignores the reality of how insurance policies normally come into existence. *Rory*, 473 Mich at 514-515 (CAVANAGH, J., dissenting). I believe that the analysis should embrace, rather than discount, this reality. See *Brakeman*, 472 Pa at 72-73. I would not turn a blind eye to the manner in which the insurance industry operates and discount the effects of encouraging insurers to include technical escape hatches to preclude coverage at the expense of unwary injured citizens. *Rory*, 473 Mich at 516 (CAVANAGH, J., dissenting). Accordingly, I respectfully dissent.

MARILYN KELLY and HATHAWAY, JJ., concurred with CAVANAGH, J.

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[4] As Justice LEVIN observed, in the typical insurance agreement

> "[t]here is no meeting of the minds except regarding the broad outlines of the transaction, the insurer's desire to sell a policy and the insured's desire to buy a policy of insurance for a designated price and period of insurance to cover loss arising from particular perils . . . . The details (definitions, exceptions, exclusions, conditions) are generally not discussed and rarely negotiated.
>
> "The policyholder can, of course, be said to have agreed to whatever the policy says—in that sense his mind met with that of the insurer. Such an analysis may not violate the letter of the concept that a written contract expresses the substance of a meeting of minds, but it does violate the spirit of that concept.
>
> "To be sure, contract law principles are not confined by the concept of a 'meeting of the minds'. Nevertheless, a point is reached when the label 'contract' ceases to fully and accurately describe the relationship of the parties and the nature of the transaction between insurer and insured." [*Rory*, 473 Mich at 514 n 1 (CAVANAGH, J., dissenting), quoting *Lotoszinski v State Farm Mut Auto Ins Co*, 417 Mich 1, 14 n 1; 331 NW2d 467 (1982) (LEVIN, J., dissenting) (alteration in original).]

PEOPLE v KOLANEK

PEOPLE v KING

Docket Nos. 142695, 142712, and 142850. Argued January 12, 2012 (Calendar Nos. 5 and 6). Decided May 31, 2012.

Alexander E. Kolanek was charged in the 52-3 District Court with possession of marijuana. He moved for dismissal of the charge under MCL 333.26428, the section of the Michigan Medical Marihuana Act (MMMA), MCL 333.26421 *et seq*., that provides an affirmative defense if a physician has stated that the defendant would benefit from the medical use of marijuana. After an evidentiary hearing, the court, Julie A. Nicholson, J., denied the motion because Kolanek had not shown that a physician had approved his medical use of marijuana pursuant to MCL 333.26428(a)(1) after the MMMA was enacted but before his arrest. Kolanek appealed in the Oakland Circuit Court, Edward Sosnick, J., which reversed the district court's denial of Kolanek's motion to dismiss, ruling that the MMMA did not require that the physician's statement be made at any particular time and that the statement made by Kolanek's physician at the evidentiary hearing was sufficient to establish the defense. The prosecution appealed. The Court of Appeals, MURPHY, C.J., and METER and SHAPIRO, JJ., reversed the circuit court's order and remanded the case for reinstatement of the charge, holding that a physician must have provided the required statement after the MMMA was enacted but before the defendant's arrest to establish the defense. The Court of Appeals also held that Kolanek's failure to provide proofs sufficient to support his motion to dismiss did not bar him from asserting the defense at trial. 291 Mich App 227 (2011). The Supreme Court granted Kolanek's application for leave to appeal in Docket No. 142695 to consider when the physician's statement must have been made to support a defense under MCL 333.26428 and granted the prosecution's application for leave to appeal in Docket No. 142712 to consider whether a defendant may assert the defense at trial after a motion to dismiss on that basis was denied. 489 Mich 956 (2011).

Larry S. King was charged in the 66th District Court with two counts of manufacturing marijuana after police officers found marijuana growing in a locked chain-link dog kennel in his backyard and in

an unlocked closet inside his house. The court denied King's motion to dismiss under MCL 333.26428 and bound him over for trial. King again moved in the Shiawassee Circuit Court to quash the bindover, raising various grounds and asserting the affirmative defense provided by MCL 333.26428. The circuit court, Gerald D. Lostracco, J., dismissed the charges, and the prosecution appealed. The Court of Appeals, SAWYER, P.J., and FITZGERALD and SAAD, JJ., reversed and remanded, holding that because the places in which King had kept his plants did not qualify as enclosed, locked facilities under MCL 333.26424, he could not establish a defense under MCL 333.26428. 291 Mich App 503 (2011). The Supreme Court granted King's application for leave to appeal in Docket No. 142850 to consider whether a defendant must meet the requirements of MCL 333.26424 to establish a defense under MCL 333.26428. 489 Mich 957 (2011).

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

A defendant asserting a medical purpose for using marijuana as an affirmative defense to a prosecution involving marijuana pursuant to MCL 333.26428 is not required to meet the requirements of MCL 333.26424. To establish this affirmative defense, a defendant must show pursuant to MCL 333.26428(a)(1) that a physician stated, after the MMMA was enacted but before the offense was committed, that the defendant was likely to benefit from the medical use of marijuana. A defendant who fails to establish a prima facie case for the affirmative defense by presenting evidence on all the elements of MCL 333.26428(a) in a motion to dismiss may not reassert the affirmative defense at trial.

1. MCL 333.26424 (§ 4 of the MMMA) grants qualifying patients who hold registry identification cards broad immunity from criminal prosecution, civil penalties, and disciplinary actions for the medical use of marijuana in accordance with the MMMA if they possess no more than 2.5 ounces of usable marijuana and 12 marijuana plants kept in an enclosed, locked facility. MCL 333.26428 (§ 8 of the MMMA) grants more narrow protections to all persons, regardless of whether they are registered cardholders, by providing an affirmative defense to charges involving marijuana if a physician has stated that the patient is likely to receive therapeutic or palliative benefit from the medical use of marijuana to treat or alleviate a serious or debilitating medical condition or its symptoms and the amount of marijuana possessed was no more than reasonably necessary for this purpose. Nothing in § 8 explicitly requires a defendant to establish the elements of § 4 in order to present a valid affirmative defense under § 8, nor is such a requirement implied by the fact that the § 8 defense is subject to

the limitations in MCL 333.26427 (§ 7 of the MMMA). The MMMA extends differing protections to registered and unregistered patients in order to encourage registration and compliance with the act. Accordingly, even a defendant who possessed more than 2.5 ounces of usable marijuana or 12 plants not kept in an enclosed, locked facility may satisfy the affirmative defense and have the charges dismissed under § 8, regardless of registration status, as long as the defendant establishes the elements of § 8 and none of the circumstances in § 7(b) exists.

2. Generally, statutes are presumed to operate prospectively unless the contrary intent is clearly manifested. However, statutes that operate in furtherance of a remedy or mode of procedure and that neither create new rights nor destroy, enlarge, or diminish existing rights are presumed to operate retrospectively absent a contrary legislative intent. Section 8 created a new substantive right by providing an affirmative defense, the provision cannot be fairly described as a mere correction to an oversight in the law, and the MMMA contains no specific indication that it is to apply retrospectively. Therefore, the MMMA does not apply retrospectively. Consequently, physician's statements made before the MMMA was enacted, including the one at issue in *Kolanek*, cannot satisfy MCL 333.26428(a)(1).

3. A physician's statement that a defendant is likely to benefit from the medical use of marijuana must be made before the offense was committed in order to satisfy MCL 333.26428(a)(1). The wording of this provision indicates that the marijuana use is a future event that will occur after the physician's statement and contemplates that a patient will not start using marijuana for medical purposes until after the physician has provided a statement of approval. It follows that any marijuana use before the physician's statement was not for medical purposes. MCL 333.26428(a)(2) and (3) also presuppose a physician's prior diagnosis of a serious or debilitating medical condition or symptoms before a patient may treat the condition with marijuana. Accordingly, none of the statements made by Kolanek's physician satisfied MCL 333.26428(a)(1) as a matter of law.

4. The burden of proof for establishing the defense rests with the defendant. The § 8 defense cannot be asserted for the first time at trial, but must be raised in a pretrial motion for an evidentiary hearing. If a defendant raises a § 8 defense, there are no material questions of fact, and the defendant shows the elements listed in MCL 333.26428(a), then the defendant is entitled to dismissal of the charges following the evidentiary hearing. If a defendant establishes a prima facie case for this affirmative defense by

presenting evidence on all the elements listed in MCL 333.26428(a) but material questions of fact exist, then dismissal of the charges is not appropriate and the defense must be submitted to the jury. If the defendant has not shown the elements listed in MCL 333.26428(a) and there are no material questions of fact, the defendant is not entitled to dismissal of the charges and cannot assert § 8(a) as a defense at trial. If the defendant believes that the circuit court erroneously denied the motion, the defendant's remedy is to apply for interlocutory leave to appeal.

5. Because no reasonable jury could have concluded that Kolanek satisfied the elements of the § 8 affirmative defense given that he did not obtain a physician's statement after the MMMA was enacted and before he committed the offense, he was precluded from presenting evidence of this defense at trial. Because neither the district court nor the circuit court held the required evidentiary hearing on King's motion to dismiss, the case must be remanded to the circuit court for that purpose.

Kolanek affirmed in part and reversed in part.

King reversed and case remanded to the circuit court for an evidentiary hearing on the motion to dismiss.

1. CONTROLLED SUBSTANCES — MARIJUANA — MEDICAL MARIJUANA — CRIMINAL DEFENSES — PHYSICIAN STATEMENTS — DISMISSAL OF CHARGES — APPEAL.

A defendant is entitled to the dismissal of criminal charges under MCL 333.26428 in any prosecution involving marijuana if he or she establishes at the evidentiary hearing on the motion to dismiss (1) that after the Michigan Medical Marihuana Act, MCL 333.26421 *et seq*., was enacted and before the defendant was arrested, a physician has stated that, in the physician's professional opinion after having completed a full assessment of the defendant's medical history and current medical condition made in the course of a bona fide physician-patient relationship, the defendant is likely to receive therapeutic or palliative benefit from the medical use of marijuana, (2) that the defendant did not possess an amount of marijuana that was more than reasonably necessary for this purpose, and (3) that the defendant's use was to treat or alleviate his or her serious or debilitating medical condition or symptoms, as long as none of the circumstances in MCL 333.26427(b) exists; a defendant need not meet the requirements of MCL 333.26424 to establish this affirmative defense; if the motion to dismiss is denied, a defendant may not raise the defense at trial but may move for interlocutory appeal of the denial.

2. CONTROLLED SUBSTANCES — MARIJUANA — MEDICAL MARIJUANA — APPLICATION OF MICHIGAN MEDICAL MARIHUANA ACT.

The Michigan Medical Marihuana Act, MCL 333.26421 *et seq.*, does not operate retrospectively.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Jessica R. Cooper*, Prosecuting Attorney, and *Thomas R. Grden*, Chief, Appellate Division, for the people in *Kolanek*.

Mark A. Ambrose and *Shawn Patrick Smith* for Alexander E. Kolanek.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Richard A. Bandstra*, Chief Legal Counsel, and *Joel D. McGormley*, Assistant Attorney General, for the people in *King*.

Cramer & Minock PLC (by *John R. Minock*), *Daniel S. Korobkin*, *Michael J. Steinberg*, and *Kary L. Moss* for Larry S. King.

Amici Curiae:

Bradford W. Springer for *Scholten Fant, P.C.*, in *Kolanek*.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Richard A. Bandstra*, Chief Legal Counsel, and *Joel D. McGormley*, Assistant Attorney General, for the Attorney General in *Kolanek*.

Larry Burdick, *Jeffrey R. Fink*, and *Cheri L. Bruinsma* for the Prosecuting Attorneys Association of Michigan in *Kolanek*.

Arvid Perrin and Irina Perrin *in propriis personis* in *King*.

MARY BETH KELLY, J. We granted leave in these cases to consider substantive and procedural aspects of the affirmative defense of medical use of marijuana under § 8, MCL 333.26428, of the Michigan Medical Marihuana Act (MMMA).[1] Given the plain language of the statute, we hold that a defendant asserting the § 8 affirmative defense is not required to establish the requirements of § 4, MCL 333.26424, which pertains to broader immunity granted by the act. The Court of Appeals erred by reaching the opposite conclusion in *People v King*,[2] and we therefore reverse the Court of Appeals' judgment in *King*.

Further, to establish the affirmative defense under § 8, we hold that a defendant must show under § 8(a)(1) that the physician's statement was made after enactment of the MMMA but before commission of the offense. The Court of Appeals reached this conclusion in *People v Kolanek*,[3] and we affirm the Court of Appeals in this regard. However, the Court of Appeals also held that defendant could reassert the affirmative defense at trial, despite his failure at the evidentiary hearing to establish the existence of a timely physician's statement under § 8(a)(1). This was error, and we reverse that portion of the Court of Appeals' holding.

I. FACTUAL BACKGROUND

A. *PEOPLE v KING*

In May 2009, police officers received an anonymous tip that marijuana was growing in the backyard of

[1] MCL 333.26421 *et seq*. Although the act uses the spelling "marihuana," we use the more common spelling "marijuana" throughout this opinion.

[2] *People v King*, 291 Mich App 503; 804 NW2d 911 (2011).

[3] *People v Kolanek*, 291 Mich App 227; 804 NW2d 870 (2011).

defendant Larry King's home in Owosso, Michigan. The officers went to the residence and observed, from a neighbor's driveway, marijuana plants growing inside a chain-link dog kennel that was wrapped on three sides with a plastic tarp. The officers then spoke with King, who showed them his "registry identification card" for medical use of marijuana that had been issued April 20, 2009. The officers asked to see the marijuana plants, and King consented. Using a key, he unlocked the padlock on the kennel. Inside the kennel were six marijuana plants. The kennel was six feet tall, was not anchored to the ground, and was open on top.

The officers then obtained a search warrant for King's home. Inside, the officers discovered six marijuana plants in his living-room closet, which did not have a lock on it. The back door to the home also lacked a lock. In addition to the live plants, the officers also found processed marijuana in two prescription bottles; several plastic bags containing marijuana stalks, buds, and leaves; two additional dead marijuana plants; and a food dehydrator.

King was arrested and charged with one count of manufacturing marijuana.[4] At the preliminary examination in the district court, he moved to dismiss the charge under § 8 of the MMMA.[5] The court denied King's motion and bound him over on the charge.[6]

King renewed his motion to dismiss in the circuit court, again asserting that he had established the elements of the affirmative defense under § 8. The

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[4] MCL 333.7401(2)(d)(*iii*).

[5] Although King had a valid registry card, he never asserted that he was entitled to immunity under § 4 of the MMMA.

[6] The district court did not hold an evidentiary hearing on King's motion to dismiss. Rather, the court denied the motion on the basis that the evidence supported binding King over on the charge.

prosecutor responded that because King had failed to comply with § 4(a) by not keeping his marijuana in an "enclosed, locked facility," King could not establish the elements of the affirmative defense under § 8. The circuit court disagreed with the prosecutor that King was not in compliance with § 4(a), ruling instead that King had satisfied the requirements of § 4 because he was a qualifying patient with a valid registry identification card; possessed no more than 12 plants in an enclosed, locked facility; and was entitled to the presumption that he was engaged in the medical use of marijuana. The circuit court further reasoned that King, in accordance with § 8, had obtained a valid physician's statement, possessed a reasonably necessary amount of marijuana consistently with § 4, and was engaged in the use and possession of marijuana to treat a serious medical condition. The circuit court therefore ruled that King's use of marijuana was "in accordance with [the MMMA]"[7] and that King was entitled to dismissal of the charge under § 8.[8]

The Court of Appeals reversed. The Court of Appeals held that the "express reference" in § 8 "to § 7 [MCL 333.26427] and the statement in § 7(a) that medical use of marijuana must be carried out in accordance with the provisions of the MMMA require [King] to comply with the provisions of § 4 concerning growing marijuana."[9] Applying its interpretation of the statute, the Court of Appeals concluded that because King had failed to keep the plants in an " 'enclosed, locked facility,' " he had not complied with § 4(a). As a consequence, the Court held that he also failed to meet the requirements for the

[7] See MCL 333.26427(a).

[8] The circuit court reached this conclusion without holding an evidentiary hearing on King's motion to dismiss under § 8.

[9] *King*, 291 Mich App at 510.

affirmative defense in § 8.[10] The Court of Appeals reversed the circuit court and remanded for further proceedings.

We granted leave to consider, in relevant part, "whether the language '[e]xcept as provided in section 7' in § 8(a) required the defendant to fulfill all of the conditions set forth in § 4 in order to have a valid affirmative defense under § 8(a)."[11]

B. *PEOPLE v KOLANEK*

On April 6, 2009, police arrested defendant Alexander Kolanek for the possession of eight marijuana cigarettes. Kolanek did not have a registry identification card at the time of his arrest. The next day, the prosecution charged Kolanek with possession of marijuana.[12]

Six days later, on April 12, 2009, Kolanek requested that his physician of nine years, Dr. Ray Breitenbach, authorize his medical use of marijuana to treat chronic severe pain and nausea caused by Lyme disease. Breitenbach complied with this request on the basis of his professional opinion that Kolanek would receive a therapeutic benefit from using marijuana. The same day, Kolanek applied for a registry identification card. The Michigan Department of Community Health issued him a card two weeks later on May 1, 2009.

On June 9, 2009, Kolanek moved to dismiss the criminal charge pending against him, asserting the

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[10] *Id*. at 514, quoting MCL 333.26424(a).

[11] *People v King*, 489 Mich 957 (2011). Our grant order in *King* contained several other issues. However, because resolution of those questions is not necessary to the disposition of King's appeal, we have limited our consideration to the issue stated above.

[12] MCL 333.7403(2)(d).

affirmative defense in § 8 of the MMMA. The district court held an evidentiary hearing on the motion, at which Breitenbach testified that Kolanek would have been eligible for the medical use of marijuana on the date of his arrest. However, despite having discussed Kolanek's potential medical use of marijuana on July 14, 2008, before the enactment of the MMMA, Breitenbach testified that he did not provide Kolanek with authorization to use marijuana until April 12, 2009, six days after the date of Kolanek's arrest.[13]

The district court rejected the prosecutor's argument that Kolanek must have had a valid registry identification card to assert a § 8 defense, but nonetheless denied Kolanek's motion to dismiss. The court reasoned that the language "has stated" in § 8(a)(1) contemplates a physician's statement made before commission of the offense. Because Kolanek had not obtained such a statement, the court concluded that Kolanek had failed to meet his burden under § 8.

Kolanek appealed in the circuit court, which reversed the district court's ruling. In the circuit court's view, the district court's interpretation of § 8(a)(1) was erroneous. Section 8(a)(1), according to the circuit court, "does not require the physician have stated [sic] this before the defendant's arrest. It merely requires that the physician has stated it. In this case, the physician stated it at the hearing."

The Court of Appeals reversed the circuit court. Like the district court, the panel rejected the prosecution's argument that Kolanek had to meet the registry-card requirement of § 4 in order to assert a valid defense

[13] Kolanek testified that he mentioned the upcoming vote on the medical use of marijuana during an appointment with Breitenbach on July 14, 2008. According to Kolanek's testimony, Breitenbach responded that if it was legalized, he would support Kolanek in using it.

under § 8.[14] The Court of Appeals also concluded that Kolanek had not produced sufficient evidence of the § 8 affirmative defense.[15] The Court of Appeals reasoned, like the district court, that the phrase "has stated" in § 8(a)(1) contemplates a physician's statement made after enactment of the MMMA but before the offense occurs.[16] It reversed the circuit court's decision and remanded for reinstatement of the charge.[17] In doing so, the Court provided directions on remand:

> Because the statute does not provide that the failure to bring, or to win, a pretrial motion to dismiss deprives the defendant of the statutory defense before the factfinder, [Kolanek's] failure to provide sufficient proofs pursuant to his motion to dismiss does not bar him from asserting the § 8 defense at trial or from submitting additional proofs in support of the defense at that time.[18]

We granted Kolanek's application for leave to appeal to consider "whether, in order to have a valid affirmative defense for the medical use of marijuana under MCL 333.26428(a)(1), a defendant must obtain the required physician's statement after the date of enactment of the [MMMA], but before the date of the defendant's arrest."[19] We also granted the prosecution's application for leave to appeal to consider "whether a defendant may assert the affirmative defense under MCL 333.26428(a) as a defense at trial after a court has denied the defendant's motion to dismiss under MCL 333.26428(b)" and also the issue raised in *King* regarding whether a defendant must satisfy § 4 to have a valid

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[14] *Kolanek*, 291 Mich App at 233.

[15] *Id.* at 241.

[16] *Id*. at 235, 240-241.

[17] *Id*. at 241.

[18] *Id*. at 241-242.

[19] *People v Kolanek*, 489 Mich 956 (2011) (Docket No. 142695).

§ 8 defense.[20]

II. STANDARD OF REVIEW

These cases present issues of statutory interpretation. We review questions of statutory interpretation de novo.[21]

III. ANALYSIS

A. THE MICHIGAN MEDICAL MARIHUANA ACT

The MMMA was proposed in a citizen's initiative petition, was elector-approved in November 2008, and became effective December 4, 2008.[22] The purpose of the MMMA is to allow a limited class of individuals the medical use of marijuana, and the act declares this pur-

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[20] *People v Kolanek*, 489 Mich 956, 956-957 (2011) (Docket No. 142712). Our grant order also requested the parties to brief "whether a defendant is eligible to assert the affirmative defense of medical use of marijuana under MCL 333.26428(a) without first obtaining a valid "registry identification card[.]" *Id.* at 956. However, because all the parties concede that unregistered patients and persons can assert the affirmative defense under § 8, we do not separately address this issue at length.

[21] *People v Feezel*, 486 Mich 184, 205; 783 NW2d 67 (2010).

[22] Const 1963, art 2, § 9 reserves to the people of Michigan the power to enact laws by initiative. The ballot proposal at the November 2008 election, Proposal 08-1, explained to voters that the MMMA would:

> • Permit physician approved use of marijuana by registered patients with debilitating medical conditions including cancer, glaucoma, HIV, AIDS, hepatitis C, MS and other conditions as may be approved by the Department of Community Health.
>
> • Permit registered individuals to grow limited amounts of marijuana for qualifying patients in an enclosed, locked facility.
>
> • Require Department of Community Health to establish an identification card system for patients qualified to use marijuana and individuals qualified to grow marijuana.
>
> • Permit registered and unregistered patients and primary caregivers to assert medical reasons for using marijuana as a defense to any prosecution involving marijuana.

pose to be an "effort for the health and welfare of [Michigan] citizens."[23] To meet this end, the MMMA defines the parameters of legal medical-marijuana use, promulgates a scheme for regulating registered patient use and administering the act, and provides for an affirmative defense, as well as penalties for violating the MMMA.

The MMMA does *not* create a general right for individuals to use and possess marijuana in Michigan. Possession, manufacture, and delivery of marijuana remain punishable offenses under Michigan law.[24] Rather, the MMMA's protections are limited to individuals suffering from serious or debilitating medical conditions or symptoms, to the extent that the individuals' marijuana use "is carried out in accordance with the provisions of [the MMMA]."[25]

The cases before us involve two sections of the MMMA that provide separate protections from prosecution for offenses involving marijuana. The first, § 4, MCL 333.26424, grants "qualifying patient[s]"[26] who hold "reg-

[23] MCL 333.26422(c).

[24] See MCL 333.7403(2)(d) (making possession of marijuana a misdemeanor); MCL 333.7401(2)(d) (making the manufacture or delivery of marijuana or the possession of marijuana with intent to deliver it a felony). Marijuana remains a schedule 1 substance in Michigan's Public Health Code, MCL 333.7212(1)(c), and medical use of marijuana is not recognized as a legal activity at the federal level. The MMMA acknowledges that federal law continues to prohibit marijuana use, but justifies allowing limited marijuana use on the grounds that research suggests that marijuana has beneficial medical uses, the majority of marijuana prosecutions are made under state law, and states are not required to enforce federal laws. MCL 333.26422.

[25] MCL 333.26427(a).

[26] The MMMA defines "qualifying patient" as "a person who has been diagnosed by a physician as having a debilitating medical condition." MCL 333.26423(h). "Debilitating medical condition" means one or more of the following:

istry identification card[s]"[27] broad immunity from criminal prosecution, civil penalties, and disciplinary actions, and provides in part:

> A qualifying patient who has been issued and possesses a registry identification card shall not be subject to arrest, prosecution, or penalty in any manner, or denied any right or privilege, including but not limited to civil penalty or disciplinary action by a business or occupational or professional licensing board or bureau, for the medical use of marihuana[28] in accordance with this act, provided that the qualifying patient possesses an amount of marihuana that does not exceed 2.5 ounces of usable marihuana, and, if the qualifying patient has not specified that a primary caregiver will be allowed under state law to cultivate marihuana for the qualifying patient, 12 marihuana plants kept in an enclosed, locked facility. Any incidental amount of seeds, stalks, and

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> (1) Cancer, glaucoma, positive status for human immunodeficiency virus, acquired immune deficiency syndrome, hepatitis C, amyotrophic lateral sclerosis, Crohn's disease, agitation of Alzheimer's disease, nail patella, or the treatment of these conditions.
>
> (2) A chronic or debilitating disease or medical condition or its treatment that produces 1 or more of the following: cachexia or wasting syndrome; severe and chronic pain; severe nausea; seizures, including but not limited to those characteristic of epilepsy; or severe and persistent muscle spasms, including but not limited to those characteristic of multiple sclerosis.
>
> (3) Any other medical condition or its treatment approved by the [Department of Community Health], as provided for in [MCL 333.26425(a)]. [MCL 333.26423(a).]

[27] "Registry identification card" is defined as "a document issued by the [Department of Community Health] that identifies a person as a registered qualifying patient or registered primary caregiver." MCL 333.26423(i).

[28] The MMMA defines "medical use" to mean "the acquisition, possession, cultivation, manufacture, use, internal possession, delivery, transfer, or transportation of marihuana or paraphernalia relating to the administration of marihuana to treat or alleviate a registered qualifying patient's debilitating medical condition or symptoms associated with the debilitating medical condition." MCL 333.26423(e).

> unusable roots shall also be allowed under state law and shall not be included in this amount.[29]

The second provision, § 8, MCL 333.26428, applies to "patients" generally, provides an affirmative defense to charges involving marijuana for its medical use, and states in relevant part:

> (a) Except as provided in [MCL 333.26427], a patient and a patient's primary caregiver, if any, may assert the medical purpose for using marihuana as a defense to any prosecution involving marihuana, and this defense shall be presumed valid where the evidence shows that:
>
> (1) A physician has stated that, in the physician's professional opinion, after having completed a full assessment of the patient's medical history and current medical condition made in the course of a bona fide physician-patient relationship,[30] the patient is likely to receive therapeutic or palliative benefit from the medical use of marihuana to treat or alleviate the patient's serious or debilitating medical condition or symptoms of the patient's serious or debilitating medical condition;
>
> (2) The patient and the patient's primary caregiver, if any, were collectively in possession of a quantity of marihuana that was not more than was reasonably necessary to ensure the uninterrupted availability of marihuana for the purpose of treating or alleviating the patient's serious or debilitating medical condition or symptoms of the patient's serious or debilitating medical condition; and
>
> (3) The patient and the patient's primary caregiver, if any, were engaged in the acquisition, possession, cultiva-

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[29] MCL 333.26424(a).

[30] Although the MMMA does not define "bona fide physician-patient relationship," a joint statement by the Michigan Board of Medicine and the Michigan Board of Osteopathic Medicine and Surgery advises that this term envisions "a pre-existing and ongoing relationship with the patient as a treating physician." *Statement of the Board of Medicine and Board of Osteopathic Medicine and Surgery Regarding Certification for Medical Use of Marihuana by Michigan Physicians* <https://www.michigan.gov/documents/lara/lara_Medical_Marihuana_Final_Written_Certification_Statement_8-15-11_376283_7.pdf> (accessed May 25, 2012).

> tion, manufacture, use, delivery, transfer, or transportation of marihuana or paraphernalia relating to the use of marihuana to treat or alleviate the patient's serious or debilitating medical condition or symptoms of the patient's serious or debilitating medical condition.
>
> (b) A person may assert the medical purpose for using marihuana in a motion to dismiss, and the charges shall be dismissed following an evidentiary hearing where the person shows the elements listed in subsection (a).
>
> (c) If a patient or a patient's primary caregiver demonstrates the patient's medical purpose for using marihuana pursuant to this section, the patient and the patient's primary caregiver shall not be subject to the following for the patient's medical use of marihuana:
>
> (1) disciplinary action by a business or occupational or professional licensing board or bureau; or
>
> (2) forfeiture of any interest in or right to property.

Our consideration of the availability of the affirmative defense in § 8 and the immunity conferred under § 4 is guided by the traditional principles of statutory construction. However, because the MMMA was the result of a voter initiative, our goal is to ascertain and give effect to the intent of the electorate, rather than the Legislature, as reflected in the language of the law itself.[31] We must give the words of the MMMA their ordinary and plain meaning as would have been understood by the electorate.[32]

Clearly, § 4 applies only to "qualifying patients" who have obtained registry cards. Under this section, those patients are provided broad immunity from "arrest,

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[31] Cf. *Feezel*, 486 Mich at 205; *Schmidt v Dep't of Ed*, 441 Mich 236, 241-242; 490 NW2d 584 (1992). Laws enacted by the people, rather than the Legislature, have the same force and effect and are on equal footing. *Advisory Opinion on Constitutionality of 1982 PA 47*, 418 Mich 49, 66; 340 NW2d 817 (1983).

[32] See *People v Barbee*, 470 Mich 283, 286; 681 NW2d 348 (2004).

prosecution, or penalty in any manner" and protection from the denial of "any right or privilege, including but not limited to civil penalty or disciplinary action by a business or occupational or professional licensing board or bureau," provided that these patients possess not more than 2.5 ounces of usable marijuana and 12 marijuana plants kept in "an enclosed, locked facility."[33] Additional protections in § 4 prohibit the denial of custody or visitation with a minor based on the medical use of marijuana in accordance with the MMMA[34] and provide a presumption that registered cardholders possessing an appropriate amount of marijuana are engaged in the medical use of marijuana.[35]

Comparatively, § 8 provides an affirmative defense to "patients" or "a person" generally.[36] As the prosecution in both cases concedes, the language of § 8 permits those individuals who are not registered cardholding patients to assert the § 8 affirmative defense.[37] Under § 8, a patient in any criminal prosecution involving marijuana may establish an affirmative defense requiring dismissal of the charges if the patient can establish that (1) "[a] physician has stated that, in the physician's professional opinion, after having completed a

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[33] MCL 333.26424(a).

[34] MCL 333.26424(c).

[35] MCL 333.26424(d).

[36] All the parties concede that § 8 is, in fact, an affirmative defense, and we agree with this characterization. As we have explained, an affirmative defense " 'admits the doing of the act charged, but seeks to justify, excuse, or mitigate it . . . .' It does not 'negate selected elements or facts of the crime.' " *People v Lemons*, 454 Mich 234, 246 n 15; 562 NW2d 447 (1997) (citations omitted).

[37] Not only does the textual language of the MMMA support this conclusion, but so does the text of the ballot proposal, which stated in part that the proposed law would "[p]ermit registered and unregistered patients and primary caregivers to assert medical reasons for using marijuana as a defense to any prosecution involving marijuana."

full assessment of the patient's medical history and current medical condition made in the course of a bona fide physician-patient relationship, the patient is likely to receive therapeutic or palliative benefit from the medical use of marihuana," (2) the patient did not possess an amount of marijuana that was more than "reasonably necessary" for this purpose, and (3) the patient's use was "to treat or alleviate the patient's serious or debilitating medical condition or symptoms . . . ."[38] The protections afforded a patient under § 8 are much less broad than those provided under § 4 and extend only to prosecutions involving marijuana, disciplinary actions by a business or occupational or professional licensing board or bureau, and forfeiture of any interest in or right to property.

B. REQUIREMENTS OF THE § 8 AFFIRMATIVE DEFENSE

The facts of *King* and *Kolanek* require us to consider whether a defendant must satisfy the requirements of § 4 in order to have a valid defense under § 8. The prosecution argues that the language "except as provided by section 7" in § 8(a) incorporates the requirements of § 4, so that a defendant must establish under § 8 that he did not possess more than 2.5 ounces of usable marijuana and did not possess more than 12 plants contained in an "enclosed, locked facility."

The relevant language of § 8 provides, "*Except as provided in section 7*, a patient and a patient's primary caregiver, if any, may assert *the medical purpose for using marihuana* as a defense to any prosecution involving marihuana . . . ."[39] Section 7 provides a list of places where and situations in which the MMMA pro-

[38] MCL 333.26428(a)(1) through (3).

[39] MCL 333.26428(a) (emphasis added).

hibits a person from using or possessing marijuana. Specifically, it states, in relevant part:

> (a) The *medical use of marihuana* is allowed under state law *to the extent that it is carried out in accordance with the provisions of this act*.
>
> (b) *This act shall not permit* any person to do any of the following:
>
> (1) Undertake any task under the influence of marihuana, when doing so would constitute negligence or professional malpractice.
>
> (2) Possess marihuana, or otherwise engage in the medical use of marihuana:
>
> (A) in a school bus;
>
> (B) on the grounds of any preschool or primary or secondary school; or
>
> (C) in any correctional facility.
>
> (3) Smoke marihuana:
>
> (A) on any form of public transportation; or
>
> (B) in any public place.
>
> (4) Operate, navigate, or be in actual physical control of any motor vehicle, aircraft, or motorboat while under the influence of marihuana.
>
> (5) Use marihuana if that person does not have a serious or debilitating medical condition.[40]

Reading §§ 7 and 8 together, it is clear that even if a defendant can establish the elements of the affirmative defense under § 8, the defendant will not be entitled to dismissal under § 8 if the possession or medical use of marijuana at issue was in a manner or place prohibited under § 7(b).

Under the Court of Appeals' construction, which the prosecution urges that we adopt, the phrase "in accor-

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[40] MCL 333.26427 (emphasis added).

dance with the provisions of this act" in § 7(a) requires a defendant to satisfy all the requirements of § 4 in order to establish the § 8 affirmative defense. Principles of statutory construction, however, do not support this conclusion. Nowhere does § 8 state that a defendant must also establish the requirements of § 4 in order to present a valid affirmative defense under § 8. Precisely because such a requirement is lacking, assertion of the § 8 defense without establishment of the § 4 requirements is "in accordance with the provisions of [the MMMA]."

The textual distinctions among §§ 4, 7(a), and 8 provide further support for our interpretation that the plain language of § 8 does not require compliance with the requirements of § 4. Sections 4 and 8 provide separate and distinct protections and require different showings, while § 7(a), by its plain terms, does not incorporate § 4 into § 8.[41] Both §§ 4 and 7(a) refer to the "medical use" of marijuana, which the MMMA specifically defines as the use of marijuana "to treat or alleviate a *registered qualifying patient's* debilitating medical condition or symptoms associated with the

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[41] The Court of Appeals recognized this distinction in *People v Redden*, 290 Mich App 65, 81; 799 NW2d 184 (2010), in which the Court rejected the same argument that the prosecution raises here:

> [T]his position ignores that the MMMA provides two ways in which to show legal use of marijuana for medical purposes in accordance with the act. Individuals may either register and obtain a registry identification card under § 4 or remain unregistered and, if facing criminal prosecution, be forced to assert the affirmative defense in § 8.
>
> * * *
>
> [A]dherence to § 4 provides protection that differs from that of § 8. Because of the differing levels of protection in §§ 4 and 8, the plain language of the statute establishes that § 8 is applicable for a patient who does not satisfy § 4.

debilitating medical condition."[42] Comparatively, § 8 refers primarily to the "medical purpose" of marijuana and refers only to "patients," not "registered qualifying patient[s]."[43] Thus, §§ 4 and 7(a) have no bearing on the requirements of § 8, and the requirements of § 4 cannot logically be imported into the requirements of § 8 by means of § 7(a).

Further, in both cases, the prosecution concedes that the § 8 affirmative defense is available to unregistered patients. There is simply no principled basis on which to conclude that a defendant asserting a § 8 affirmative defense must meet some of the § 4 requisites, but not others, i.e., the registry card requirement. Moreover, if § 8 required a defendant to establish all the requirements of § 4, then unregistered patients would never be eligible for the affirmative defense under § 8. The result would be to effectively abolish the differing protections extended to registered and unregistered patients. This interpretation is internally inconsistent, renders the affirmative defense in § 8 a nullity, and is contrary to the electors' intent to permit both registered and unregistered patients to assert medical reasons for using marijuana as a defense to any prosecution involving marijuana.

We also reject the argument that § 8 must incorporate § 4 because otherwise unregistered patients could

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[42] MCL 333.26423(e) (emphasis added).

[43] Section 4 further refers to requirements applicable only to registered patients. The term "enclosed, locked facility" used in § 4(a) is defined as a "closet, room, or other enclosed area equipped with locks or other security devices *that permit access only by a registered primary caregiver or registered qualifying patient*." MCL 333.26423(c) (emphasis added). It would make no sense to import this requirement into § 8 given that unregistered patients could never meet the definition of maintaining "an enclosed, locked facility" because they are not registered qualifying patients.

possess more than 2.5 ounces of usable marijuana and keep more than 12 marijuana plants outside an enclosed locked facility while registered users cannot do so in an enclosed locked facility. The prosecution asserts that this result affords unregistered patients more protection under the MMMA than registered patients. This assertion is false and premised on a basic misunderstanding of how the differing protections of § 4 and § 8 operate. The stricter requirements of § 4 are intended to encourage patients to register with the state and comply with the act in order to avoid arrest and the initiation of charges and obtain protection for other rights and privileges. If registered patients choose not to abide by the stricter requirements of § 4, they will not be able to claim this broad immunity, but will be forced to assert the affirmative defense under § 8, just like unregistered patients.[44] In that instance, registered patients will be entitled to the same lower level of protection provided to unregistered patients under § 8. This result is not absurd, but is the consequence of the incentives created by the wider protections of § 4.

Accordingly, we hold that to establish the elements of the affirmative defense in § 8, a defendant need not establish the elements of § 4. Any defendant, regardless of registration status, who possesses more than 2.5 ounces of usable marijuana or 12 plants not kept in an enclosed, locked facility may satisfy the affirmative defense under § 8. As long as the defendant can establish the elements of the § 8 defense and none of the circumstances in § 7(b) exists, that defendant is entitled to the dismissal of criminal charges.

Consequently, we reverse the Court of Appeals in *King* because it held that a defendant asserting a § 8

[44] See *Redden*, 290 Mich App at 81.

defense must also meet all the requirements of § 4. King, who had a valid patient registry card, may move for dismissal under § 8 and is not required to establish the immunity requirements of § 4 in order to satisfy the requirements of the § 8 affirmative defense.[45] Similarly, Kolanek, who did not have a patient registry card at the time of the offense, is likewise entitled to move for dismissal under § 8 and does not have to establish the requirements of § 4 to be entitled to dismissal under § 8. The Court of Appeals in *Kolanek* reached this same conclusion, and we therefore affirm the Court of Appeals in this regard.

C. TIMELINESS OF PHYSICIAN'S STATEMENT UNDER § 8(a)(1)

The facts of *Kolanek* require us to determine *when* a physician must provide a statement that a defendant is likely to receive therapeutic or palliative benefit from the medical use of marijuana under § 8(a)(1) in order for the defendant to assert the affirmative defense. This inquiry requires us to answer two related questions: whether the MMMA applies retroactively, so that a defendant may have a viable defense based on a physician's statement made before the MMMA's effective date, and whether a physician's statement made after commission of the offense, but after enactment of the MMMA, satisfies § 8(a)(1).

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[45] Because we have concluded that a defendant need not establish the requirements of § 4 in order to satisfy the elements of the § 8 affirmative defense, we need not address the Court of Appeals' holding that Kolanek did not satisfy the "enclosed, locked facility" requirement of § 4. However, to provide some guidance, we note that courts considering whether a defendant's plants were kept in an "enclosed, locked facility" should focus on whether the security device functions to "permit access *only* by a registered primary caregiver or registered qualifying patient." MCL 333.26423(c) (emphasis added).

1. PRE-MMMA PHYSICIAN'S STATEMENTS

With regard to the first question, Kolanek argues that the MMMA applies retroactively and that he therefore has a viable affirmative defense based on his physician's statements made five months before enactment of the MMMA. In determining whether a statute adopted by initiative applies retroactively, the intent of the electors governs.[46] Generally, " 'statutes are presumed to operate prospectively unless the contrary intent is clearly manifested.' "[47] However, statutes that "operate in furtherance of a remedy or mode of procedure" and that "neither create new rights nor destroy, enlarge, or diminish existing rights are generally held to operate retrospectively" absent a contrary legislative intent.[48]

We agree with the Court of Appeals that § 8 creates an affirmative defense that did not previously exist for patients with serious medical conditions who are facing prosecution for possession of marijuana. This defense is a new substantive right available to some defendants.[49] Section 8 cannot be fairly described as a mere correction to an oversight in the law. Absent from the MMMA is any specific indication that the act is to be applied retrospectively.[50] Therefore, the presumption of pro-

[46] Cf. *Brewer v A D Transp Express, Inc*, 486 Mich 50, 55-56; 782 NW2d 475 (2010).

[47] *Franks v White Pine Copper Div*, 422 Mich 636, 671; 375 NW2d 715 (1985), quoting *Selk v Detroit Plastic Prod*, 419 Mich 1; 345 NW2d 184 (1984).

[48] *Franks*, 422 Mich at 672.

[49] *Kolanek*, 291 Mich App at 240-241, discussing *People v Campbell*, 289 Mich App 533, 536; 798 NW2d 514 (2010) (reaching the same conclusion).

[50] See *Frank W Lynch & Co v Flex Technologies, Inc*, 463 Mich 578, 584; 624 NW2d 180 (2001) (explaining that the Legislature can make clear its intent for a statute to apply retroactively by explicitly so stating).

spective application controls. Accordingly, we conclude that the MMMA does not apply retroactively and only has prospective effect.

Consequently, it would make no sense to permit Kolanek to rely on a physician's statement made before the MMMA's enactment. At the time of the July 2008 conversation between Kolanek and his physician, state law prohibited the medical use of marijuana, and Breitenbach's speculative statements at that time could not have formed the basis of an affirmative defense. Because the MMMA does not apply retroactively, those pre-MMMA statements are legally inoperative in the present prosecution. Pre-MMMA physician's statements, which could not have been used to insulate a defendant from criminal prosecution before enactment of the MMMA, are not somehow transformed to protect a defendant after enactment of the MMMA. Because the MMMA does not apply retroactively, we hold that physician's statements made before its enactment cannot satisfy § 8(a)(1).

2. POSTOFFENSE PHYSICIAN'S STATEMENTS

Kolanek also argues that the physician's statement he obtained six days after committing the offense satisfied the requirements of § 8(a)(1) because that provision merely requires that a physician "has stated" at some point in time that the patient has a medical need for marijuana. When subdivisions (1) through (3) are read together, it becomes clear that the physician's statement must necessarily have occurred before the commission of the offense if it is to be used as the basis for a § 8 defense.

As noted, § 8(a) provides in relevant part:

> (1) A physician *has stated* that, in the physician's professional opinion, after having completed a full assessment of the patient's medical history and current medical condition made in the course of a bona fide physician-patient relationship, the patient *is likely to receive* therapeutic or palliative benefit from the medical use of marihuana to treat or alleviate the patient's serious or debilitating medical condition or symptoms of the patient's serious or debilitating medical condition;
>
> (2) The patient . . . [was] . . . in possession of a quantity of marihuana that was not more than was reasonably necessary to ensure the uninterrupted availability of marihuana for the purpose of treating or alleviating the patient's serious or debilitating medical condition or symptoms . . . ; and
>
> (3) The patient . . . [was] engaged in the . . . possession . . . of marihuana to treat or alleviate the patient's serious or debilitating medical condition or symptoms of the patient's serious or debilitating medical condition.[51]

Beginning with § 8(a)(1), the term "has stated" is in the present perfect tense, which "indicates action that was started in the past and has recently been completed or is continuing up to the present time."[52] In *People v Stewart*,[53] we considered the temporal limits of another present-perfect-tense term, "has cooperated," and concluded it meant that a defendant's cooperation must have occurred sometime before the defendant applied for parole. Similarly, the term "has stated" indicates that the physician's statement must have been made sometime before a defendant filed the motion to dismiss under § 8 but not necessarily before commission of the offense.

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[51] MCL 333.26428(a) (emphasis added).

[52] Sabin, *The Gregg Reference Manual* (11th ed) (New York: Glenco McGraw-Hill, 2011), p 314.

[53] *People v Stewart*, 472 Mich 624, 631-632; 698 NW2d 340 (2005).

Other language of § 8(a)(1), however, indicates that the statement must in fact have been made even before the patient began using marijuana for the defense to apply. Reading the term "has stated" in conjunction with the language in the same sentence "is likely to receive [benefit from the medical use of marijuana]" indicates a future event that will occur after the physician's statement. Stated differently, § 8(a)(1) contemplates that a patient will not start using marijuana for medical purposes until after the physician has provided a statement of approval. It necessarily follows that any marijuana use before the physician's statement was not for medical purposes.

The language of § 8(a)(2) and (3) supports this conclusion. Section 8(a)(2) requires a patient to establish that he or she had a "reasonably necessary" quantity of marijuana "for the purpose of treating or alleviating the patient's serious or debilitating medical condition or symptoms . . . ." Similarly, § 8(a)(3) requires a showing that the patient possessed the marijuana "to treat or alleviate the patient's serious or debilitating medical condition or symptoms . . . ." Both provisions presuppose a physician's prior diagnosis of a serious or debilitating medical condition or symptoms before a patient may treat the condition with marijuana. Consequently, reading these provisions together, it is clear that the physician's statement under § 8(a)(1) must have been made before a patient began using marijuana for medical purposes. Thus, we hold that in order to satisfy the requirements of § 8(a)(1), a defendant must establish that the physician's statement was made before the commission of the offense.[54]

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[54] See also *People v Reed*, 294 Mich App 78; 819 NW2d 3 (2011) (holding the same).

This interpretation makes sense in light of the laws criminalizing possession, manufacture, and delivery of marijuana and the fact that the MMMA allows such charges to be dismissed under certain circumstances. A reasonable inference to be drawn from the MMMA's provisions allowing the medical use of marijuana is that § 8 is intended to protect those individuals who believe they have a genuine medical need for marijuana that has been recognized by a physician, but for whatever reason have not obtained a registry card. It would be illogical to extend this protection to individuals who have not obtained a physician's recognition of their medical need because the MMMA provides no protections to such individuals. An after-the-fact exception to criminal liability would encourage individuals to engage in self-medication or criminal activity on the basis of the possibility that if prosecuted they could then obtain a doctor's approval postoffense and avoid criminal charges.[55] Because the MMMA was not intended to legitimize illegal marijuana use, it makes sense to require that a defendant obtain a physician's statement authorizing the medical use of marijuana before the defendant actually uses marijuana for that purpose.[56]

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[55] The Court of Appeals in *Reed*, 294 Mich App at 84, recognized the nonsensical result if § 8(a)(1) could be satisfied by a postoffense physician's statement:

> It would be absurd if it were possible to assert the § 8 affirmative defense by obtaining a physician's statement after the crime had been committed but before an arrest has been made. The law would provide less incentive to obtain a qualifying physician's statement if it were construed in the manner defendant suggests.

[56] In this regard, the Court of Appeals in *Kolanek* recognized:

> The law generally denies defendants the ability to excuse a criminal violation postarrest. Thus, defendants cannot escape prosecution for a violation of the concealed weapon statute by

In *Kolanek*, neither the postarrest physician's statements nor the physician's statements made before the enactment of the MMMA satisfy, as a matter of law, the requirement under § 8(a)(1). Thus, Kolanek, although entitled to raise the § 8 defense in a motion for an evidentiary hearing, failed to establish at that hearing the requirements of the § 8 affirmative defense and he cannot now, for reasons we will explain, present the defense to the jury.

D. RAISING THE § 8 AFFIRMATIVE DEFENSE

The facts of *Kolanek* also require us to consider whether a defendant may reassert the defense at trial after the circuit court has denied the defendant's motion to dismiss under § 8. As we have explained, the medical use of marijuana is a statutorily created affirmative defense. Section 8(a) provides that a patient or person may assert this defense in "any prosecution involving marihuana" and that the defense "shall be presumed valid" if its elements can be established.[57] Section 8(b) provides that a person "*may* assert [this defense] in a motion to dismiss, and the charges *shall be dismissed following an evidentiary hearing* where the person shows the elements listed in subsection (a)."[58] This scheme makes clear that the burden of proof rests with the defendant, that the defendant "may" move to

> seeking a permit after arrest, or escape prosecution for violations of the controlled substances act by seeking a prescription for the substance from a physician after arrest. Furthermore, the very fact that the law creates the ability to legitimately have a defense to certain actions that would otherwise be illegal indicates that persons must fulfill those requirements prior to any arrest. Otherwise, there would be no incentive for anyone to spend their time and money to go through the process . . . . [*Kolanek*, 291 Mich App at 238-239.]

[57] MCL 333.26428(a).

[58] MCL 333.26428(b) (emphasis added).

dismiss the charges by asserting the defense in a motion to dismiss, and that dismissal "shall" follow an evidentiary hearing. This last requirement is significant because it indicates that the § 8 defense cannot be asserted for the first time at trial, but must be raised in a pretrial motion for an evidentiary hearing.

A trial judge considering such a motion must be guided by well-established principles of criminal procedure. Questions of fact are the province of the jury, while question of law are reserved to the courts.[59] Judges presiding over criminal trials regularly separate legal questions from factual ones, leaving to the jury those issues requiring factual resolution and pertaining to the credibility of witnesses and weight of the evidence. Trial judges undertake this same inquiry with respect to the defenses that a defendant raises. If, for example, a defendant raises a defense but fails to present evidence from which a reasonable jury could conclude that the elements of the defense have been met, then the defendant is not entitled to the defense instruction and the jury is precluded from considering the defense.[60] Conversely, if a defendant produces sufficient evidence of the elements of the defense, then the

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[59] See *Hamilton v People*, 29 Mich 173 (1874); *People v Mortimer*, 48 Mich 37; 11 NW 776 (1882); *People v Waldvogel*, 49 Mich 337; 13 NW 620 (1882).

[60] See, e.g., *United States v Bailey*, 444 US 394, 415; 100 S Ct 624; 62 L Ed 2d 575 (1980) (holding that a criminal defendant must produce evidence of all the elements of an affirmative defense to be entitled to an instruction on that defense theory); *Lemons*, 454 Mich at 248 (" 'Unless a defendant submits sufficient evidence to warrant a finding of [the common-law affirmative defense of] duress, the trial court is not required to instruct the jury on that defense.' ") (citation omitted); *People v Mills*, 450 Mich 61, 81; 537 NW2d 909 (1995) ("A trial court is required to give a requested instruction [for a defense theory], except where the theory is not supported by evidence.").

question whether the defendant has asserted a valid defense is for the jury to decide.[61]

Thus, if a defendant raises a § 8 defense, there are no material questions of fact, and the defendant "shows the elements listed in subsection (a),"[62] then the defendant is entitled to dismissal of the charges following the evidentiary hearing. Alternatively, if a defendant establishes a prima facie case for this affirmative defense by presenting evidence on all the elements listed in subsection (a) but material questions of fact exist, then dismissal of the charges is not appropriate and the defense must be submitted to the jury.[63] Conflicting evidence, for example, may be produced regarding the existence of a bona fide doctor-patient relationship or whether the amount of marijuana possessed was reasonable. Finally, if there are no material questions of fact and the defendant has not shown the elements listed in subsection (a), the defendant is not entitled to dismissal of the charges and the defendant cannot assert § 8(a) as a defense at trial. A trial judge must preclude from the jury's consideration evidence that is legally insufficient to support the § 8 defense because, in this instance, no reasonable juror could conclude that

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[61] See *People v Dupree*, 486 Mich 693, 712; 788 NW2d 399 (2010) (holding that a defendant who had produced sufficient prima facie evidence of the affirmative defense of self-defense was entitled to the defense instruction).

[62] MCL 333.26428(b).

[63] The Court of Appeals has reached the same conclusion in a number of MMMA cases. See, e.g., *Redden*, 290 Mich App at 83-85 (ruling that the circuit court improperly acted as the trier of fact when "colorable issues" remained concerning the defendant's § 8 defense, which should have been submitted to a jury); *People v Anderson*, 293 Mich App 33, 66; 809 NW2d 176 (2011) (M. J. KELLY, J., concurring) (reasoning that determination by a jury is appropriate if questions of fact exist regarding a defendant's § 8 defense).

the defendant satisfied the elements of the defense.[64] If the defendant believes that the circuit court erroneously denied the motion, the defendant's remedy is to apply for interlocutory leave to appeal.

In *Kolanek*, no reasonable jury could have concluded that Kolanek satisfied the elements of the § 8 affirmative defense. As explained, Kolanek did not meet the requirements of § 8(a)(1) because he did not obtain a physician's statement after enactment of the MMMA and before the commission of his offense. Thus, Kolanek failed to present evidence supporting the affirmative defense under § 8. Because no reasonable jury could have concluded that Kolanek is entitled to the defense as a matter of law, he is precluded from presenting evidence of this defense at trial. To allow submission of the defense to the jury when the defense fails as a matter of law would unnecessarily burden the jury and the circuit court with irrelevant testimony.[65] Accordingly, the Court of Appeals erred by permitting Kolanek a " 'second bite at the apple' "[66] by allowing him to present his defense to the jury despite its conclusion that he failed to present sufficient evidence that his use of marijuana was for medical purposes under § 8. We therefore reverse this portion of the Court of Appeals' judgment.

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[64] See *Reed*, 294 Mich App at 86 (concluding that "[no] reasonable jury could find that defendant is entitled to the § 8 defense, and thus defendant is barred from asserting it at trial"); *Anderson*, 293 Mich App at 65 (M. J. KELLY, J., concurring) ("[A] trial court may bar a defendant from presenting evidence and arguing a § 8 defense at trial when, given the undisputed evidence, no reasonable jury could find that the elements of the § 8 defense had been met.").

[65] See *Bailey*, 444 US at 416 ("If . . . an affirmative defense consists of several elements and testimony supporting one element is insufficient to sustain it even if believed, the trial court and jury need not be burdened with testimony supporting other elements of the defense.").

[66] *People v D'Angelo*, 401 Mich 167, 178; 257 NW2d 655 (1977).

In *King*, neither the district court nor the circuit court held an evidentiary hearing with regard to King's § 8 motion to dismiss. Because § 8 expressly requires an evidentiary hearing to obtain dismissal of criminal charges, we remand to the circuit court for it to hold such a hearing.

IV. CONCLUSION

The plain language of the MMMA does not require that a defendant asserting the affirmative defense under § 8 also meet the requirements of § 4. Additionally, to meet the requirements of § 8(a)(1), a defendant must establish that the physician's statement occurred after the enactment of the MMMA and before the commission of the offense. If a circuit court denies a defendant's motion to dismiss under § 8 and there are no material questions of fact, then the defendant may not reassert the defense at trial; rather, the appropriate remedy is to apply for interlocutory leave to appeal. Thus, we reverse the Court of Appeals' judgment in *King* and remand for an evidentiary hearing so that King may raise the affirmative defense under § 8. We affirm the Court of Appeals' judgment in *Kolanek*, with the exception of the portion directing the circuit court to allow Kolanek to reassert the § 8 affirmative defense at trial.

YOUNG, C.J., and CAVANAGH, MARILYN KELLY, MARKMAN, HATHAWAY, and ZAHRA, JJ., concurred with MARY BETH KELLY, J.

APPENDIX

In light of the need for guidance regarding the medical use of marijuana in Michigan, the following is designed to summarize our numerous holdings in these cases.

1. Section 4 of the Michigan Medical Marihuana Act (MMMA), MCL 333.26424, provides qualified registered patients broad immunity from "arrest, prosecution, or penalty in any manner" and protection from the denial of "any right or privilege, including but not limited to civil penalty or disciplinary action by a business or occupational or professional licensing board or bureau, for the medical use of marihuana in accordance with this act . . . ."

2. To be entitled to the broad immunity of § 4, a qualifying patient with a registry identification card who has not specified a primary caregiver must possess no more than 2.5 ounces of usable marijuana and 12 marijuana plants, which must be kept in "an enclosed, locked facility."

3. Registered patients who do not qualify for immunity under § 4, as well as unregistered persons, are entitled to assert in a criminal prosecution the affirmative defense of medical use of marijuana under § 8 of the MMMA, MCL 333.26428.

4. Section 8 of the MMMA provides a limited protection for the use of medical marijuana in criminal prosecutions, which requires dismissal of the charges if all the elements of the defense are established.

5. A defendant need not establish the elements of § 4 to have a valid affirmative defense under § 8.

6. A defendant who moves for the dismissal of criminal charges under § 8 must raise the defense in a pretrial motion to dismiss and for an evidentiary hearing.

7. A defendant is entitled to the dismissal of criminal charges under § 8 if, at the evidentiary hearing, the defendant establishes all the elements of the § 8 affirmative defense, which are (1) "[a] physician has stated that, in the physician's professional opinion, after hav-

ing completed a full assessment of the patient's medical history and current medical condition made in the course of a bona fide physician-patient relationship, the patient is likely to receive therapeutic or palliative benefit from the medical use of marihuana," (2) the defendant did not possess an amount of marijuana that was more than "reasonably necessary for this purpose," and (3) the defendant's use was "to treat or alleviate the patient's serious or debilitating medical condition or symptoms . . . ." As long as a defendant can establish these elements, no question of fact exists regarding these elements, and none of the circumstances in § 7(b), MCL 333.26427(b), exists, then the defendant is entitled to dismissal of the criminal charges.

8. With regard to the physician's statement required by § 8(a)(1), the defendant must have obtained the physician's statement after enactment of the MMMA, but before the commission of the offense.

9. If a defendant moves for dismissal of criminal charges under § 8 and at the evidentiary hearing establishes prima facie evidence of all the elements of the § 8 affirmative defense, but material questions of fact exist, then dismissal of the charges is not appropriate and the defense must be submitted to the jury.

10. If a defendant moves for dismissal of criminal charges under § 8 and at the evidentiary hearing fails to present evidence from which a reasonable jury could conclude that the defendant satisfied the elements of the § 8 affirmative defense, and there are no questions of fact, then the circuit court must deny the motion to dismiss the charges. In this instance, the defendant is not permitted to present the § 8 defense to the jury. Rather, the defendant's remedy is to apply for interlocutory leave to appeal.

JOHNSON v PASTORIZA

Docket No. 142127. Argued November 9, 2011 (Calendar No. 5). Decided June 5, 2012.

Candice Johnson and Baby Johnson (Candice's child who died following its premature birth on November 1, 2005) brought an action in the Jackson Circuit Court against Rajan Pastoriza, M.D., and Rajan Pastoriza, M.D., P.L.C., doing business as Women's First Health Services, alleging negligence under MCL 600.2922a and medical malpractice as a result of Pastoriza's failure to perform a cerclage that Candice had requested during her pregnancy with Baby Johnson. The court, Thomas D. Wilson, J., denied defendants' motions for summary disposition, but ordered Candice to have a personal representative appointed for the estate of the deceased child and to amend the complaint to bring the negligence claim concerning the child under the wrongful-death statute, MCL 600.2922. After granting defendants' application for leave to appeal, the Court of Appeals, DONOFRIO and STEPHENS, JJ. (DAVIS, P.J., not participating), affirmed, concluding in part that MCL 600.2922, as amended by 2005 PA 270, applied retroactively and that plaintiffs had sufficiently established a cause of action under MCL 600.2922 by alleging that Pastoriza had failed to perform the requested cerclage. 290 Mich App 260 (2010). The Supreme Court granted defendants leave to appeal. 489 Mich 856.

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

The 2005 amendment of the wrongful-death statute, which incorporated the language "or death as described in" MCL 600.2922a, does not apply to claims arising before the effective date of the amendatory act. MCL 600.2922a requires an affirmative act for the imposition of liability, not an omission or refusal to act.

1. Plaintiffs' cause of action accrued before the effective date of 2005 PA 270. The intent of the Legislature governs whether a statute applies retroactively. The Legislature failed to include any language in 2005 PA 270 indicating that it should be applied retroactively. And while statutes that operate in furtherance of a

remedy or mode of procedure and neither create new rights nor destroy, enlarge, or diminish existing rights are generally held to apply retroactively unless a contrary legislative intent is manifested, this exception to the presumption of prospective application was inapplicable because 2005 PA 270 affected substantive rights. Accordingly, the Court of Appeals erred by holding that MCL 600.2922, as amended by 2005 PA 270, could be applied retroactively and that plaintiffs could proceed under that statute.

2. Because the 2005 amendment of MCL 600.2922 was not retroactive, plaintiffs could only have proceeded with their wrongful-death claim under MCL 600.2922a. MCL 600.2922a(1), however, provides that a person who commits "a wrongful or negligent act" against a pregnant woman is liable for damages if the act results in a miscarriage or stillbirth by that individual or physical injury to or the death of the fetus or embryo. The Legislature did not use expansive terms in the statute such as "neglect" or "fault of another" that would permit liability on the basis of omissions. Thus, from the language used by the Legislature, it is clear that the Legislature intended to impose liability under MCL 600.2922a(1) only for affirmative or positive acts. Pastoriza's alleged refusal to perform a cerclage cannot be characterized as anything other than a willful and knowing failure to do something, which the Supreme Court has long held is the omission of a duty, not an affirmative act. Thus, plaintiffs failed to state a claim under MCL 600.2922a because they did not allege that defendants committed a wrongful or negligent act, and the trial court erred by denying defendants' motions for summary disposition with regard to plaintiffs' claims alleging negligence under MCL 600.2922a.

Reversed and remanded for entry of partial summary disposition in favor of defendants.

Justice CAVANAGH, joined by Justice MARILYN KELLY, concurring in the result only, wrote separately to emphasize that the majority opinion did not address whether a plaintiff may base a claim for the wrongful death of a nonviable fetus on a defendant's omission occurring after the effective date of 2005 PA 270. Rather, it appeared that the majority's holding only applied to claims for the wrongful death of a nonviable fetus arising out of omissions occurring before the effective date of the act.

Justice HATHAWAY, dissenting, would have affirmed the decision of the Court of Appeals. Plaintiffs' allegations centered on the fact that Pastoriza specifically refused to perform a requested medical procedure. MCL 600.2922a imposes liability when a person commits a wrongful or negligent act. Pastoriza's active decision-

making process in refusing to perform the procedure clearly involved an affirmative act, not an omission. Accordingly, plaintiffs should have been permitted to proceed with their claims under MCL 600.2922a, and it was unnecessary to reach the issue whether liability can be based on an omission under MCL 600.2922a(1). The Court of Appeals also correctly concluded that the amended version of the wrongful-death statute applies retroactively. The 2005 amendment of MCL 600.2922(1) incorporated fetal deaths, as described in MCL 600.2922a, into the purview of the wrongful-death statute. The purpose of the amendment was merely to clarify that claims for the wrongful death of a nonviable fetus could be brought under the wrongful-death statute. This was not a new right, because the right to pursue an action for the death of a fetus already existed under MCL 600.2922a. The Legislature intended the amended version of the wrongful-death statute to apply retroactively. Baby Johnson's estate was entitled as a matter of law to proceed with its wrongful-death claim.

1. STATUTES — RETROACTIVITY — WRONGFUL-DEATH STATUTE.

The wrongful-death statute, MCL 600.2922, as amended by 2005 PA 270, may not be applied retroactively.

2. NEGLIGENCE — EMBRYOS OR FETUSES — AFFIRMATIVE ACTS — OMISSIONS OF DUTIES.

MCL 600.2922a(1) provides that a person who commits a wrongful or negligent act against a pregnant woman is liable for damages if the act results in a miscarriage or stillbirth by that individual or physical injury to or death of a fetus or embryo; liability may be imposed under MCL 600.2922a(1) only for an affirmative act; liability may not be imposed under the statute for an omission or a refusal to act.

Ferris & Salter, P.C. (by *Don Ferris*), for plaintiffs.

Kitch Drutchas Wagner Valitutti & Sherbook (by *Beth A. Wittmann*) for defendants.

ZAHRA, J. Candice Johnson suffered a lost pregnancy at 20 weeks' gestation, and on behalf of herself and the deceased fetus, Baby Johnson, sued Rajan Pastoriza, M.D., and his professional corporation, alleging negligence under MCL 600.2922a, which provides that a person who commits "a wrongful or negligent act

against a pregnant individual is liable for damages if the act results in a miscarriage or stillbirth by that individual, or physical injury to or the death of the embryo or fetus," and medical malpractice. Defendants moved for summary disposition. The circuit court refused to grant summary disposition, but ordered plaintiffs to appoint a personal representative for the estate of Baby Johnson and to amend the complaint to bring the negligence claim that had been brought on behalf of Baby Johnson through the wrongful-death statute, MCL 600.2922. Defendants appealed by leave granted. The Court of Appeals held that MCL 600.2922, as amended by 2005 PA 270, effective December 19, 2005, to incorporate the language "or death as described in section 2922a," applied retroactively to plaintiffs' claim for wrongful death, which arose no later than November 1, 2005. The Court of Appeals further held that Pastoriza's refusal to perform a cerclage was a "wrongful or negligent act" under MCL 600.2922a.

We hold that the 2005 amendment of the wrongful-death statute, incorporating the language "or death as described in" MCL 600.2922a, does not apply to claims arising before the effective date of the amendment. The Legislature only intended the 2005 amendment to apply to claims arising on or after the effective date. Further, because defendants would be subjected to liability that did not exist at the time the cause of action arose, the amendment is not remedial and, therefore, cannot be deemed retroactive. Because the 2005 amendment of MCL 600.2922(1), incorporating "death as described in" MCL 600.2922a, is *not* retroactive, plaintiffs can only proceed under MCL 600.2922a.[1] In regard to plaintiffs' claim under MCL 600.2922a, we hold that MCL

[1] Given this disposition, we do not address "whether the reference to 'death as described in section 2922a' in the 2005 amendment of MCL

600.2922a plainly requires an affirmative act and that an omission or refusal to act cannot constitute an affirmative act. We therefore reverse the judgment of the Court of Appeals and remand the case to the circuit court for entry of summary disposition in favor of defendants on the wrongful-death claim.[2]

I. FACTUAL HISTORY

Candice had a history of miscarriages because of an incompetent cervix. Using a cerclage procedure between 13 and 16 weeks' gestation, however, Candice was able to have three consecutive full-term pregnancies. For her next pregnancy, she saw Pastoriza as her obstetrician. Pastoriza was aware of her success with the cerclage procedure and had removed her cerclage suture shortly before she last gave birth.

In September 2005, Candice experienced vaginal bleeding and went to Foote Hospital in Jackson. Emergency personnel recommended that she rest and meet with her treating obstetrician. A few days later, she saw Pastoriza, but he did not perform a cerclage. At that time an ultrasound showed a live, 12-week-old fetus. On October 12, 2005, another ultrasound showed a live fetus at almost 17 weeks' gestation. The ultrasound also showed that the length of Candice's cervix was roughly the same as when the previous cerclages had been performed. On October 19, 2005, Candice complained to Pastoriza that she felt preterm, labor-like cramping. She asked Pastoriza to perform a cerclage, but he did not do so. On November 1, 2005, Candice's cervix dilated and she went into premature labor. She was transferred to Sparrow Hospital in

600.2922 incorporates the exceptions to recovery contained at MCL 600.2922a(2)." *Johnson v Pastoriza*, 489 Mich 856 (2011) (*Johnson II*).

[2] This opinion does not affect plaintiff's separate medical malpractice claim.

Lansing and received an emergency cerclage, but lost the 20-week-old fetus shortly after the transfer. The failed emergency cerclage also resulted in a significant and permanent cervical tear that might prevent Candice from having another child.

II. LEGAL BACKGROUND

Following amendment by 1985 PA 93, subsection (1) of Michigan's wrongful-death statute, MCL 600.2922(1), provided that

> [w]henever the death of a person or injuries resulting in death shall be caused by wrongful act, neglect, or fault of another, and the act, neglect, or fault is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages, the person who or the corporation that would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death was caused under circumstances that constitute a felony.

This version of MCL 600.2922 did not permit a plaintiff to bring a claim for the death of a nonviable fetus because a nonviable fetus was not viewed as a "person."[3]

In 1998, the Legislature created a new statute, MCL 600.2922a. Section 2922a, which became effective on January 1, 1999, is separate from the wrongful-death

[3] In *Thomas v Stubbs*, 455 Mich 853; 564 NW2d 463 (1997), this Court acknowledged that "[s]ince at least 1975 it has been held that a nonviable fetus is not a 'person' within the meaning of the wrongful death act." Cf. *Thomas v Stubbs*, 218 Mich App 46; 553 NW2d 634 (1996) (holding that a fetus "born alive," although not viable, is a "person" within the meaning of the wrongful-death statute). The parties have not asked us to reconsider *Thomas* and such reconsideration is unnecessary given that the Legislature has since amended MCL 600.2922 and adopted MCL 600.2922a, which specifically imposes liability under certain circumstances for wrongful or negligent acts against a pregnant woman that result in physical injury to or the death of a fetus.

statute, and imposes liability for wrongful or negligent acts against a pregnant woman that result in the pregnant woman's miscarriage or stillbirth or "physical injury" to the fetus. MCL 600.2922a, as added by 1998 PA 2011, provided:

> (1) A person who commits a wrongful or negligent act against a pregnant individual is liable for damages if the act results in a miscarriage or stillbirth by that individual or physical injury to the embryo or fetus.
>
> (2) This section does not apply to any of the following:
>
> (a) An act committed by the pregnant individual.
>
> (b) A medical procedure performed by a physician or other licensed medical professional within the scope of his or her practice and with the pregnant individual's consent or the consent of an individual who may lawfully provide consent on her behalf or without consent as necessitated by a medical emergency.
>
> (c) The lawful dispensation, administration, or prescription of medication.
>
> (3) This section does not prohibit a civil action under any other applicable law.
>
> (4) As used in this section, "physician or other licensed medical professional" means a person licensed under article 15 of the public health code, 1978 PA 368, MCL 333.16101 to 333.18838.

In 2002, the Legislature amended MCL 600.2922a. The amendment extended civil liability to wrongful or negligent acts that caused the "death" of an embryo or fetus and changed the term "medical professional" to "health professional."[4] MCL 600.2922a, as amended by 2002 PA 164, currently provides:

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[4] 2001 PA 1 similarly amended the Michigan Penal Code to provide felony penalties for intentional conduct or gross negligence that causes the death of an embryo or fetus.

(1) A person who commits a wrongful or negligent act against a pregnant individual is liable for damages if the act results in a miscarriage or stillbirth by that individual, or physical injury to or the death of the embryo or fetus.

(2) This section does not apply to any of the following:

(a) An act committed by the pregnant individual.

(b) A medical procedure performed by a physician or other licensed health professional within the scope of his or her practice and with the pregnant individual's consent or the consent of an individual who may lawfully provide consent on her behalf or without consent as necessitated by a medical emergency.

(c) The lawful dispensation, administration, or prescription of medication.

(3) This section does not prohibit a civil action under any other applicable law.

(4) As used in this section, "physician or other licensed health professional" means a person licensed under article 15 of the public health code, 1978 PA 368, MCL 333.16101 to 333.18838.

In 2003, the Court of Appeals addressed a medical malpractice action concerning a miscarriage in *McClain v Univ of Mich Bd of Regents*.[5] In *McClain*, the mother sought to recover damages for emotional distress resulting from the medical malpractice that had caused the miscarriage.[6] The defendant moved for summary disposition, claiming that the plaintiff was not entitled to recover damages arising from the loss of her deceased fetus.[7] The trial court granted summary disposition, holding that the plaintiff had failed to state a valid medical malpractice claim "with regard to delivery of a

[5] *McClain v Univ of Mich Bd of Regents*, 256 Mich App 492; 665 NW2d 484 (2003).

[6] *Id*. at 493-495.

[7] *Id*. at 494.

nonviable fetus."[8]

The Court of Appeals reversed.[9] It first noted that a wrongful-death action under MCL 600.2922 could not be brought on behalf of the fetus because the wrongful-death statute applied only to a "person" and the plaintiff's nonviable fetus was not a person.[10] The mother, therefore, could not recover for loss of society and companionship under MCL 600.2922.[11] Significantly, the *McClain* panel did not recognize or address the import of MCL 600.2922a.

The Legislature amended the wrongful-death statute in 2005 to specifically incorporate and cross-reference MCL 600.2922a. Because of the 2005 amendment, MCL 600.2922(1) currently reads as follows:

> Whenever the death of a person, injuries resulting in death, *or death as described in section 2922a* shall be caused by wrongful act, neglect, or fault of another, and the act, neglect, or fault is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages, the person who or the corporation that would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured or death as described in section 2922a, and although the death was caused under circumstances that constitute a felony. [Emphasis added.]

Public Act 270 of 2005 was signed into law and given immediate effect as of December 19, 2005.

III. PROCEDURAL HISTORY

Plaintiffs filed a complaint against defendants alleging negligence under MCL 600.2922a and medical mal-

[8] *Id*. at 495.

[9] *Id*. at 499-500.

[10] *Id*. at 495

[11] *Id*. at 495-496.

practice. The complaint did not mention wrongful death or MCL 600.2922.

Defendants moved for summary disposition under MCR 2.116(C)(8) and (C)(10). Defendants first argued that plaintiffs could not sustain a wrongful-death claim for a nonviable fetus under MCL 600.2922 because a nonviable fetus is not a person. Defendants also argued that plaintiffs had failed to state a claim under MCL 600.2922a because there was no allegation that defendants had committed an affirmative act.

In response, plaintiffs maintained that the refusal to perform a cerclage was an affirmative act. Plaintiffs further argued that MCL 600.2922, as amended by 2005 PA 270, was inapplicable because the amendment took effect after the instant case arose, stating, "It was not until December, 2005 that the legislature made clear that a cause of action for the death of a fetus under MCL 600.2922a now must be brought as a wrongful death action . . . ." Indeed, they indicated, "[f]or this reason, [p]laintiffs fashioned their complaint on behalf of the fetus under MCL 600.2922a, not under the wrongful death act." Plaintiffs did posit, however, that "if this Court disagrees, then plaintiff has only to either amend the complaint to add a Count III of wrongful death of the fetus, or bring a separate wrongful death action on behalf of the fetus under MCL 600.2922, and then consolidate."

Defendants then filed an additional motion for summary disposition. Defendants argued that the 2005 amendment of MCL 600.2922 was retroactive, and by incorporating references to MCL 600.2922a, MCL 600.2922, as amended by 2005 PA 270, requires that a plaintiff establish, in a case in which "death as described in section 2922a" occurs, negligence through an affirmative act.

After a hearing, the circuit court denied defendants' motions, finding that plaintiffs could develop a cause of action under MCL 600.2922a through the wrongful-death statute or by pursuing a standard medical malpractice claim under *McClain*. The court reasoned that Pastoriza's refusal to perform the cerclage after Candice asked for it could be interpreted under MCL 600.2922a as an affirmative act and that the exception for medical providers did not apply. The court also permitted plaintiffs to amend the complaint.

Defendants applied for interlocutory leave to appeal.[12] On leave granted, the Court of Appeals affirmed the circuit court's decision in a published opinion.[13] Before addressing the substance of plaintiffs' claims, the Court considered whether MCL 600.2922, as amended by 2005 PA 270, applied retroactively. The Court concluded that the 2005 amendment was remedial and, thus, that the presumption that new statutes only have prospective application was inapplicable. The Court reasoned that the 2005 amendment "was enacted in order to clarify MCL 600.2922 and MCL 600.2922a and to resolve a controversy regarding their meaning."[14] Having concluded that the amended version of MCL 600.2922 applies retroactively, the Court then rejected defendants' position that MCL 600.2922a requires an affirmative act in order to establish a claim under the wrongful-death statute for death of a fetus. The Court stated:

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[12] This interlocutory appeal does not involve Candice's standard malpractice action.

[13] Plaintiffs submitted their third amended complaint after the Court of Appeals issued its opinion in this case. The third amended complaint, filed in October 2010, reasserted Candice's claims of medical malpractice under *McClain*, her individual negligence claim under MCL 600.2922a, and added a new claim for wrongful death on behalf of the estate of Baby Johnson.

[14] *Johnson v Pastoriza*, 290 Mich App 260, 272; 810 NW2d 42 (2010) (*Johnson I*).

> Pursuant to MCL 600.2922, a party need not establish that the injury was caused by an act. Rather, MCL 600.2922 specifically provides that liability is possible when the injury is "caused by wrongful act, neglect, or fault of another . . . ." While MCL 600.2922 refers to a "death as described in [MCL 600.2922a]," it does not indicate that the death in question must occur in the *manner* described in MCL 600.2922a. Plaintiffs are alleging that defendants caused their injuries when they neglected to perform the requested procedure in a timely manner. That allegation, when accepted as true, sufficiently established a cause of action pursuant to MCL 600.2922.[15]

The Court reasoned in the alternative that Pastoriza's refusal to perform the cerclage constituted an affirmative act.[16] The Court also concluded that the medical provider exception of MCL 600.2922a was inapplicable because no medical procedure had been performed.[17]

Defendants filed an application for leave to appeal in this Court. This Court granted leave to appeal in an order dated March 23, 2011, and directed the parties to brief "(1) whether the 2005 amendment of MCL 600.2922, 2005 PA 270, applies retroactively and (2) if so, whether the reference to 'death as described in section 2922a' in the 2005 amendment of MCL 600.2922 incorporates the exceptions to recovery contained at MCL 600.2922a(2)."[18]

IV. STANDARD OF REVIEW

We review de novo a trial court's ruling on a motion for summary disposition.[19] Likewise, whether a statute

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[15] *Id*. at 272-273 (alteration in original).

[16] *Id*. at 273.

[17] *Id*. at 274.

[18] *Johnson II*, 489 Mich at 856.

[19] *Haynes v Neshewat*, 477 Mich 29, 34; 729 NW2d 488 (2007).

applies retroactively is a question of statutory construction that this Court reviews de novo.[20] Questions of statutory interpretation are questions of law that are reviewed de novo.[21]

V. ANALYSIS

A. RETROACTIVITY OF MCL 600.2922(1) AS AMENDED BY 2005 PA 270

Public Act 270 of 2005 took effect on December 19, 2005, and plaintiffs' cause of action arose on November 1, 2005. Plaintiffs argue that the Court of Appeals was correct in holding that 2005 PA 270 is retroactive and applicable to this case. Plaintiffs argue that the Court of Appeals correctly held that MCL 600.2922 specifically provides that liability is possible when the "death as described in [MCL 600.2922a]" is "caused by wrongful act, neglect, or fault of another." Thus, plaintiffs need not establish under MCL 600.2922, as amended by 2005 PA 270, that the injury was caused by Pastoriza's affirmative act.

In determining whether a statute applies retroactively or prospectively, the intent of the Legislature governs.[22] Statutes are presumed to apply prospectively unless the Legislature clearly manifests the intent for retroactive application.[23] This is "especially true when giving a statute retroactive operation will . . . create a new liability in connection with a past transaction, or invalidate a defense which was good when the statute

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

[21] *Haynes*, 477 Mich at 34.

[22] *Lynch*, 463 Mich at 583.

[23] *Brewer v A D Transp Express, Inc*, 486 Mich 50, 55-56; 782 NW2d 475 (2010); *Franks v White Pine Copper Div*, 422 Mich 636, 670; 375 NW2d 715 (1985).

was passed."[24] Further, "[e]ven if the Legislature acts to invalidate a prior decision of this Court, the amendment is limited to prospective application if it enacts a substantive change in the law."[25]

While 2005 PA 270 was given immediate effect, nothing in the statutory amendment suggests that the Legislature intended *retroactive* effect. The phrase "immediate effect" simply refers to Const 1963, art 4, § 27, which provides that "[n]o act shall take effect until the expiration of 90 days from the end of the session at which it was passed, but the legislature may give *immediate effect* to acts by a two-thirds vote of the members elected to and serving in each house." (Emphasis added.)[26] Use of the phrase "immediate effect" does not at all suggest that a public act applies retroactively.[27]

As we have noted in other cases, "the Legislature has shown . . . that it knows how to make clear its intention that a statute apply retroactively."[28] In this case, that the Legislature knows how to do so is palpably demonstrated by considering a previous amendment of the

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

[25] *Brewer*, 486 Mich at 56, citing *Hurd v Ford Motor Co*, 423 Mich 531, 533; 377 NW2d 300 (1985).

[26] We agree with the opinion that a bill passed by the Legislature, given immediate effect in accordance with Const 1963, art, 4, § 27, and signed by the Governor becomes law upon its filing with the Secretary of State. See OAG, 1983-1984, No 6201, p 230 (January 30, 1984).

[27] Compare *Ludka v Dep't of Treasury*, 155 Mich App 250, 260-261; 399 NW2d 490 (1986) (holding that Const 1963, art 4, § 27 does not require the Legislature to pass legislation by a 2/3 vote in order to make the legislation retroactive).

[28] *Lynch*, 463 Mich at 584, citing MCL 141.1157 ("This act shall be applied retroactively . . . ."); MCL 324.21301a(2) ("The changes in liability that are provided for in the amendatory act that added this subsection shall be given retroactive application.").

wrongful-death statute. MCL 600.2922, as amended by 1985 PA 93, was ordered to take immediate effect on the date the act was filed, July 10, 1985.[29] In contrast to 2005 PA 270, however, § 2 of 1985 PA 93 expressly provided, in pertinent part, "This amendatory act applies to cases and matters pending on or filed after the effective date of this amendatory act. While the Legislature made clear its intention that 1985 PA 93 take immediate effect on the date it was filed, it also made clear that the amendatory act would be applied retroactively to cases and matters that were pending on the effective date of the amendatory act. We will not ignore that the Legislature did not include language making MCL 600.2922, as amended by 2005 PA 270, retroactive given that a previous amendment of MCL 600.2922 was specifically made retroactive.[30] The Legislature was cognizant of the operative language necessary to apply any particular provision in the amendatory act retroactively but did not include such language in 2005 PA 270.[31] The Court of Appeals improperly held that "MCL

[29] Section 3 of 1985 PA 93 conditioned the effective date of the act on the enactment of HB 4486 of the 83rd Legislature. That bill became law 1985 PA 92 and was also filed with the Secretary of State on July 10, 1985.

[30] We also note that the most recent amendment of another statute relevant to this case, MCL 600.2922a, was also given immediate effect. See 2002 PA 164. Again, that indicates that the Legislature by a 2/3 vote expressed an intention that the amendatory act take effect on the date it was filed, April 11, 2002. However, within the language of 2002 PA 164 itself the Legislature provided an enacting section that expressly stated that "[t]his amendatory act applies to a cause of action arising on or after May 1, 2002." While we recognize that the Legislature gave 2002 PA 164 immediate effect and that the amendment was filed on April 11, 2002, we also recognize the Legislature made clear that the amendatory act only applies "to a cause of action arising on or after May 1, 2002."

[31] As an additional example, during the 2005 session, the Legislature passed a law providing for limited immunity from civil liability for guardians ad litem. The law specifically provided, in part, that "[a]

600.2922, as amended by 2005 PA 270, . . . may be applied retroactively from April 1, 2000, the effective date of the last prior amendment of MCL 600.2922 before its amendment in 2005."[32] Had the Legislature intended that 2005 PA 270 apply retroactively, the Legislature could readily have provided that "[t]his amendatory act applies to a cause of action arising on or after April 1, 2000."

This Court has recognized that "providing a specific, future effective date and omitting any reference to retroactivity supports a conclusion that a statute should be applied prospectively only."[33] This is akin to what the 2005 amendment of the wrongful-death statute does: it provides a specific effective date, that being the date of filing with the Secretary of State, without the slightest hint of retroactive application. The amendment contains no language suggesting that it applies to an antecedent "death as described in section 2922a." Therefore, the amended language applies only to injuries occurring on or after the effective date of 2005 PA 270, December 19, 2005.

Acknowledging the absence of statutory language expressing legislative intent to apply the statute retroactively, both plaintiffs and the Court of Appeals' opinion rely on an "exception" to the presumption that statutes apply prospectively: that "statutes which operate in furtherance of a remedy or mode of procedure

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guardian ad litem is immune from civil liability for an injury to a person or damage to property if he or she is acting within the scope of his or her authority as guardian ad litem." MCL 691.1407(6), as amended by 2005 PA 318. The law then expressly states that "[t]his subsection applies to actions filed before, on, or after May 1, 1996." *Id*.

[32] *Johnson I*, 290 Mich App at 272.

[33] *Brewer*, 486 Mich at 56, citing *White v Gen Motors Corp*, 431 Mich 387, 398-399; 429 NW2d 576 (1988) (opinion by RILEY, J.) (quotation marks omitted).

and which neither create new rights nor destroy, enlarge, or diminish existing rights are generally held to operate retrospectively unless a contrary legislative intent is manifested."[34] Simply calling a statute "remedial," however, is not enough for retroactive application, as we explained in *Lynch*:

> [W]e have rejected the notion that a statute significantly affecting a party's substantive rights should be applied retroactively merely because it can also be characterized in a sense as "remedial." In that regard, we agree with Chief Justice RILEY's plurality opinion in *White v General Motors Corp*, that the term "remedial" in this context should *only be employed to describe legislation that does not affect substantive rights*. Otherwise, the mere fact that a statute is characterized as remedial is of little value in statutory construction. Again, the question is one of legislative intent.[35]

This exception to the presumption of prospective application for remedial statutes is inapplicable here because the statutory amendment affects substantive rights. Before the 2005 amendment of the wrongful-death statute, a plaintiff could not bring an action under MCL 600.2922 for the death of a nonviable fetus. Nothing in the language of either MCL 600.2922 or MCL 600.2922a indicated that the death of a nonviable fetus could be redressed under § 2922. Under MCL 600.2922, as amended by 2005 PA 270, the representative of the fetus's estate is now able to file a wrongful-death claim on the basis of the fetus's death.[36] Addition-

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[34] *Lynch*, 463 Mich at 584 (citations and quotation marks omitted).

[35] *Id*. at 585 (emphasis added; citations and quotations marks omitted; formatting altered).

[36] The pregnant woman appears to have a cause of action in her own right under MCL 600.2922a. Under § 2922a, a defendant is liable for damages if his or her acts resulted in a "miscarriage or stillbirth" by the pregnant woman or "physical injury to or death of" the fetus. The

ally, MCL 600.2922, as amended by 2005 PA 270, permits plaintiffs to bring claims, as the result of the death of a nonviable fetus, for loss of consortium and other damages unique to the wrongful-death statute that plaintiffs would not otherwise be entitled to bring.[37] The 2005 amendment thus affects the substantive rights of those who would harm or kill a nonviable fetus, as well as the substantive rights of those who bring claims on behalf of a fetus's estate.

Given these considerations, we conclude that the 2005 amendment of MCL 600.2922 does not apply retroactively. The Legislature gave the amendatory act immediate effect without giving any indication that it intended retroactive effect. The amendment affects substantive rights and therefore cannot be given retroactive effect on the basis that it is remedial.[38]

B. VALID CLAIM UNDER MCL 600.2922a

The Court of Appeals held that the circuit court properly denied defendants' motion for summary disposition under MCR 2.116(C)(8) because Candice alleged that she had "specifically requested the performance of a cerclage and defendants consciously chose to deny the request," and [t]heir conduct in denying the requested care is tantamount to an affirmative act."[39] A motion for

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pregnant woman's injuries are distinct from those of the fetus, although either a miscarriage or stillbirth has the same result—death of the fetus.

[37] *Sizemore v Smock*, 430 Mich 283, 285, 296 n 24; 422 NW2d 666 (1988) (noting that common-law negligence principles do not permit recovery for the loss of a child's society and companionship, whereas the wrongful-death statute extends a defendant's liability to consortium damages).

[38] The dissent simply does not address whether the language of 2005 PA 270 justifies retroactive application of MCL 600.2922, as amended by 2005 PA 270. Finding that the legislative history supports the dissent's position, the dissent chooses to ignore the dispositive statutory text.

[39] *Johnson I*, 290 Mich App at 273.

summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of the complaint.[40] All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant.[41] A motion under MCR 2.116(C)(8) may be granted only when the claims alleged "are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery."[42]

MCL 600.2922a provides:

> (1) A person who commits a wrongful or negligent act against a pregnant individual is liable for damages if the act results in a miscarriage or stillbirth by that individual, or physical injury to or the death of the embryo or fetus.
>
> (2) This section does not apply to any of the following:
>
> (a) An act committed by the pregnant individual.
>
> (b) A medical procedure performed by a physician or other licensed health professional within the scope of his or her practice and with the pregnant individual's consent or the consent of an individual who may lawfully provide consent on her behalf or without consent as necessitated by a medical emergency.
>
> (c) The lawful dispensation, administration, or prescription of medication.
>
> (3) This section does not prohibit a civil action under any other applicable law.
>
> (4) As used in this section, "physician or other licensed health professional" means a person licensed under article 15 of the public health code, 1978 PA 368, MCL 333.16101 to 333.18838.

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[40] *Dolan v Continental Airlines/Continental Express*, 454 Mich 373, 380; 563 NW2d 23 (1997).

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

[42] *Id*. at 163.

We must give effect to the Legislature's intent, and the best indicator of the Legislature's intent is the words used.[43] We must give every word its plain and ordinary meaning, unless otherwise defined, and may rely on dictionary definitions.[44] If the language is plain and unambiguous, then judicial construction is neither necessary nor permitted.[45]

MCL 600.2922a(1) provides that a person "who commits a wrongful or negligent act" against a pregnant woman is liable for damages if "the act" results in a miscarriage or stillbirth by that individual or physical injury to or the death of the embryo or fetus. The term "act" commonly means "anything done, being done, or to be done[.]"[46] The phrases "wrongful act" and "negligent act" also have plain legal connotations. According to Black's Law Dictionary, the phrase "wrongful act" is synonymous with the phrase "wrongful conduct," which means "[a]n act taken in violation of a legal duty; an act that unjustly infringes on another's rights."[47] And Black's Law Dictionary defines "negligent act" as an "act that creates an unreasonable risk of harm to another."[48] Further, Black's Law Dictionary compares the phrase, "active negligence," with the phrase "passive negligence." The former means "[n]egligence resulting from *an affirmative or positive act*,

[43] *Wesche v Mecosta Co Rd Comm*, 480 Mich 75, 83; 746 NW2d 847 (2008).

[44] *Krohn v Home-Owners Ins Co*, 490 Mich 145, 156-157; 802 NW2d 281 (2011), citing *Veenstra v Washtenaw Country Club*, 466 Mich 155, 160; 645 NW2d 643 (2002), in turn citing MCL 8.3a.

[45] *Griffith v State Farm Mut Auto Ins Co*, 472 Mich 521, 526; 697 NW2d 895 (2005).

[46] *Random House Webster's College Dictionary* (2001).

[47] Black's Law Dictionary (9th ed), pp 337, 1751.

[48] *Id*. at 28.

such as driving through a barrier."[49] On the other hand, "passive negligence" means "[n]egligence resulting from a person's failure or omission in acting, such as failing to remove hazardous conditions from public property."[50] The Legislature clearly intended to impose liability for affirmative or positive acts under MCL 600.2922a(1).

In comparison, it is very clear that the Legislature did not intend to impose liability for omissions, something it can and has done in other statutes.[51] The Legislature did not even include the more expansive terms "neglect" and "fault of another" that it included in MCL 600.2922(1), which permit liability on the basis of omissions. The Legislature's decision to exclude omissions from MCL 600.2922a indicates that it did not intend to attach liability to omissions that cause prenatal death or injury. To read the phrase "wrongful or negligent act" as including omissions would expand liability under MCL 600.2922a beyond the Legislature's intent.

In addition, MCL 600.2922a exempts healthcare professionals from liability for medical procedures performed either with consent or under emergency circumstances, and from liability for lawfully dispensing and prescribing medication. It would be incongruous to read the statute as

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[49] *Id*. at 1134 (emphasis added).

[50] *Id*. at 1135.

[51] The Legislature has specifically addressed liability for acts *and* omissions in numerous statutes. See, e.g., MCL 3.751, art 7, § a(9) (concerning liability for acts or omissions for those involved in the transport of radioactive waste); MCL 41.711a (eliminating liability for good-faith acts or omissions of emergency personal when rendering care at the scene of an emergency); MCL 52.205(7) (concerning liability for acts or omissions of medical examiners); MCL 333.18826 (concerning liability for acts or omissions of veterinarians and veterinary technicians); MCL 600.2962 (concerning liability for acts or omissions of certified public accountants); MCL 600.5838a(2) (providing that a medical malpractice action generally accrues at time of the act or omission claimed).

providing liability for negligent omissions when it specifically exempts healthcare professionals from liability for their affirmative acts of commission performed within the scope of their practice under MCL 600.2922a(2)(b). Because the statute specifically requires a wrongful or negligent act, a wrongful or negligent omission does not impose liability under the statute.

In *People v Thomas*,[52] this Court similarly distinguished between the omission of a duty and an affirmative act. In *Thomas*, a police officer was charged with crimes related to his falsification of a police report, including common-law obstruction of justice, MCL 750.505. The question presented was whether the trial court erred by dismissing the obstruction of justice charge because the alleged conduct fell within the statutory prohibition of failing to uphold the law, MCL 752.11.[53] The relevant statute, MCL 752.11, provided:

> Any public official, appointed or elected, who is responsible for enforcing or upholding any law of this state and who wilfully and knowingly fails to uphold or enforce the law with the result that any person's legal rights are denied is guilty of a misdemeanor.

Just as in this case, the *Thomas* Court found it necessary when reading the relevant statute to "distinguish between the omission of a duty and affirmative acts."[54] We concluded that MCL 752.11 "proscribes the wilful and knowing *failure* to uphold the law, *acts of omission*."[55] We also unanimously concluded that falsifying a police report is clearly an act of commission, not an act of omission.[56]

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[52] *People v Thomas*, 438 Mich 448; 475 NW2d 288 (1991).

[53] *Id*. at 450-451.

[54] *Id*. at 454.

[55] *Id*. at 455 (emphasis added).

[56] *Id*. (CAVANAGH, C.J.); *id*. at 458-459 (BOYLE, J., concurring).

Under the analytical framework laid out in *Thomas*, even assuming that defendant "refused" to perform a procedure,[57] his refusal still could not be characterized as anything other than "wilful and knowing failure to [do something]," language which this Court in *Thomas* unequivocally construed as an act of omission.[58]

Moreover, we cannot accept the dissent's conclusion "that an active decision-making process clearly involves an affirmative act."[59] This conclusion morphs all willful omissions into commissions. And even assuming that Pastoriza did refuse to perform a cerclage, his words of refusal did not create any risk of harm. Rather, as plaintiffs claim, it was Pastoriza's failure to perform a medical procedure that caused the harm, and this alleged *failure* cannot be reasonably characterized as an affirmative act. The dissent's conclusion that Pastoriza committed an "act" when he "refused to act" is untenable. A refusal to act is to abstain from action and, therefore, cannot reasonably be considered an act. In sum, the dissent distorts the express language of MCL 600.2922a, obliterates the long-recognized distinction between the omission of a duty and affirmative acts, and improperly equates saying "no" with an affirmative act.

Viewing the pleadings in a light most favorable to plaintiff and accepting each and every factual allegation as true, Pastoriza's act was, at most, an omission. Consequently, plaintiffs have failed to state a claim

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[57] Plaintiffs' original complaint alleges that Candice "asked [Pastoriza] to place a cerclage, but he did not do so." It also alleges that Pastoriza "fail[ed] to perform a cerclage," but it says nothing about his "refusing" to perform a cerclage. Indeed, it was not until plaintiffs' third amended complaint, filed after the Court of Appeals rendered its decision, that they alleged that Pastoriza "refused" to perform the procedure.

[58] *Id*. at 455.

[59] *Post* at 444.

under MCL 600.2922a because defendants did not commit a "wrongful or negligent act." Therefore, the trial court erred by denying summary disposition to defendants.

VI. CONCLUSION

In sum, we hold that the 2005 amendment of MCL 600.2922(1) does not have retroactive application because (1) the Legislature failed to give any indication that retroactive application was intended, and (2) the amendment affects substantive rights and cannot be given retroactive application on the ground that it is remedial. Therefore, plaintiffs may not proceed under MCL 600.2922. Further, we hold that the text of MCL 600.2922a provides liability only for affirmative acts and does not encompass omissions. In this case, plaintiffs have only alleged an omission or failure to act by defendants; therefore, plaintiffs have failed to state a claim under MCL 600.2922a. We therefore reverse the judgment of the Court of Appeals and remand the case to the trial court for the entry of partial summary disposition in favor of defendants.[60]

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

CAVANAGH, J. (*concurring*). I concur with the majority's result only. I write separately to emphasize that, because the majority concludes that MCL 600.2922(1), as amended by 2005 PA 270, does not apply retroactively, the majority opinion does not address whether a plaintiff may base a claim for the wrongful death of a nonviable fetus on a defendant's omission occurring

[60] Again, this opinion does not affect Candice's separate medical malpractice claim.

after the effective date of the amendatory act. As the majority notes, however, the terms "neglect" and "fault of another" in MCL 600.2922(1) "permit liability on the basis of omissions." *Ante* at 437. Accordingly, it appears that the majority's holding is applicable only to claims for the wrongful death of a nonviable fetus arising out of omissions occurring before December 19, 2005.

MARILYN KELLY, J., concurred with CAVANAGH, J.

HATHAWAY, J. (*dissenting*). At issue is the extent of liability imposed under two statutes, MCL 600.2922a and MCL 600.2922, for wrongful or negligent acts against a pregnant woman that result in injuries to or the death of a fetus. The majority holds that plaintiffs' claims for negligence brought under MCL 600.2922a, which provides a cause of action for injuries to or the death of a fetus, fail as a matter of law. The majority believes that MCL 600.2922a only imposes liability for negligent conduct when the conduct complained of consists of an "affirmative" act rather than an "omission." The majority further holds that claims brought under the wrongful-death statute, MCL 600.2922, as amended by 2005 PA 270, fail because the majority believes that the 2005 amendment of the statute, incorporating the death of a fetus, is not retroactive. Because I find both of these conclusions erroneous, I respectfully dissent.

The underlying claims in this case involve allegations of negligence resulting in the death of plaintiff Baby Johnson,[1] as well as injuries to his mother, plaintiff

[1] This action was originally filed in the name of two plaintiffs, Baby Johnson and Candice Johnson. The complaint was subsequently amended, identifying the decedent, Baby Johnson, as Ordane Michael Johnson, and adding a count on behalf of the estate of Ordane Michael Johnson. To avoid confusion, I refer to the decedent as Baby Johnson.

Candice Johnson. Ms. Johnson had a history of miscarriages resulting from a condition known as an incompetent cervix. Treatment for this condition includes placement of a cerclage, which involves suturing the lower end of the uterus to strengthen it and prevent miscarriages. Ms. Johnson had multiple previous pregnancies, and in each pregnancy in which a cerclage was not placed, she miscarried; however, in her last three pregnancies, a cerclage was used, and she was able to carry her children to full-term. Defendant Rajan Pastoriza, M.D.,[2] was briefly involved in Ms. Johnson's last pregnancy and had removed the cerclage before the successful birth of her last full-term child.

Ms. Johnson became pregnant with Baby Johnson in June 2005 and chose defendant as her obstetrician. In September 2005, Ms. Johnson began bleeding vaginally and went to Foote Hospital, where she was advised to follow up with defendant. Defendant failed to place a cerclage during that follow-up visit. Ms. Johnson continued treatment with defendant as instructed, but he never placed a cerclage, despite ultrasound findings that Baby Johnson was the appropriate gestational age for placement of a cerclage. On October 19, 2005, Ms. Johnson complained to defendant that she felt preterm labor-like cramping. On this occasion, she specifically asked defendant to place a cerclage, but he refused to do so.

On November 1, 2005, Ms. Johnson went into premature labor. She was transferred to Sparrow Hospital where an emergency cerclage was placed. However, the

[2] Plaintiffs brought suit against Rajan Pastoriza, M.D., in his individual capacity and against his professional corporation. Plaintiffs' allegations center on the actions of Dr. Pastoriza in his individual capacity. Accordingly, I use the singular term "defendant" throughout this opinion for ease of reference.

cerclage failed to prevent the miscarriage. Baby Johnson was delivered at 20 weeks' gestation and did not survive. Plaintiffs alleged that the cerclage was placed too late to be effective in preventing the miscarriage and that Baby Johnson died as a result of defendant's refusal to place the cerclage at an earlier time. Ms. Johnson also alleged that the failed emergency cerclage caused a significant and permanent cervical tear that will prevent her from having any more children.

Only counts II and III of plaintiffs' third amended complaint are at issue in this appeal.[3] Count II, brought by Ms. Johnson, is based on MCL 600.2922a, which provides for liability for injuries to or the death of a fetus caused by a wrongful or negligent act against a pregnant individual. Count III, on behalf of Baby Johnson, was brought under MCL 600.2922a and the wrongful-death statute, MCL 600.2922. The trial court denied defendant's motions for summary disposition, and the Court of Appeals affirmed. I believe that the trial court and the Court of Appeals reached the correct result with respect to both of these issues.

With regard to the claims brought under MCL 600.2922a, the majority opines that those claims fail as a matter of law because it believes that this statute only imposes liability for negligent or wrongful conduct consisting of an *affirmative act*, rather than an *omission*. I disagree with the majority's conclusion that the conduct complained of in this case was an omission. Instead, defendant's conduct involved affirmative acts.

[3] Count I, alleging medical malpractice for Ms. Johnson's injuries, is not at issue in this appeal. Additionally, the majority's opinion does not address Ms. Johnson's claim for emotional-distress damages. See *ante* at 421 n 2. The Court of Appeals ruled in favor of Ms. Johnson on the issue of whether she can recover emotional-distress damages. The majority opinion does not affect that ruling.

As such, it is unnecessary to reach the issue whether liability can be based on an omission under this statute.

MCL 600.2922a(1) provides in relevant part:

> A person who commits a wrongful or negligent act against a pregnant individual is liable for damages if the act results in a miscarriage or stillbirth by that individual, or physical injury to or the death of the embryo or fetus.

According to the plain language of this subsection, the relevant inquiry is whether a person has committed a wrongful or negligent act against a pregnant individual. This case involves conduct, consisting of medical treatment by a physician, which is alleged to be "wrongful" or "negligent." The specific allegation is that Ms. Johnson needed a cerclage, defendant was aware of her need for the procedure, and he made a conscious decision not to perform that treatment. On one occasion, after having been asked to place the cerclage, defendant specifically refused to perform the procedure. Thus, the salient question is whether a defendant's active decision-making process in refusing to perform a necessary and specifically requested medical procedure is properly characterized as an omission or whether it is, in fact, an affirmative act. I believe that an active decision-making process clearly involves an affirmative act.

To hold otherwise ignores the language of the statute and the obvious intent of the Legislature. MCL 600.2922a imposes liability when a person "commits a wrongful or negligent act . . . ." This defendant committed "an act" when he consciously and actively refused to perform the procedure. An active, conscious decision is not an omission. Thus, I agree with the Court of Appeals' conclusion that "[i]t is improper in this instance to classify defendants' alleged conduct as an omission" and that "conduct in denying the requested

care is tantamount to an affirmative act."[4] Accordingly, I believe that plaintiffs' claims under MCL 600.2922a may proceed.

The majority also addresses the claims brought under the wrongful-death statute on behalf of the estate of Baby Johnson. The relevant portion of the wrongful-death statute, MCL 600.2922(1), as amended by 2005 PA 270, currently provides in pertinent part:

> Whenever the death of a person, injuries resulting in death, *or death as described in section 2922a* shall be caused by wrongful act, neglect, or fault of another, and the act, neglect, or fault is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages, the person who or the corporation that would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured or *death as described in section 2922a*, and although the death was caused under circumstances that constitute a felony. [Emphasis added.]

At the time of the alleged negligence, MCL 600.2922(1) did not include the language regarding "death as described in section 2922a," which is now twice cross-referenced in this subsection. This amendatory language was added in 2005 to specifically incorporate fetal deaths into the purview of actionable claims that can be pursued under the wrongful-death statute. The effective date of the amendatory act was in December 2005, the month following the death of Baby Johnson. The majority opines that because the negligent acts complained of occurred before the effective date of the amendatory act, the claims for Baby Johnson must fail because the amendatory act was not retroactive. I disagree. I believe that the Court of Appeals correctly analyzed this issue and properly

[4] *Johnson v Pastoriza*, 290 Mich App 260, 273; 810 NW2d 42 (2010).

found that the amended version of the wrongful-death statute applies retroactively.

To determine whether a statute should be applied prospectively or retroactively, the primary rule is that the intent of the Legislature controls, and all other rules of construction are subservient to this rule. *Frank W Lynch & Co v Flex Technologies, Inc*, 463 Mich 578, 583; 624 NW2d 180 (2001). Generally, statutes are presumed to operate prospectively unless a contrary intent is expressed. *Id.* However, there is a long-recognized exception when a statute is deemed remedial or procedural in nature. *Hansen-Snyder Co v Gen Motors Corp*, 371 Mich 480, 484-485; 124 NW2d 286 (1963). "Statutes which operate in furtherance of a remedy already existing and which neither create new rights nor destroy existing rights are held to operate retrospectively, unless a contrary legislative intention is manifested." *Selk v Detroit Plastic Prod*, 419 Mich 1, 10; 345 NW2d 184 (1984).

The 2005 amendment of MCL 600.2922(1) incorporated fetal deaths, as described in MCL 600.2922a, into the purview of the wrongful-death statute. By amending MCL 600.2922(1), the Legislature did not create a new right because the right to bring a cause of action based on wrongful or negligent acts that resulted in the death of a fetus already existed under MCL 600.2922a. This clearly delineated statutory right contained in MCL 600.2922a was seemingly disregarded or at least overlooked in *McClain v Univ of Mich Bd of Regents*, 256 Mich App 492; 665 NW2d 484 (2003). *McClain* held that an action for wrongful death could not be brought on behalf of a nonviable fetus. The Court opined that because a nonviable fetus is not a "person" within the meaning of the wrongful-death statute, such an action could not proceed. *Id.* at 495. However, *McClain* failed

to address or acknowledge the rights embodied in MCL 600.2922a, which permits a cause of action for injuries to or the death of a fetus irrespective of whether the fetus was viable. In doing so, *McClain* effectively abrogated the rights given to nonviable fetuses in MCL 600.2922a. Thus, it appears that the purpose of the 2005 amendment was merely to clarify the legislative intent that a cause of action could be brought on behalf of a nonviable fetus.

This conclusion is buttressed by the following legislative history[5] from the House Fiscal Agency's analysis of the amendatory act:

> Prior to 1998, the Michigan law did not specifically speak to the right of an individual to sue if the death in question was that of the unborn. Historically, lawsuits through the years went back and forth, sometimes applying regardless of gestational age, then more recently, being limited to instances in which the fetus was viable. Legislation in 1998 sought to settle the question by establishing both civil liability and criminal penalties for conduct against a pregnant woman that caused a miscarriage or stillbirth or that caused physical injury to the embryo or fetus (Public Act 211 — civil and Public Act 238 — criminal).
>
> The language establishing the civil penalty was placed in a separate section (MCL 600.2922a) from the existing wrongful death provision (MCL 600.2922) as a compromise between pro-life and pro-choice advocates. Since Section 2922 specifies a right to recover damages for the wrongful death of a "person," pro-choice advocates voiced a concern that including conduct against a pregnant woman in that section would, by association, attach "personhood" to a

[5] An analysis of a statute's legislative history is an important tool in ascertaining legislative intent. *Bush v Shabahang*, 484 Mich 156, 168; 772 NW2d 272 (2009); *In re MCI Telecom Complaint*, 460 Mich 396, 415; 596 NW2d 164 (1999).

fetus or embryo and subsequently could be used to attack laws protecting reproductive rights.

Many thought the 1998 legislation was clear, but a 2000 Oakland County case proved otherwise. The Oakland County Circuit Court ruled that a man who had killed his pregnant wife could not be charged with the death of his wife's embryo because his actions did not "technically" result in either a miscarriage or a stillbirth as the embryo was not expelled from the wife's body. As a result, Public Act 2 of 2001 and Public Act 164 of 2002 were enacted to amend the Michigan Penal Code and the wrongful death statute, respectively, to extend the criminal and civil penalties to conduct causing the death of an embryo or fetus. It was believed at the time that Public Act 164 closed the loophole in the wrongful death statute and so would apply to all situations in which conduct toward a pregnant woman resulted in the death of the embryo or fetus she carried.

However, in subsequent civil actions, courts around the state have apparently only looked at Section 2922 of the wrongful death statute and not Section 2922a. Most notably, in *McClain* v *University of Michigan Board of Regents*, 256 Mich App 492 (2003), the court held that "under Michigan law, an action for wrongful death, MCL 600.2922, cannot be brought on behalf of a nonviable fetus, because a nonviable fetus is not a 'person' within the meaning of the wrongful-death act."

Once again, it has become clear that legislation is needed to clarify the legislature's intent of providing a cause of action for the wrongful death of not only a person, but also an embryo or fetus.[6]

These comments make clear that this amendment was intended to clarify that claims for the wrongful death of a nonviable fetus may be pursued under the wrongful-death statute. The amendatory act did not establish any new rights because the right to pursue an

[6] House Legislative Analysis, HB 4777, October 24, 2005, p 1 (emphasis added).

action for the death of a fetus already existed under MCL 600.2922a. The 2005 amendment of the wrongful-death statute was only adopted to resolve the confusion created by *McClain* regarding whether a claim may be brought for the death of a nonviable fetus.

Thus, I agree with the Court of Appeals' conclusion that "it is clear that MCL 600.2922 was amended to add the language 'or death as described in section 2922a' in order to clarify both MCL 600.2922 and MCL 600.2922a and to resolve a controversy regarding their meaning."[7] Under these circumstances, I am persuaded that the Legislature intended the amended version of the wrongful-death statute to apply retroactively. As such, Baby Johnson's estate, as a matter of law, is entitled to proceed with its wrongful-death claim. Whether plaintiffs' allegations will ultimately prevail on the merits involves issues to be resolved by a jury.

Therefore, I believe that the trial court's denial of defendant's motions for summary disposition was proper. I would affirm the Court of Appeals. Accordingly, I dissent.

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[7] *Johnson*, 290 Mich App at 271.

PEOPLE v WATKINS

PEOPLE v PULLEN

Docket Nos. 142031 and 142751. Argued November 8, 2011 (Calendar Nos. 9 and 10). Decided June 8, 2012.

Lincoln Watkins was charged in the Wayne Circuit Court with five counts of first-degree criminal sexual conduct (CSC-I), MCL 750.520b(1)(a), and one count of second-degree criminal sexual conduct (CSC-II), MCL 750.520c(1)(a), for allegedly having sexual intercourse with a 12-year-old girl. The prosecutor moved to admit evidence of similar acts, which included the testimony of EW, who would have stated that Watkins repeatedly had intercourse with her beginning when she was 15 years old. The court, Carole F. Youngblood, J., ruled that EW's testimony was inadmissible because it described activity that was too different from the victim's description of the charged acts to prove a common plan or scheme under MRE 404(b), which prohibits the admission of evidence of other crimes, wrongs, or acts to prove the character of a person in order to show action in conformity therewith. After granting the prosecution's application for leave to file an interlocutory appeal, the Court of Appeals entered a peremptory order reversing the trial court's exclusion of EW's testimony and remanding for the trial court to determine the extent to which EW's testimony was admissible under MCL 768.27a, which allows a court to admit evidence that a defendant accused of criminal sexual conduct against a minor had committed other such acts if the evidence is relevant. Watkins appealed in the Supreme Court, which vacated the order and remanded the case to the Court of Appeals for consideration of whether MCL 768.27a conflicts with MRE 404(b) and, if so, whether the statute prevails over the court rule. 479 Mich 853 (2007). The Court of Appeals, JANSEN, P.J., and O'CONNELL and FORT HOOD, JJ., held that 768.27a is a substantive rule of evidence and therefore controls in situations in which it conflicts with MRE 404(b). The Court of Appeals affirmed in part, reversed in part, and remanded the case to the trial court for it to determine which aspects of the proposed testimony related to the commission of listed offenses under MCL 768.27a, which would be admissible at trial. 277 Mich App 358 (2007). The Supreme Court initially

granted leave to appeal, 480 Mich 1167 (2008), but vacated that order after concluding that leave had been improvidently granted, 482 Mich 1114 (2008). After a trial at which EW's testimony was admitted, the jury found Watkins guilty of four counts of CSC-I and one count of CSC-II, but not guilty of the remaining count of CSC-I. Watkins appealed, arguing that MRE 404(b) conflicts with and prevails over MCL 768.27a; that the probative value of EW's testimony was substantially outweighed by the danger of unfair prejudice under MRE 403; and that the trial court should have held a hearing to determine the proper scope of EW's testimony. The Court of Appeals, WILDER, P.J., and CAVANAGH and M. J. KELLY, JJ., affirmed in an unpublished opinion per curiam, issued October 5, 2010 (Docket No. 291841), and the Supreme Court granted Watkins's application for leave to appeal, 489 Mich 863 (2011).

Richard Pullen was charged in the Bay Circuit Court with two counts of CSC-II and one count of aggravated indecent exposure, MCL 750.335a(2)(b), for acts allegedly committed against his then 12-year-old granddaughter. Before trial, the prosecution filed a notice of intent to introduce under MCL 768.27a a 1989 police report containing allegations that Pullen had sexually abused his then 16-year-old daughter. The court, Joseph K. Sheeran, J., granted Pullen's motion in limine to bar the evidence as unduly prejudicial under MRE 403. The Court of Appeals, SERVITTO, P.J., and GLEICHER and SHAPIRO, JJ., granted the prosecution's interlocutory application for leave to appeal and affirmed the trial court's ruling in an unpublished opinion per curiam issued February 15, 2011 (Docket No. 298138), holding that MRE 403 applies to evidence admissible under MCL 768.27a and that the trial court did not abuse its discretion by excluding the evidence. The Supreme Court granted the prosecution's application for leave to appeal. 489 Mich 864 (2011).

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

MCL 768.27a irreconcilably conflicts with MRE 404(b), and the statute prevails over the court rule because it does not impermissibly infringe on the Supreme Court's authority regarding rules of practice and procedure under Const 1963, art 6, § 5. While evidence admissible under MCL 768.27a remains subject to MRE 403, courts must weigh the propensity inference derived from other-acts evidence in favor of the evidence's probative value rather than its prejudicial effect.

1. MRE 404(b)(1) requires the exclusion of evidence of other crimes, wrongs, or acts if its only relevance is to show the

defendant's character or propensity to commit the charged offense. By contrast, MCL 768.27a allows the admission of evidence of other acts of criminal sexual conduct against a child for its bearing on any matter to which it is relevant if the defendant was accused of committing a listed offense under the Sex Offenders Registration Act, MCL 28.722, against a minor. Evidence is relevant if it has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Because a defendant's propensity to commit a crime makes it more probable that he committed the charged offense, MCL 768.27a permits the admission of evidence that MRE 404(b) precludes. Accordingly, MCL 768.27a and MRE 404(b) irreconcilably conflict.

2. A rule of evidence adopted by the Supreme Court will prevail over a conflicting statute only if the statute unconstitutionally infringes on the Supreme Court's exclusive authority under Const 1963, art 6, § 5 to establish, modify, amend, and simplify the practice and procedure in Michigan courts. The Supreme Court is not authorized to enact court rules that establish, abrogate, or modify the substantive law. A statutory rule of evidence violates the separation of powers under this provision only when no clear legislative policy reflecting considerations other than judicial dispatch of litigation can be identified. Because MCL 768.27a was enacted to address substantive concerns about the protection of children and the prosecution of persons who perpetrate certain enumerated crimes against children and are more likely than others to reoffend, it does not run afoul of Const 1963, art 6, § 5 and, in cases in which it applies, it prevails over MRE 404(b).

3. Evidence admissible under MCL 768.27a may nonetheless be excluded under MRE 403 if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. The fact that the Legislature expressly referred to MRE 403 in MCL 768.27b, which allows the admission of other-acts evidence in cases of domestic violence, but not in MCL 768.27a does not support an inference that the Legislature did not intend MRE 403 to apply to other-acts evidence in cases involving sexual misconduct against minors, given that MCL 768.27b was enacted after MCL 768.27a, that MCL 768.27a and MRE 403 can be construed so as not to conflict, that the Legislature chose not to expressly exempt evidence admissible under MCL 768.27a from analysis under MRE 403, and that the Legislature included certain other terms and phrases in MCL 768.27a but not in MCL 768.27b.

4. When applying MRE 403 to evidence admissible under MCL 768.27a, courts must weigh the propensity inference in favor of the evidence's probative value rather than its prejudicial effect, and they may not exclude the evidence as overly prejudicial merely because it allows a jury to draw a propensity inference. However, the evidence may be excluded on the basis of other considerations that include (1) the dissimilarity between the other acts and the charged crime, (2) the temporal proximity of the other acts to the charged crime, (3) the infrequency of the other acts, (4) the presence of intervening acts, (5) the lack of reliability of the evidence supporting the occurrence of the other acts, and (6) the lack of need for evidence beyond the complainant's and the defendant's testimony. Trial courts should apply the balancing to each separate piece of evidence offered under MCL 768.27a. In addition, trial courts may determine how many separate pieces of other-acts evidence may be admitted under MCL 768.27a before the probative value of the evidence is outweighed by the other considerations in MRE 403 permitting exclusion of evidence, and the determination must be made in the context of the entire trial. The trial court should consider giving the standard jury instruction in CJI2d 20.28a to ensure that evidence admitted under MCL 768.27a is properly employed by the jury.

5. In *Watkins*, the Court of Appeals properly held that MCL 768.27a and MRE 404(b) conflict and the statute prevails, that the other-acts evidence remained subject to MRE 403, and that the trial court's failure to apply MRE 403 was harmless. In *Pullen*, the trial court abused its discretion by misapplying MRE 403 and failing to analyze the evidence of indecent exposure under MRE 404(b) because it was not a listed offense.

Watkins affirmed.

Judgments in *Pullen* vacated and case remanded for further proceedings.

Justice MARILYN KELLY, joined by Justices CAVANAGH and HATHAWAY, dissenting, agreed with the majority that MCL 768.27a and MRE 404(b) irreconcilably conflict but would have held that MCL 768.27a is an unconstitutional legislative intrusion into the power of the judiciary because, regardless of whether the policy concerns supporting it were substantive, its only function is to tell the courts what evidence they may admit in a court proceeding. She would have vacated the convictions in *Watkins* and remanded that case for a new trial and would have affirmed the lower court judgments in *Pullen* that excluded the other-acts evidence as substantially more prejudicial than probative under MRE 403.

1. CRIMINAL LAW — EVIDENCE — CRIMINAL SEXUAL CONDUCT — OTHER-ACTS EVIDENCE.

MCL 768.27a, which allows the admission of evidence that a defendant charged with a sexual offense against a minor committed another sexual offense against a minor, is a substantive rule of evidence that irreconcilably conflicts with and prevails over MRE 404(b), which requires the exclusion of other-acts evidence if its only relevance is to show a defendant's character or propensity to commit the charged offense.

2. CRIMINAL LAW — EVIDENCE — CRIMINAL SEXUAL CONDUCT — OTHER-ACTS EVIDENCE — EXCLUSION OF EVIDENCE OF OTHER-ACTS EVIDENCE.

Evidence admissible under MCL 768.27a, which allows the admission of evidence that a defendant charged with a sexual offense against a minor committed another sexual offense against a minor, may be excluded under MRE 403 if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence; when applying MRE 403 to evidence admissible under MCL 768.27a, courts must weigh the propensity inference in favor of the evidence's probative value rather than its prejudicial effect and may not exclude the evidence as overly prejudicial merely because it allows a jury to draw a propensity inference; the evidence may be excluded on the basis of other considerations that include (1) the dissimilarity between the other acts and the charged crime, (2) the temporal proximity of the other acts to the charged crime, (3) the infrequency of the other acts, (4) the presence of intervening acts, (5) the lack of reliability of the evidence supporting the occurrence of the other acts, and (6) the lack of need for evidence beyond the complainant's and the defendant's testimony; courts should apply this balancing to each separate piece of evidence offered under MCL 768.27a and determine in the context of the entire trial how many separate pieces of evidence may be admitted under MCL 768.27a before the probative value of such evidence is outweighed by the other considerations in MRE 403 permitting exclusion of evidence.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Kym L. Worthy*, Prosecuting Attorney, and *Timothy A. Baughman*, Chief of Research, Training and Appeals, for the people in *Watkins*.

State Appellate Defender (by *Gail Rodwan*) for Lincoln Watkins.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Kurt C. Asbury*, Prosecuting Attorney, and *Sylvia L. Linton*, Assistant Prosecuting Attorney, for the people in *Pullen*.

Bay Justice Associates, P.C. (by *Edward M. Czuprynski*), for Richard Pullen.

Amici Curiae:

John R. Minock and *Randy E. Davidson* for the Criminal Defense Attorneys of Michigan.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Richard A. Bandstra*, Chief Legal Counsel, and *Mark G. Sands*, Assistant Attorney General, for the Attorney General.

ZAHRA, J. These consolidated cases involve MCL 768.27a(1), which provides in relevant part that "in a criminal case in which the defendant is accused of committing a listed offense against a minor, evidence that the defendant committed another listed offense against a minor is admissible and may be considered for its bearing on any matter to which it is relevant."[1] We hold that MCL 768.27a irreconcilably conflicts with MRE 404(b), which bars the admission of other-acts evidence for the purpose of showing a defendant's propensity to commit similar acts, and that the statute prevails over the court rule because it does not impermissibly infringe on this Court's authority regarding

[1] " 'Listed offense' means that term as defined in section 2 of the sex offenders registration act, 1994 PA 295, MCL 28.722." MCL 768.27a(2)(a).

rules of practice and procedure under Const 1963, art 6, § 5. We also hold that evidence admissible under MCL 768.27a remains subject to MRE 403, which provides that a court may exclude relevant evidence if the danger of unfair prejudice, among other considerations, outweighs the evidence's probative value.[2] In applying the balancing test in MRE 403 to evidence admissible under MCL 768.27a, however, courts must weigh the propensity inference in favor of the evidence's probative value rather than its prejudicial effect. Accordingly, we affirm the judgment of the Court of Appeals in *People v Watkins*, Docket No. 142031, vacate the judgments of the lower courts in *People v Pullen*, Docket No. 142751, and remand the latter case to the trial court for further proceedings consistent with this opinion.

I. FACTS AND PROCEDURAL HISTORY

A. DOCKET NO. 142031

In Docket No. 142031, defendant, Lincoln Anderson Watkins, appeals by leave granted the judgment of the Court of Appeals affirming his convictions and sentences. Watkins was charged with five counts of first-degree criminal sexual conduct (CSC-I)[3] and one count of second-degree criminal sexual conduct (CSC-II)[4] for allegedly molesting a 12-year-old girl.

The Court of Appeals summarized the allegations of sexual abuse that the prosecution presented at the pretrial stage:

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[2] Given this conclusion, we need not address whether, if evidence admissible under MCL 768.27a were *not* subject to MRE 403, the statute would violate a defendant's due-process right to a fair trial or interfere with the judicial power to ensure that a criminal defendant receives a fair trial.

[3] MCL 750.520b(1)(a) (involving a person under the age of 13).

[4] MCL 750.520c(1)(a) (involving a person under the age of 13).

> The victim in the instant case was a 12-year-old girl whose family lived next door to defendant and whose father was defendant's business partner. The victim had known defendant and his wife since she was two years old and regarded defendant as a father figure. The victim babysat defendant's youngest child. In May 2006, defendant showed her a picture of his penis being inserted into a vagina. The next day, while she was playing video games with defendant's daughter in his bedroom, he touched her breasts. The day after that incident the victim was again babysitting at defendant's house when defendant sent his daughter into another room, unbuttoned the victim's pants, and told her to pull them down and get on his bed. She stood up and pulled down her pants, and when she bent over, defendant inserted his penis into her vagina from behind repeatedly until he ejaculated. She and defendant engaged in intercourse again in his bedroom the following day while she was babysitting his daughter. The victim claimed that she and defendant engaged in intercourse yet another time in defendant's bedroom and one time in his living room. The victim alleged that, about two weeks later, defendant asked her if she wanted to have sex, but she declined because she was menstruating. The victim claimed that defendant nevertheless instructed her to stand up and lift her skirt, and, when she complied, he inserted his penis into her vagina. The victim asserted that she worried that defendant might force her to have sexual intercourse in the future, so she told her mother that she had been having a sexual relationship with defendant.[5]

Before trial, the prosecution filed a motion to introduce evidence of other acts to establish a common plan or scheme, as permitted under MRE 404(b).[6] In particu-

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[5] *People v Watkins*, 277 Mich App 358, 360; 745 NW2d 149 (2007).

[6] MRE 404(b)(1) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or

lar, the prosecution sought to have a witness, EW, testify that Watkins had also engaged in vaginal-penile penetration with her.[7] Like the victim in the instant action, EW was a minor at the time, and she had a close relationship with Watkins's wife. The trial court granted the motion over Watkins's objection. The following is a summary of EW's testimony offered at defendant's first trial:

> At the first trial, [EW] testified that defendant's wife is her first cousin and that she [EW] met defendant when she was 14 years old. [EW] loved defendant like a brother and often babysat for defendant's children. On one occasion when she was 15 years old, she visited defendant and his wife for the weekend and helped them with their infant. While alone with [EW], defendant commented on her sexual attractiveness, took her hand, and began leading her up the stairs to his bedroom on the second floor. [EW] was reluctant to go upstairs, so defendant pulled down her pants and inserted his penis into her vagina while they were still in the hallway. After eventually moving to defendant's bedroom, they continued having intercourse until defendant ejaculated. [EW] stated that the episode began a two-year sexual relationship, during which they had sexual encounters about 15 different times at defendant's home, her mother's home, and in empty houses where defendant was painting. [EW] explained that defendant included her in his family; they went to an amusement park together, went out to eat together, and watched movies together.[8]

Following the close of trial, the jury commenced deliberations but was unable to reach a verdict. Consequently, the trial court declared a mistrial.

> absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

[7] The prosecution also sought to have a second witness testify regarding other-acts evidence. That testimony is not at issue in this appeal.

[8] *Watkins*, 277 Mich App at 361.

At the opening of his second trial, Watkins moved for the trial court to reconsider its ruling on the other-acts evidence under MRE 404(b). This time, the trial court granted the motion. It reasoned that the other acts described by EW were too dissimilar from the charged acts to justify their use to show a common plan or scheme. The prosecution applied for leave to file an interlocutory appeal while the case proceeded to trial for the second time.

The trial court declared a second mistrial when it learned that a juror had overheard a supervisor in the prosecutor's office comment about the court's exclusion of the other-acts evidence while riding in a courthouse elevator. Meanwhile, the Court of Appeals peremptorily reversed the trial court's decision to exclude EW's testimony and remanded the case to the trial court with instructions for it to determine which aspects of EW's proposed testimony were admissible under MCL 768.27a as evidence of criminal sexual conduct against a minor. Subsequently, this Court vacated the Court of Appeals' order and remanded the case to the Court of Appeals with directions to consider whether MCL 768.27a conflicted with MRE 404(b) and, if so, whether the statute prevailed over the rule of evidence.[9]

In a published opinion, the Court of Appeals held that MCL 768.27a conflicted with MRE 404(b) and that the statute prevailed over the rule of evidence.[10] Accordingly, it remanded the case to the trial court to determine under MCL 768.27a which aspects of EW's testimony related to the commission of a criminal sexual act against a minor.[11] This Court granted leave to appeal,[12]

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[9] *People v Watkins*, 479 Mich 853 (2007).

[10] *Watkins*, 277 Mich App at 365.

[11] *Id*.

[12] *People v Watkins*, 480 Mich 1167 (2008).

but later vacated that order after determining that leave had been improvidently granted.[13] Watkins preserved all his previous constitutional challenges as the case proceeded to trial for the third time.

At the third trial, the victim, then 15 years old, testified that she had known Watkins all her life, having lived next door to him and having occasionally babysat one of his children. She also stated that she was good friends with Watkins's wife, whom she considered her godmother. She considered Watkins her boyfriend. According to the victim, when she was 12 years old, Watkins approached her at a Memorial Day gathering and showed her sexually explicit images that were on his cell phone. She claimed that Watkins touched her breasts the next time she babysat and penetrated her vaginally the day after that. This conduct allegedly occurred consensually for the next couple of weeks. Sometime thereafter, when the victim arrived to babysit, she declined Watkins's request to engage in sexual activity because she was menstruating. She testified that Watkins's insistence disturbed her and she thought he might rape her. She told her mother what had happened. Although the victim did not want to get Watkins in trouble, she agreed to speak with the police.

The trial court allowed EW to testify regarding other-acts evidence under MCL 768.27a. According to EW, about 10 years earlier, when she was 15 years old, she had often babysat Watkins's oldest child. She testified that, during one visit, Watkins led her upstairs by the hand. He allegedly began kissing her, and their interactions culminated in sexual penetration. According to EW, their sexual relationship lasted a couple of years.

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[13] *People v Watkins*, 482 Mich 1114 (2008).

Watkins did not take the stand or call any witnesses. Defense counsel argued that the witnesses lacked credibility because their statements were inconsistent and uncorroborated. Ultimately, the jury returned a verdict finding Watkins guilty of four counts of CSC-I and one count of CSC-II, but not guilty of the remaining count of CSC-I.

Watkins raised several arguments on appeal, including that MCL 768.27a conflicts with MRE 404(b) and the rule of evidence prevails over the statute; that EW's testimony should have been excluded under MRE 403, which the trial court failed to consider; and that the trial court failed to hold a hearing to determine the proper scope of EW's testimony.

The Court of Appeals affirmed in an unpublished opinion per curiam.[14] While agreeing with Watkins that MCL 768.27a conflicts with MRE 404(b), it rejected the argument that the rule of evidence takes priority over the statute. Instead, it observed that a previous panel had already held that MCL 768.27a, as a substantive rule of evidence, did not interfere with the Supreme Court's authority to regulate court administration and, therefore, the statute takes priority over the rule of evidence.[15] With regard to MRE 403, it held that evidence admissible under MCL 768.27a remains subject to MRE 403.[16] Although acknowledging that the trial court had failed to apply MRE 403, the Court of Appeals reasoned that it had already decided the issue of admissibility when it directed the trial court to determine which aspects of EW's testimony fit the requirements of

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[14] *People v Watkins*, unpublished opinion per curiam of the Court of Appeals, issued October 5, 2010 (Docket No. 291841).

[15] *Id.* at 4, citing *People v Pattison*, 276 Mich App 613, 619-620; 741 NW2d 558 (2007), and *Watkins*, 277 Mich App at 364.

[16] *Watkins*, unpub op at 5.

MCL 768.27a and stated that those aspects were admissible.[17] The Court of Appeals concluded that EW's testimony would have been admissible even had the trial court considered MRE 403:

> The evidence that defendant had assaulted another minor . . . was relevant because it tended to show that it was more probable than not that the victim was telling the truth. The similarity of the relationships (E.W. was defendant's wife's cousin while the victim thought of his wife as a godmother) and defendant's modus operandi (taking advantage of minors who had a close relationship with his wife and were present in his home to baby sit) also made the likelihood of defendant's behavior toward the victim more probable. Moreover, the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. Whether the victim was telling the truth had significant probative value in deciding whether defendant should be convicted of the crimes for which he was charged. Further, defense counsel was able to effectively cross-examine E.W. regarding the fact that she thought of defendant as her boyfriend and maintained contact with him after their relationship ended, even expressing a desire to have his child. Finally, the court instructed the jury on how to properly use the other acts evidence[.][18]

Thus, the Court of Appeals concluded that the testimony was relevant and not more prejudicial than probative and that any error by the trial court was harmless.[19]

Finally, the Court of Appeals concluded that the trial court had abused its discretion when it failed to determine which aspects of EW's testimony met the requirements of MCL 768.27a.[20] EW's testimony regarding sexual intercourse with Watkins that occurred from the

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[17] *Id*.

[18] *Id*.

[19] *Id*. at 6.

[20] *Id*. at 6-7.

time she was 16 years old and after was not admissible under the statute.[21] Nonetheless, as the Court of Appeals explained, the only incident for which EW provided specific details occurred when she was 15 years old.[22] Moreover, the testimony regarding events that occurred from the time EW was 16 years old and after was helpful to the defense because it highlighted the fact that EW deeply cared for Watkins.[23] Accordingly, it held that the error in admitting all of EW's testimony "was not inconsistent with substantial justice."[24] We granted leave, instructing the parties to address

> (1) whether MCL 768.27a conflicts with MRE 404(b) and, if it does, (2) whether the statute prevails over the court rule . . . , (3) whether the omission of any reference to MRE 403 in MCL 768.27a (as compared to MCL 768.27b(1)), while mandating that evidence of other offenses "is admissible and may be considered for its bearing on any matter to which it is relevant," would violate a defendant's due process right to a fair trial, and (4) whether MCL 768.27a interferes with the judicial power to ensure that a criminal defendant receives a fair trial, a power exclusively vested in the courts of this state under Const 1963, art 6, § 1.[25]

B. DOCKET NO. 142751

In Docket No. 142751, the prosecution appeals by leave granted the judgment of the Court of Appeals

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[21] MCL 750.520d(1)(a) provides: "A person is guilty of criminal sexual conduct in the third degree if the person engages in sexual penetration with another person . . . [who] is at least 13 years of age and under 16 years of age." As the Court of Appeals explained, "after E.W. turned 16 years old, the sexual acts described would no longer constitute a crime" under this provision and thus "would not constitute a listed offense admissible as other acts evidence under MCL 768.27a." *Watkins*, unpub op at 7.

[22] *Id*.

[23] *Id*. at 7-8.

[24] *Id*. at 8.

[25] *People v Watkins*, 489 Mich 863 (2011).

affirming the trial court's opinion and order granting the motion in limine filed by defendant, Richard Kenneth Pullen. Pullen was charged with two counts of CSC-II[26] and one count of aggravated indecent exposure[27] for acts allegedly committed against his then 12-year-old granddaughter. At the preliminary examination, the victim testified that Pullen had touched her breasts with his hands under her clothes multiple times and that the touching started when she was five or six years old. She also claimed that Pullen touched her "crotch" under her clothes on a weekly basis. With regard to Pullen's alleged indecent exposure, the victim testified that, when she was 11 or 12 years old, she saw Pullen touching his penis in the next room while on the computer and, at the time, Pullen knew she could see him masturbating.

Before trial, the prosecution filed a notice of intent to introduce under MCL 768.27a other acts of sexual misconduct against a minor. Specifically, the prosecution sought to introduce a 1989 police report containing allegations that Pullen had sexually abused his then 16-year-old daughter. In the report, Pullen's daughter alleged multiple instances of digital penetration in which he "checked if [she] was still a virgin." In addition, the report contained allegations that defendant had frequently touched his daughter's breasts, buttocks, and genital area while wrestling and massaging her back, had repeatedly walked in on her while she was undressed, and had arranged to expose himself to her when he was bathing. Although Pullen had apparently admitted engaging in some of the conduct alleged in the report, including the digital penetration, criminal charges were never filed.

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[26] MCL 750.520c(1)(a) (involving a person under the age of 13).

[27] MCL 750.335a(2)(b).

In response to the notice of intent to introduce the 1989 police report, Pullen filed a motion in limine to bar the evidence as unduly prejudicial. The trial court granted Pullen's motion and excluded the evidence. After concluding that it "must perform the balancing test set forth in MRE 403 before admitting evidence under MCL 768.27a," the trial court ruled that the 1989 police report failed to survive that balancing:

> [I]t is the opinion of this Court that the prejudicial impact of the evidence proffered by the People substantially outweighs the probative value because it involves more serious facts than those in the case at bar. [Pullen] is charged with having sexual contact with his granddaughter, as well as exposing himself to his granddaughter. The police report from 1989 sets forth facts of a long pattern of sexual abuse by [Pullen] against his daughter, including multiple digital penetrations . . . . According to the police report, [Pullen] admitted to police that he had perpetrated these acts upon his daughter. Should this evidence be presented to the jury, it is highly probable that the jury would not be able to separate the two cases and would likely decide the case based on emotional impact rather than logical reasons. Thus, this evidence does not survive the balancing test of MRE 403 and is not admissible.
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> The Court also finds that it would be fundamentally unfair and a violation of due process to force [Pullen] to defend accusations from over 20 years ago for which charges were never filed. [Pullen] is in an untenable position to try to disprove more serious and greatly dated charges. It is unlikely that he would be able to do so, and to require him to do so would be manifestly unjust.

Following the ruling, the trial court agreed to stay the trial court proceedings to allow the prosecution to pursue an appeal. The Court of Appeals granted the prosecution's interlocutory application for leave to appeal and affirmed the trial court's ruling in an unpub-

lished opinion per curiam.[28] It concluded that MRE 403 applies to evidence admissible under MCL 768.27a and held that the trial court did not abuse its discretion by excluding the evidence:

> Even given the fact that the evidence is relevant because the past conduct also involves a family member, it is highly likely that the jury would convict defendant solely based on his past conduct out of inflamed passion, anger or shock. In addition, because the prior conduct did not result in a conviction or even in the filing of charges, the trial court correctly observed that the necessary presentation of this evidence concerning the earlier alleged conduct would not only overshadow the question of defendant's guilt that is directly at issue in the instant case, it would be virtually impossible for defendant to defend himself against the earlier unproven allegations.[29]

The prosecution applied for leave to appeal in this Court. We granted leave, instructing the parties to address

> (1) whether the omission of any reference to MRE 403 in MCL 768.27a (as compared to MCL 768.27b(1)), while mandating that evidence of other offenses "is admissible and may be considered for its bearing on any matter to which it is relevant," would violate a defendant's due process right to a fair trial and (2) whether the Court should rule that evidence of other offenses described in MCL 768.27a is admissible only if it is not otherwise excluded under MRE 403.[30]

II. STANDARD OF REVIEW

Constitutional questions and issues of statutory interpretation are questions of law, which this Court

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[28] *People v Pullen*, unpublished opinion per curiam of the Court of Appeals, issued February 15, 2011 (Docket No. 298138).

[29] *Id.* at 4.

[30] *People v Pullen*, 489 Mich 864 (2011).

reviews de novo.[31] In addition, we review for an abuse of discretion a trial court's decision to exclude evidence.[32] A trial court abuses its discretion when it chooses an outcome falling outside the range of principled outcomes.[33]

III. ANALYSIS

A. MCL 768.27a AND MRE 404(b) CONFLICT

Addressing whether MCL 768.27a prevails over MRE 404(b) requires the initial determination whether the statute and court rule irreconcilably conflict.[34] It is only in cases of irreconcilable conflict that we must determine whether the Legislature has enacted a statute that improperly supplants the Court's exclusive authority under Const 1963, art 6, § 5 to promulgate rules regarding the practice and procedure of the courts.[35] "We do not lightly presume that the Legislature intended a conflict, calling into question this Court's authority to control practice and procedure in the courts."[36]

When construing a statute, whether to determine the existence of a conflict or otherwise, our primary objective remains the same: to ascertain and give effect to the Legislature's intent.[37] We begin our analysis with the text. If the statutory language is plain and unambiguous, courts must "enforce the statute as written

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[31] *People v McCuller*, 479 Mich 672, 681; 739 NW2d 563 (2007); *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003).

[32] *People v Blackston*, 481 Mich 451, 480; 751 NW2d 408 (2008).

[33] *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

[34] *McDougall v Schanz*, 461 Mich 15, 24; 597 NW2d 148 (1999).

[35] *Id*.

[36] *People v Dobben*, 440 Mich 679, 697 n 22; 488 NW2d 726 (1992).

[37] *People v Phillips*, 469 Mich 390, 395; 666 NW2d 657 (2003).

and follow its plain meaning, giving effect to the words used by the Legislature."[38] We are also mindful of the need to read statutory provisions as a whole, focusing on not only the individual words and phrases but also the placement of those words and phrases in the context of the broader legislative scheme.[39] The same principles govern the construction of court rules.[40]

In this case, we have little trouble concluding that MCL 768.27a and MRE 404(b) irreconcilably conflict. MRE 404(b)(1) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

Thus, MRE 404(b) requires the exclusion of other-acts evidence if its only relevance is to show the defendant's character or propensity to commit the charged offense.[41] "Underlying the rule is the fear that a jury will convict the defendant inferentially on the basis of his bad character rather than because he is guilty beyond a reasonable doubt of the crime charged."[42] Preventing the jury from drawing this inference recognizes the risk that propensity evidence might " 'weigh too much with the jury and . . . so overpersuade them as to prejudge

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[38] *People v Barbee*, 470 Mich 283, 286; 681 NW2d 348 (2004).

[39] *Herman v Berrien Co*, 481 Mich 352, 366; 750 NW2d 570 (2008).

[40] *Grievance Administrator v Underwood*, 462 Mich 188, 193-194; 612 NW2d 116 (2000).

[41] *People v Knox*, 469 Mich 502, 510; 674 NW2d 366 (2004).

[42] *People v Crawford*, 458 Mich 376, 384; 582 NW2d 785 (1998).

one with a bad general record and deny him a fair opportunity to defend against a particular charge.' "[43]

By contrast, MCL 768.27a provides:

> (1) Notwithstanding [MCL 768.27],[44] in a criminal case in which the defendant is accused of committing a listed offense against a minor, evidence that the defendant committed another listed offense against a minor is admissible and may be considered for its bearing on any matter to which it is relevant. If the prosecuting attorney intends to offer evidence under this section, the prosecuting attorney shall disclose the evidence to the defendant at least 15 days before the scheduled date of trial or at a later time as allowed by the court for good cause shown, including the statements of witnesses or a summary of the substance of any testimony that is expected to be offered.
>
> (2) As used in this section:
>
> (a) "Listed offense" means that term as defined in section 2 of the sex offenders registration act, 1994 PA 295, MCL 28.722.
>
> (b) "Minor" means an individual less than 18 years of age.

Of significance here is the statutory language allowing the admission of evidence that defendant committed

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[43] *Old Chief v United States*, 519 US 172, 181; 117 S Ct 644; 136 L Ed 2d 574 (1997), quoting *Michelson v United States*, 335 US 469, 476; 69 S Ct 213; 93 L Ed 168 (1948).

[44] MCL 768.27 provides:

> In any criminal case where the defendant's motive, intent, the absence of, mistake or accident on his part, or the defendant's scheme, plan or system in doing an act, is material, any like acts or other acts of the defendant which may tend to show his motive, intent, the absence of, mistake or accident on his part, or the defendant's scheme, plan or system in doing the act, in question, may be proved, whether they are contemporaneous with or prior or subsequent thereto; notwithstanding that such proof may show or tend to show the commission of another or prior or subsequent crime by the defendant.

The statute essentially parallels MRE 404(b).

another listed offense "for its bearing on any matter to which it is relevant." Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."[45] Because a defendant's propensity to commit a crime makes it more probable that he committed the charged offense, MCL 768.27a permits the admission of evidence that MRE 404(b) precludes.

As the Court of Appeals has explained, "our cases have never suggested that a defendant's criminal history and propensity for committing a particular type of crime is irrelevant to a similar charge."[46] Quite the opposite, this Court has long recognized that a defendant's character and propensity to commit the charged offense is highly relevant because "an individual with a substantial criminal history is more likely to have committed a crime than is an individual free of past criminal activity."[47] Indeed, "it is because of the human instinct to focus exclusively on the relevance of such evidence that the judiciary has traditionally limited its presentation to juries."[48] Thus, the language in MCL 768.27a allowing admission of another listed offense "for its bearing on any matter to which it is relevant" permits the use of evidence to show a defendant's character and propensity to commit the charged crime, precisely that which MRE 404(b) precludes.

That the Legislature envisioned and intended the statute to supersede MRE 404(b) is unmistakable given the statute's prefatory phrase "[n]otwithstanding

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[45] MRE 401.

[46] *People v Pattison*, 276 Mich App 613, 620; 741 NW2d 558 (2007).

[47] *People v Allen*, 429 Mich 558, 566; 420 NW2d 499 (1988).

[48] *Pattison*, 276 Mich App at 620.

[MCL 768.27]." MCL 768.27 codified what later essentially became the substance of MRE 404(b). Both MCL 768.27 and MRE 404(b) limit the admissibility of other-acts evidence to consideration for noncharacter purposes, such as to show a defendant's motive, intent, or common plan or scheme. "Notwithstanding" is defined as "in spite of" or "without being opposed or prevented by[.]"[49] Parsed out, MCL 768.27a can be rephrased as follows: In spite of the statute limiting the admissibility of other-acts evidence to consideration for noncharacter purposes, other-acts evidence in a case charging the defendant with sexual misconduct against a minor is admissible and may be considered for its bearing on any matter to which it is relevant. Thus, the statute establishes an exception to MRE 404(b) in cases involving a charge of sexual misconduct against a minor.

Although an issue of first impression for this Court, federal courts have concluded that FRE 414,[50] the federal counterpart of MCL 768.27a, conflicts with FRE 404(b).[51] One court explained, "[FRE 414] allows the prosecution to use evidence of a defendant's prior acts for the purpose of demonstrating to the jury that the defendant had a disposition of character, or propensity, to commit child molestation."[52] As another federal court

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[49] *Random House Webster's College Dictionary* (2001).

[50] In pertinent part, FRE 414, regarding similar crimes in child-molestation cases, provides: "In a criminal case in which a defendant is accused of child molestation, the court may admit evidence that the defendant committed any other child molestation. The evidence may be considered on any matter to which it is relevant." FRE 414(a).

[51] FRE 404(b)(1) provides: "Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character."

[52] *United States v Castillo*, 140 F3d 874, 879 (CA 10, 1998). Our discussion of federal cases is limited to the initial question whether MCL 768.27a conflicts with MRE 404(b). Turning to federal cases addressing whether FRE 414 and FRE 404(b) conflict is useful given that MCL

succinctly stated, "[p]ropensity evidence is precisely what [FRE] 414 permits."[53] The Michigan Court of Appeals has similarly reasoned:

> When a defendant is charged with a sexual offense against a minor, MCL 768.27a allows prosecutors to introduce evidence of a defendant's uncharged sexual offenses against minors without having to justify their admissibility under MRE 404(b). In many cases, it allows evidence that previously would have been inadmissible, because it allows what may have been categorized as propensity evidence to be admitted in this limited context.[54]

We reach the same conclusion. Because we cannot read MCL 768.27a and MRE 404(b) in harmony, the question becomes which decree prevails—that of the Legislature or that of the judiciary.

B. MCL 768.27a PREVAILS OVER MRE 404(b)

A rule of evidence will prevail over a conflicting statute only if the statute unconstitutionally infringes on this Court's authority under Const 1963, art 6, § 5 to "establish, modify, amend and simplify the practice and procedure in all courts of this state." In accordance with separation-of-powers principles, this Court's authority in matters of practice and procedure is exclusive and

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768.27a and MRE 404(b) were clearly drawn from their federal counterparts. See note to MRE 404. 402 Mich xcvi. The constitutional question whether MCL 768.27a violates separation-of-powers principles, however, is unique to Michigan law. It is necessary to address the issue only because Michigan's Constitution vests in the Supreme Court the exclusive authority regarding rules of practice and procedure. Const 1963, art 6, § 5. In the federal system, "Congress has power to prescribe what evidence is to be received in the courts of the United States." *Tot v United States*, 319 US 463, 467; 63 S Ct 1241; 87 L Ed 1519 (1943). See 28 USC 2071 *et seq*.

[53] *United States v Bentley*, 561 F3d 803, 815 n 7 (CA 8, 2009).

[54] *Pattison*, 276 Mich App at 618-619.

therefore beyond the Legislature's power to exercise.[55] This exclusive authority, however, extends only to rules of practice and procedure, as "this Court is not authorized to enact court rules that establish, abrogate, or modify the substantive law."[56] Accordingly, our task is to determine whether MCL 768.27a is an impermissible rule governing the practice and procedure of the courts or a valid enactment of substantive law.

McDougall v Schanz addressed whether MCL 600.2169, a statute requiring that expert witnesses offered in medical malpractice actions possess certain medical practice or teaching experience, violated the Court's exclusive authority regarding rules of practice and procedure.[57] We harbored no doubt in *McDougall* that MCL 600.2169 acts as a rule of evidence, given that its application determines the admissibility of expert testimony in medical malpractice cases.[58] MCL 768.27a similarly determines the admissibility of evidence that the defendant committed an offense against a minor in a case charging the defendant with the commission of a separate offense against a minor. Therefore, MCL 768.27a is also a rule of evidence.

But our analysis does not end upon reaching this conclusion. In *McDougall*, we rejected the mechanical

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[55] See *McDougall*, 461 Mich at 27; *Pattison*, 276 Mich App at 619.

[56] *McDougall*, 461 Mich at 27; see also *Shannon v Ottawa Circuit Judge*, 245 Mich 220, 223; 222 NW 168 (1928) (" 'A rule of court cannot enlarge or restrict jurisdiction, or abrogate or modify the substantive law.' ") (citation omitted).

[57] *McDougall*, 461 Mich at 18. The Court determined that MCL 600.2169 conflicted with MRE 702, which permits the admission of expert testimony on the basis of "knowledge, skill, experience, training, or education." "Anyone qualified by virtue of the MRE 702 criteria of skill, training, or education could nonetheless be excluded under the statute's strict practice or teaching requirements." *McDougall*, 461 Mich at 25.

[58] *Id.* at 27-28.

approach of characterizing all rules of evidence as procedural.[59] Instead, we established a sensible approach to separate procedural rules of evidence on the one hand from substantive rules of evidence on the other:

> [A] statutory rule of evidence violates Const 1963, art 6, § 5 only when " 'no clear legislative policy reflecting considerations other than judicial dispatch of litigation can be identified . . . .' " Therefore, "[i]f a particular court rule contravenes a legislatively declared principle of public policy, having as its basis something other than court administration . . . the [court] rule should yield." We agree . . . that "[m]ost rules of evidence have been made by courts. Now and then the legislature has, as a result of policy consideration [sic] over and beyond matters involving the orderly dispatch of judicial business, enacted rules of evidence. The distinction previously pointed out between policy considerations involving the orderly dispatch of judicial business on the one hand and policy considerations involving something more than that on the other hand is the distinction that must be carried through into the evidence field."[60]

Thus, statutory rules of evidence that reflect policy considerations limited to "the orderly dispatch of judicial business," i.e., court administration, are procedural and violate Const 1963, art 6, § 5. But statutory rules of evidence that reflect policy considerations "over and beyond matters involving the orderly dispatch of judicial business" are substantive, and in the case of a conflict with a court rule, the legislative enactment prevails. As noted in *McDougall*, procedural rules of evidence involving the orderly dispatch of judicial business are " 'those rules of evidence designed to allow the adjudicatory process to function effectively . . . . Ex-

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[59] *Id*. at 29.

[60] *Id*. at 30-31 (citations omitted).

amples are rules of evidence designed to let the jury have evidence free from the risks of irrelevancy, confusion and fraud.' "[61] *McDougall* identified the line separating statutory rules of evidence that are constitutional from those that impermissibly venture into the area of practice and procedure over which this Court has exclusive authority.

Applying *McDougall*, we conclude that MCL 768.27a is a valid enactment of substantive law to which MRE 404(b) must yield. The statute is based on policy considerations over and beyond the orderly dispatch of judicial business. We note several policy reasons that support the Legislature's decision to allow other-acts evidence in cases involving sexual misconduct against minors. As the United States Supreme Court has observed, "[w]hen convicted sex offenders [including child molesters] reenter society, they are much more likely than any other type of offender to be rearrested for a new rape or sexual assault."[62] Evidence of guilt in child molestation cases is typically hard to come by because in most cases the only witness is the victim, whose testimony may not be available, helpful, or deemed credible because of his or her age. It may also be difficult for a jury to believe that a defendant is capable of engaging in such egregious behavior with a child. Consistent with our analysis is the fact that federal

[61] *Id.* at 31 n 15, quoting 3 Honigman & Hawkins, Michigan Court Rules Annotated (2d ed), p 403. Although we refrain from deciding cases not before us, it is not hard to see that MRE 402 and 403 are rules of the procedural variety. Likewise, it appears beyond debate that matters of discovery embody purely procedural considerations. See *United States v Nobles*, 422 US 225, 241; 95 S Ct 2160; 45 L Ed 2d 141 (1975) (rejecting the Sixth Amendment claim of a defendant who failed to comply with the trial court's discovery order because "the Sixth Amendment does not confer the right to present testimony free from the legitimate demands of the adversarial system").

[62] *McKune v Lile*, 536 US 24, 33; 122 S Ct 2017; 153 L Ed 2d 47 (2002).

courts considering the validity of FRE 414 have identified similar policy considerations underlying the rule that are over and beyond the orderly dispatch of judicial business. Those considerations include "[p]romoting the effective prosecution of sex offenses," "the reliance of sex offense cases on difficult credibility determinations," and "the 'exceptionally probative' value of a defendant's sexual interest in children."[63] In our judgment, MCL 768.27a was not " 'designed to allow the adjudicatory process to function effectively . . . .' "[64] Rather, it reflects a substantive legislative determination that juries should be privy to a defendant's behavioral history in cases charging the defendant with sexual misconduct against a minor.

In sum, the reasons for enacting MCL 768.27a were not to further the orderly dispatch of judicial business, but to address a substantive concern about the protection of children and the prosecution of persons who perpetrate certain enumerated crimes against children and are more likely than others to reoffend. Accordingly, we hold that MCL 768.27a does not run afoul of

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[63] *United States v Mound*, 149 F3d 799, 801 (CA 8, 1998) (citation omitted). Although the defendant in *Mound* challenged the validity of FRE 413, as opposed to FRE 414, the court indicated that its analysis applied equally to FRE 414. *Mound*, 149 F3d at 800 n 2. We also note that the court mentioned these policy considerations in the context of an equal-protection analysis to support the conclusion that FRE 413 survived rational-basis review. *Id*. at 801. As noted previously, the separation-of-powers concern at issue in this case does not arise in the federal system.

[64] *McDougall*, 461 Mich at 31 n 15, quoting 3 Honigman & Hawkins, p 403. By enacting MCL 768.27a, the Legislature merely deemed other acts of sexual misconduct against a minor substantively admissible, avoiding intrusion into the court's province over the procedural aspects of the evidence's admissibility such as relevancy, risk of prejudice, and adherence to proper discovery practices. See part III(C) of this opinion (holding that MCL 768.27a remains subject to MRE 403).

Const 1963, art 6, § 5, and in cases in which the statute applies, it supersedes MRE 404(b).[65]

The dissent would instead hold that MCL 768.27a is unconstitutional. The dissent first takes the position that MCL 768.27a should fail the *McDougall* test because the statute primarily concerns the judicial dispatch of litigation, which the dissent says is true of all rules that have the "effect" of "telling [courts] what evidence juries can hear."[66] This is a misapplication of *McDougall*. If it were true that all rules that operate to tell courts what evidence is admissible concerned the judicial dispatch of litigation, then all rules of evidence would be procedural. But *McDougall* specifically rejected the approach of mechanically characterizing all rules of evidence as procedural. Therefore, the dissent's position is inconsistent with a proper reading of *McDougall*.

Alternatively, the dissent would refine or discard the *McDougall* test. The dissent's proposed test would treat the legislative policy concerns surrounding a statute's enactment as irrelevant to whether an evidentiary rule is substantive or procedural.[67] According to the dissent, the only inquiry should be whether the *function* of the

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[65] The dissent criticizes our analysis as brief and oversimplified. To the extent that our analysis is to the point, by no means do we view drawing the line between procedural and substantive rules of evidence as an easy endeavor. Nor do we take lightly the task of line-drawing in this case. Like the Court in *McDougall*, we too "appreciate the difficulty that attends the drawing of the line between 'practice and procedure' and substantive law." *McDougall*, 461 Mich at 36.

[66] *Post* at 500, 502 (emphasis omitted).

[67] *Post* at 500 (stating that the "laudatory nature" of the policy concerns identified in the majority opinion "is irrelevant for purposes of this Court's analysis of the issue involved in this case" because "[t]he Legislature's public policy considerations in enacting a statute can neither dictate nor disguise whether the statute enacted to address those considerations is a proper exercise of legislative authority").

statute "is to tell the courts what evidence they may admit in a court proceeding . . . ."[68] This approach would also mechanically characterize all rules of evidence as procedural because, as a purely *functional* matter (if we truly disregard every underlying policy concern), all evidentiary rules tell the courts what evidence is admissible.[69] Thus, although the dissent criticizes the majority's application of the *McDougall* test as vastly underinclusive in defining which evidentiary rules qualify as procedural, the dissent's alternative approaches are vastly overinclusive in defining the same.

The dissent cites the rules of privilege as an example of an area of substantive rulemaking. But rules relating to privilege still serve the exclusive *function* of telling the courts what evidence is admissible at trial and, therefore, would be procedural under the dissent's test. Privilege rules function to dictate the admissibility of communications made between parties in certain relationships; accordingly, privilege rules tell the courts what evidence is admissible at trial.[70]

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[68] *Post* at 504.

[69] The dissent emphasizes the placement of MCL 768.27a in the Code of Criminal *Procedure*. Reliance on labels is a reflexive practice that the United States Supreme Court and the courts of this state have admonished against. See, e.g., *Henneford v Silas Mason Co, Inc*, 300 US 577, 586; 57 S Ct 524; 81 L Ed 814 (1937) ("Catch words and labels . . . are subject to the dangers that lurk in metaphors and symbols, and must be watched with circumspection lest they put us off our guard."); *People v Evans*, 491 Mich 1; 810 NW2d 535 (2012) (applying the Supreme Court's holding that a trial court's label of "acquittal" for a given ruling does not determine whether an acquittal actually occurred for double-jeopardy purposes); *Klein v Kik*, 264 Mich App 682, 686; 692 NW2d 854 (2005) (reasoning that a party's label for its cause of action is not dispositive of the actual nature of the claim).

[70] We disagree with the dissent's characterization of privilege rules as having only "an incidental effect on the admissibility of evidence in a court proceeding." *Post* at 506. For example, Michigan's marital privilege

The dissent asserts that privileges and other substantive rules of evidence "do far more than dictate what evidence is admissible in a court proceeding; they directly affect people's out-of-court behavior."[71] We do not disagree that privileges influence out-of-court behavior by "promot[ing] free and open expression in certain relationships with the confidence that what is communicated will not be revealed in a court proceeding."[72] What the dissent fails to appreciate, however, is that the goal of promoting free expression and confidence in certain relationships is nothing more than a policy concern advanced by the Legislature, which runs directly counter to the dissent's position that legislative policy concerns are irrelevant. It is neither proper nor sensible to conclude that court rules should yield to statutes that are grounded in some policy concerns (e.g., a concern for promoting free expression and confidence in certain relationships) but not others (e.g., a concern for protecting children and addressing the high recidivism rates of child molesters). Thus, we question the wisdom of drawing a distinction that is based on whether an evidentiary rule directly influences people's out-of-court behavior.

Finally, we note as one example that the dissent's proposed test would mean the end of Michigan's rape-shield statute, MCL 750.520j, a consequence that the dissent does not dispute. Yet the United States Supreme

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statute, MCL 600.2162(1), provides: "In a civil action or administrative proceeding, a husband shall not be examined as a witness for or against his wife without her consent or a wife for or against her husband without his consent . . . ." The statute pertains precisely to the admissibility of a spouse's testimony in court.

[71] *Post* at 504.

[72] Baughman, *The emperor's old clothes: A prosecutor's reply to Mr. Leitman concerning exclusion of evidence for statutory violations*, 1999 L R Mich St U Det C L 701, 716.

Court has endorsed Michigan's rape-shield statute and described it as "represent[ing] a valid legislative determination that rape victims deserve heightened protection against surprise, harassment, and unnecessary invasions of privacy."[73] And although the Supreme Court did not specifically address the separation-of-powers issue,[74] rape-shield laws have been upheld even in the face of a constitutional provision analogous to Const 1963, art 6, § 5.[75] We reiterate our belief that the

[73] *Michigan v Lucas*, 500 US 145, 149-150; 111 S Ct 1743; 114 L Ed 2d 205 (1991).

[74] See *id*. Without discussing Const 1963, art 6, § 5, the United States Supreme Court vacated the judgment of the Michigan Court of Appeals, which had adopted a rule that precluding evidence of a rape victim's sexual history with a criminal defendant necessarily violates the Sixth Amendment. See *People v Lucas*, 160 Mich App 692, 694-695; 408 NW2d 431 (1987).

[75] See, e.g., *People v McKenna*, 196 Colo 367, 371-372; 585 P2d 275 (1978) (upholding Colorado's rape-shield law because it "represents far more than merely a legislative attempt to regulate the day-to-day procedural operation of the courts"). The dissent's reliance on *State v Mallard*, 40 SW3d 473 (Tenn, 2001), and *Opinion of the Justices (Prior Sexual Assault Evidence)*, 141 NH 562; 688 A2d 1006 (1997), is misplaced. *Mallard* dealt with a statute that, according to the Tennessee Supreme Court, if strictly construed, would interfere with the judiciary's authority to determine the *relevancy* of evidence. *Mallard*, 40 SW3d at 483. Similarly, in *Opinion of the Justices*, the New Hampshire Supreme Court construed the proposed legislation at issue as "restrict[ing] the trial court's exercise of discretion in making an initial determination that the offered evidence is *relevant*." *Opinion of the Justices*, 141 NH at 576 (emphasis added). We agree that "any legislative enactment that purports to remove the discretion of a trial judge in making determinations of logical or legal relevancy impairs the independent operation of the judicial branch of government, and no such measure can be permitted to stand." *Mallard*, 40 SW3d at 483. MCL 768.27a, however, does not remove this discretion. Rather, the statute merely deems certain other-acts evidence "admissible" and provides that this evidence "may be considered for its bearing on any matter to which it is relevant," with the determination of relevancy left to the trial court's discretion. Finally, with regard to the dissent's reliance on *State v Gresham*, 173 Wash 2d 405, 431; 269 P3d 207 (2012), we simply disagree with the Washington

sensible divide is between rules involving considerations limited to the orderly dispatch of judicial business, which are procedural, and rules involving considerations over and beyond the orderly dispatch of judicial business, which are substantive. This position recognizes the powers and limitations of both the judicial and the legislative rulemaking authority.

C. MCL 768.27a REMAINS SUBJECT TO MRE 403

Having determined that MCL 768.27a is a valid enactment of substantive law, the question remains whether evidence admissible under the statute may nonetheless be excluded under MRE 403. For the reasons that follow, we hold that evidence admissible pursuant to MCL 768.27a may nonetheless be excluded under MRE 403 if "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

The argument against applying MRE 403 to evidence admissible under MCL 768.27a comes not from the text of either MRE 403 or MCL 768.27a, but from the text of MCL 768.27b, which pertains to other-acts evidence in domestic violence cases. MCL 768.27b provides that "evidence of the defendant's commission of other acts of domestic violence is admissible for any purpose for which it is relevant, *if it is not otherwise excluded under Michigan rule of evidence 403*."[76] It is this emphasized

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Supreme Court's seemingly mechanical approach, which concluded that "the admission of evidence is a procedural matter to be controlled by the courts . . . ." This rationale is oversimplified and would define, categorically, all rules of evidence as procedural, a position that was rejected in *McDougall* and again today.

[76] Emphasis added.

portion of the statute that has generated disagreement surrounding whether MRE 403 applies to MCL 768.27a.

Unlike MCL 768.27b, MCL 768.27a does not explicitly mention MRE 403: "Notwithstanding [MCL 768.27], . . . evidence that the defendant committed another listed offense against a minor is admissible and may be considered for its bearing on any matter to which it is relevant." Accordingly, it is argued that if the Legislature expressly made other-acts evidence under MCL 768.27b subject to MRE 403 in cases of domestic violence, then the failure to mention MRE 403 in MCL 768.27a indicates that the Legislature did not intend MRE 403 to apply with regard to other-acts evidence in cases involving sexual misconduct against minors. We reject the invitation to draw this inference.

Significantly, the Legislature did not draft these statutes simultaneously. MCL 768.27a was enacted by 2005 PA 135, which became effective January 1, 2006, whereas MCL 768.27b was enacted by 2006 PA 78, which became effective March 24, 2006. The Legislature's "silence" from which it is urged we draw an inference occurred in the earlier enactment. It is one thing to infer legislative intent through silence in a simultaneous or subsequent enactment, but quite another to infer legislative intent through silence in an earlier enactment, which is only "silent" by virtue of the subsequent enactment.

We are also mindful of "consider[ing] whether [the statute and rule of evidence] can be construed so as not to conflict,"[77] and "[w]e do not lightly presume that the Legislature intended a conflict . . . ."[78] Unlike the irreconcilable conflict between MCL 768.27a and MRE

[77] *McDougall*, 461 Mich at 24.

[78] *Dobben*, 440 Mich at 697 n 22.

404(b), there is nothing inherent in the statute that prevents the application of MRE 403. And because MCL 768.27a makes no specific mention of MRE 403, we choose not to presume that the Legislature intended that MRE 403 not apply to other-acts evidence admissible under the statute. The Legislature could have expressly exempted evidence admissible under MCL 768.27a from analysis under MRE 403, but it did not.

Furthermore, as the United States Supreme Court has observed,

> "not every silence is pregnant." In some cases, Congress intends silence to rule out a particular statutory application, while in others Congress' silence signifies merely an expectation that nothing more need be said in order to effectuate the relevant legislative objective. An inference drawn from congressional silence certainly cannot be credited when it is contrary to all other textual and contextual evidence of congressional intent.[79]

In closely examining the statutes, all other textual and contextual evidence of the Legislature's intent runs contrary to inferring that MRE 403 does not apply to evidence admissible under MCL 768.27a. Despite some similarities, there are notable differences between the two statutes.

First, the Legislature used the permissive term "may" in MCL 768.27a but not in MCL 768.27b. Under MCL 768.27a, "evidence that the defendant committed another listed offense against a minor *is admissible*," but the statute goes on to provide that such evidence "*may* be considered for its bearing on any matter to which it is relevant."[80] When the statute is read as a

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[79] *Burns v United States*, 501 US 129, 136; 111 S Ct 2182; 115 L Ed 2d 123 (1991), quoting *Illinois Dep't of Pub Aid v Schweiker*, 707 F2d 273, 277 (CA 7, 1983).

[80] Emphasis added.

whole, the phrase "is admissible" is qualified by the phrase "may be considered," thereby indicating that admissibility remains subject to some level of discretion on the part of the trial court. As this Court has explained, "courts should give the ordinary and accepted meaning to . . . the permissive word 'may' unless to do so would clearly frustrate legislative intent as evidenced by other statutory language or by reading the statute as a whole."[81] Because there is no indication in MCL 768.27a that "may" should be interpreted contrary to its generally accepted meaning, the term is permissive, not mandatory. By providing that evidence admissible under MCL 768.27a "*may* be considered," the Legislature necessarily contemplated that evidence admissible under the statute need not be considered in all cases and that whether and which evidence would be considered would be a matter of judicial discretion, as guided by the rules of evidence. The most obvious rule available to guide courts in exercising this discretion is MRE 403.

By contrast, MCL 768.27b contains no permissive language. MCL 768.27b(1) simply provides that "evidence of the defendant's commission of other acts of domestic violence is admissible for any purpose for which it is relevant . . . ." Perhaps it was the choice to omit the permissive language that prompted the Legislature to qualify the admissibility of other-acts evidence under MCL 768.27b with the language "if it is not otherwise excluded under Michigan rule of evidence 403." We choose not to speculate in this regard. Whatever motivated the Legislature to draft the statutes differently, we must give meaning to the permissive term "may" used by the Legislature in MCL 768.27a.

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[81] *Browder v Int'l Fidelity Ins Co*, 413 Mich 603, 612; 321 NW2d 668 (1982).

Second, we must give effect to the prefatory clause "[n]otwithstanding [MCL 768.27]" contained in MCL 768.27a but absent from MCL 768.27b. MCL 768.27a provides, "Notwithstanding [MCL 768.27], in a criminal case in which the defendant is accused of committing a listed offense against a minor, evidence that the defendant committed another listed offense against a minor is admissible and may be considered for its bearing on any matter to which it is relevant." The specific mention of MCL 768.27, and no other rule or principle of evidence, is significant. MCL 768.27 provides:

> In any criminal case where the defendant's motive, intent, the absence of, mistake or accident on his part, or the defendant's scheme, plan or system in doing an act, is material, any like acts or other acts of the defendant which may tend to show his motive, intent, the absence of, mistake or accident on his part, or the defendant's scheme, plan or system in doing the act, in question, may be proved, whether they are contemporaneous with or prior or subsequent thereto; notwithstanding that such proof may show or tend to show the commission of another or prior or subsequent crime by the defendant.

Giving effect to the statute's reference to MCL 768.27, MCL 768.27a means that other-acts evidence in cases involving sexual misconduct against a minor "may be considered for its bearing on any matter to which it is relevant" *notwithstanding* that MCL 768.27 limits the admissibility of other-acts evidence to consideration for noncharacter purposes. MCL 768.27a does not apply "notwithstanding any rule or principle of evidence," but only "[n]otwithstanding [MCL 768.27]." Put simply, we cannot interpret the prefatory phrase "[n]otwithstanding [MCL 768.27]" to mean "notwithstanding [MCL 768.27] and MRE 403." We similarly refuse to read into MCL 768.27a a legislative intent to foreclose the application of other ordinary rules of evidence, such as those pertaining to hearsay and privilege.

In sum, the "silence" in MCL 768.27a arose only by virtue of the subsequent enactment of MCL 768.27b, MCL 768.27a can be read in harmony with MRE 403, and we must give effect to the permissive term "may" and the phrase "[n]otwithstanding [MCL 768.27]" that are present in MCL 768.27a but absent from MCL 768.27b. For all these reasons, we hold that MRE 403 applies to evidence admissible under MCL 768.27a.[82]

D. COURTS MUST WEIGH THE PROPENSITY INFERENCE IN FAVOR OF THE EVIDENCE'S PROBATIVE VALUE

Our conclusion that other-acts evidence admissible under MCL 768.27a remains subject to MRE 403 gives rise to the question of proper application. As with any balancing test, MRE 403 involves two sides of a scale—a probative side and a prejudicial side. Propensity evidence is prejudicial by nature, and it is precisely the danger of prejudice that underlies the ban on propensity evidence in MRE 404(b). Yet were a court to apply MRE 403 in such a way that other-acts evidence in cases involving sexual misconduct against a minor was considered on the prejudicial side of the scale, this would gut the intended effect of MCL 768.27a, which is to allow juries to consider evidence of other acts the defendant committed to show the defendant's character and propensity to commit the charged crime. To weigh the propensity inference derived from other-acts evidence in cases involving sexual misconduct against a minor on the prejudicial side of the balancing test would be to resurrect MRE 404(b), which the Legislature rejected in MCL 768.27a.

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[82] Given this conclusion, we need not address whether, if evidence admissible under MCL 768.27a were *not* subject to MRE 403, the statute would violate a defendant's due-process right to a fair trial or interfere with the judicial power to ensure that a criminal defendant receives a fair trial.

Accordingly, when applying MRE 403 to evidence admissible under MCL 768.27a, courts must weigh the propensity inference in favor of the evidence's probative value rather than its prejudicial effect. That is, other-acts evidence admissible under MCL 768.27a may not be excluded under MRE 403 as overly prejudicial merely because it allows a jury to draw a propensity inference. In reaching this conclusion, we join several federal courts that have addressed this issue with respect to FRE 414 and 403.[83]

This does not mean, however, that other-acts evidence admissible under MCL 768.27a may never be excluded under MRE 403 as overly prejudicial. There are several considerations that may lead a court to exclude such evidence. These considerations include (1) the dissimilarity between the other acts and the charged crime, (2) the temporal proximity of the other acts to the charged crime, (3) the infrequency of the other acts, (4) the presence of intervening acts, (5) the lack of reliability of the evidence supporting the occurrence of the other acts, and (6) the lack of need for evidence beyond the complainant's and the defendant's

[83] See, e.g., *United States v Loughry*, 660 F3d 965, 970 (CA 7, 2011) ("[A]lthough evidence cannot be excluded under [FRE] 403 simply because it tends to show that the defendant has a propensity to commit a sex offense, [FRE] 403 continues to rigorously apply to [FRE] 414 evidence."); *United States v Benais*, 460 F3d 1059, 1063 (CA 8, 2006) ("[FRE] 403 must be applied in this context in a manner that permits [FRE] 413 and 414 to have their intended effect, namely, to permit the jury to consider a defendant's prior bad acts in the area of sexual abuse or child molestation for the purpose of showing propensity."); *United States v Gabe*, 237 F3d 954, 960 (CA 8, 2001) ("[Other-acts evidence] tends to prove [a defendant's] propensity to molest young children . . . . Because propensity evidence is admissible under [FRE] 414, this is not *unfair* prejudice."); *United States v Larson*, 112 F3d 600, 604-605 (CA 2, 1997) (stating that evidence admissible under FRE 414 is presumed relevant and probative).

testimony.[84] This list of considerations is meant to be illustrative rather than exhaustive.

Several of these considerations are challenged in this appeal. Regarding the decision whether to exclude evidence admissible under MCL 768.27a when applying MRE 403, it is argued that courts should not be permitted to consider how long ago the other act occurred, its dissimilarity to the charged offense, or the fact that the defendant was never convicted of the other act. We disagree.

Although MCL 768.27b expressly imposes a 10-year limitation on the admissibility of other-acts evidence in domestic violence cases, whereas MCL 768.27a provides no such limitation, there is simply no legal basis for concluding that the lack of a temporal limitation in MCL 768.27a somehow means that the length of time since the other act of sexual misconduct against a minor occurred cannot be considered when weighing prejudice under MRE 403. Just as the statute's failure to refer to MRE 403 did not bar the court rule's application, the failure to temporally limit the admissibility of other-acts evidence does not preclude a court from considering under MRE 403 how long ago the other act occurred.

The argument that the dissimilarity of the other-acts evidence and the charged offense should not be considered under MRE 403 similarly fails. Although MCL 768.27a, by its terms, applies to all listed offenses, there is no indication that the Legislature intended to suggest that all listed offenses are sufficiently similar to each other that the dissimilarity between them and the charged offense could never be weighed in favor of concluding that the other-acts evidence presents the danger of unfair prejudice under MRE 403.

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[84] See *United States v LeMay*, 260 F3d 1018, 1032 (CA 9, 2001); *United States v Guardia*, 135 F3d 1326, 1331 (CA 10, 1998).

Finally, it is argued that, because MCL 768.27a applies to more than conduct that resulted in a conviction, whether the evidence of the other act resulted in a conviction is irrelevant under MRE 403. We disagree. That MCL 768.27a *permits* the introduction of other-acts evidence that did not result in a conviction does not mean that evidence that did not result in a conviction *must* be admitted or that a court may not consider whether charges were filed or a conviction rendered when weighing the evidence under MRE 403.[85]

The foregoing considerations may be used by trial courts to determine whether the probative value of evidence admissible under MCL 768.27a—which includes the propensity inference derived from the other-acts evidence—is nonetheless outweighed by the danger of unfair prejudice. Trial courts should apply this balancing to each separate piece of evidence offered under MCL 768.27a. In addition, trial courts retain their discretion under MRE 403 to determine how many separate pieces of other-acts evidence may be admitted before the probative value of such evidence is outweighed by the danger of "confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."[86] This determination can only be made in the context of the entire trial, considering all the other-acts evidence offered under MCL 768.27a as well as the evidence as a whole. There is no bright-line rule for how many "other acts" may be admitted before the scale tips in favor of exclusion. Rather, ensuring that the proba-

[85] At relevant times, a conviction was not required for many types of other-acts evidence to qualify as a listed offense, but a conviction was required for an act of indecent exposure to be admissible under MCL 768.27a. See MCL 28.722(e)(*iii*) as added by 2005 PA 301; see also pages 494 through 495 of this opinion.

[86] MRE 403.

tive value of other-acts evidence is not outweighed by the danger of "confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence" is a responsibility left to the trial court's discretion.

A final tool available for trial courts when admitting other-acts evidence under MCL 768.27a is CJI2d 20.28a, the standard instruction on evidence of other acts of child sexual abuse:

> (1) The prosecution has introduced evidence of claimed acts of sexual misconduct by the defendant with [a minor / minors] for which [he / she] is not on trial.
>
> (2) Before you may consider such alleged acts as evidence against the defendant, you must first find that the defendant actually committed those acts.
>
> (3) If you find that the defendant did commit those acts, you may consider them in deciding if the defendant committed the [offense / offenses] for which [he / she] is now on trial.
>
> (4) You must not convict the defendant here solely because you think [he / she] is guilty of other bad conduct. The evidence must convince you beyond a reasonable doubt that the defendant committed the alleged crime, or you must find [him / her] not guilty.

In cases in which a trial court determines that MRE 403 does not prevent the admission of other-acts evidence under MCL 768.27a, this instruction is available to ensure that the jury properly employs that evidence.

IV. APPLICATION

A. DOCKET NO. 142031

In Docket No. 142031, at Watkins's third and final trial, the trial court permitted EW to testify regarding other acts of alleged criminal sexual conduct and their surrounding circumstances. On appeal, the

Court of Appeals properly confirmed its earlier holding that MCL 768.27a conflicts with MRE 404(b) and that the statute prevails over the rule of evidence.[87] It also properly held that evidence admissible under MCL 768.27a remains subject to MRE 403.[88] Further, we agree with the Court of Appeals' conclusion that the trial court's failure to apply MRE 403 was harmless. In addition to being probative because of the propensity inference, the other-acts evidence also supported the victim's credibility, presented circumstances similar to those underlying the charged offense, and established Watkins's modus operandi. And although the trial court failed to determine which aspects of EW's testimony met the requirements of MCL 768.27a, we agree with the Court of Appeals that the only incident for which EW provided specific details met the statute's requirements and, therefore, any error in admitting all of EW's testimony "was not inconsistent with substantial justice."[89] Finally, in accordance with CJI2d 20.28a, the jury was instructed on how to properly use the other-acts evidence. Accordingly, we affirm in *Watkins*.

B. DOCKET NO. 142751

In Docket No. 142751, the trial court granted Pullen's motion in limine, excluding a 1989 police report containing allegations that Pullen had sexually abused his daughter more than 20 years ago. Although the trial court properly concluded that evidence admissible under MCL 768.27a remains subject to MRE 403, it abused its discretion by misapplying MRE 403.

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[87] *Watkins*, unpub op at 4.

[88] *Id*. at 5.

[89] *Id*. at 8.

First, the trial court failed to weigh the propensity inference in favor of the evidence's probative value. Nowhere in its analysis did the trial court mention that the other-acts evidence was probative of Pullen's character or propensity to commit the charged offense. Instead, the court stated that, "[s]hould this evidence be presented to the jury, it is highly probable that the jury would not be able to separate the two cases and would likely decide the case based on emotional impact rather than logical reasons." The Court of Appeals affirmed, characterizing this flawed reasoning as having "provided a reasoned basis" for the trial court's decision.[90]

Second, the trial court failed to weigh in favor of the evidence's probative value the extent to which the other-acts evidence supported the victim's credibility and rebutted the defense's attack thereof.[91] Pullen admitted that his trial strategy was to attack the victim's credibility, and the other-acts evidence was highly probative for rebuttal purposes and tended to support the victim's credibility.[92]

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[90] *Pullen*, unpub op at 4.

[91] The dissent disagrees, but offers no authority or rationale for doing so.

[92] We acknowledge the holdings in *People v Sabin (After Remand)*, 463 Mich 43, 71; 614 NW2d 888 (2000), and *People v Jones*, 417 Mich 285, 289-290; 335 NW2d 465 (1983), both of which precluded the introduction of evidence of sexual acts between the defendant and persons other than the complainant to bolster the complainant's credibility. This case is distinguishable because it involved the admissibility of other-acts evidence under MCL 768.27a. In *Sabin*, for example, the reason for disallowing the admission of other-acts evidence under MRE 404(b) to bolster the complainant's credibility was that the resulting inference essentially involved propensity. As explained in *People v Oliphant*, 399 Mich 472, 517; 250 NW2d 443 (1976):

> Other allegations of rape do tend to make the complainant's story more believable, not because we know more about her or

Third, the trial court failed to review separately under MRE 403 each act alleged in the 1989 report and instead lumped all of the evidence together. The trial court apparently believed that the egregiousness of some of the other-acts evidence—e.g., the allegation made by Pullen's daughter that he "checked if [she] was still a virgin"—justified excluding all the other-acts evidence as overly prejudicial. The various acts revealed in the 1989 report included digital penetration, unwelcome and inappropriate touching, and indecent exposure. The trial court should have considered each act separately.[93]

> Oliphant's tendency to tell the truth, but because such evidence gives us reason to believe that he is the kind of man who would commit the charged offense. That, however, is precisely the purpose for which this evidence may not be admitted.

Stated differently, the danger in admitting other-acts evidence to bolster the complainant's credibility is that it essentially invites the jury to draw a propensity inference. As we concluded in part III(A) of this opinion, however, MCL 768.27a specifically *permits* the use of other-acts evidence to show a defendant's propensity to commit the charged crime. Because propensity evidence tends to make the complainant's story more believable, it would not make sense to conclude that evidence admissible to show the defendant's propensity to commit the charged offense is inadmissible to bolster the complainant's credibility. The defendant's propensity and the complainant's credibility are two sides of the same coin.

[93] Support for this conclusion exists in the language of MRE 403, which provides that "evidence may be excluded if *its* probative value is substantially outweighed by the . . . *needless presentation of cumulative evidence*." (Emphasis added.) The rule thus contemplates the evaluation of an individual piece of evidence and how it compares to the other evidence sought to be admitted. This is not, as the dissent believes, a mere difference in judicial opinion. The dissent fails to cite any authority to support the proposition that the trial court did not err by lumping the other-acts evidence together for purposes of applying MRE 403. Rather than offer support for its own position, the dissent criticizes our analysis as selectively quoting MRE 403 by omitting all the language preceding "needless presentation of cumulative evidence," as if we have not considered the statute as a whole. Not so. Although, as the dissent observes, the "needless presentation of cumulative evidence" is but one

Finally, the evidence of indecent exposure at issue here did not qualify as a listed offense under MCL 768.27a at times relevant to the instant case and, therefore, its admissibility should have been analyzed under MRE 404(b). The offense of aggravated indecent exposure is set forth at MCL 750.335a.[94] Currently, § 2 of the Sex Offenders Registration Act (SORA), MCL 28.721 *et seq.*, defines "listed offense" as including "[a] violation of [MCL 750.335a(2)(b)] . . . if a victim is a minor."[95] At times relevant to this case, however, § 2 of

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basis for finding evidence excludable under MRE 403, the dissent does not explain how a trial court can consider this basis if it assesses the evidence when it is lumped together. The lumping of evidence leads to an all-or-nothing determination of admissibility; it does not leave room to determine a cumulative breaking point. Thus, unlike the dissent's position, our reading of MRE 403 adheres to the interpretive canon that "[c]ourts must give effect to every word, phrase, and clause in a statute and avoid an interpretation that renders nugatory or surplusage any part of a statute." *People v Couzens*, 480 Mich 240, 249; 747 NW2d 849 (2008) (citation and quotation marks omitted).

[94] MCL 750.335a provides:

> (1) A person shall not knowingly make any open or indecent exposure of his or her person or of the person of another.
>
> (2) A person who violates subsection (1) is guilty of a crime, as follows:
>
> (a) Except as provided in subdivision (b) or (c), the person is guilty of a misdemeanor punishable by imprisonment for not more than 1 year, or a fine of not more than $1,000.00, or both.
>
> (b) If the person was fondling his or her genitals, pubic area, buttocks, or, if the person is female, breasts, while violating subsection (1), the person is guilty of a misdemeanor punishable by imprisonment for not more than 2 years or a fine of not more than $2,000.00, or both.
>
> (c) If the person was at the time of the violation a sexually delinquent person, the violation is punishable by imprisonment for an indeterminate term, the minimum of which is 1 day and the maximum of which is life.

[95] MCL 28.722(k) and (s)(*ii*). This amended version of § 2 of SORA became effective July 1, 2011. See enacting § 2 of 2011 PA 17.

SORA defined "listed offense" to mean "[a] violation of [MCL 750.335a(2)(b)] . . . *if that individual was previously convicted of violating* [*MCL 750.335a*]."[96] Pullen was never convicted of violating MCL 750.335a for exposing himself to his daughter more than 20 years ago, as alleged in the 1989 police report. Indeed, criminal charges were never filed. Because the evidence was not a listed offense under SORA and hence not admissible as a listed offense under MCL 768.27a, the trial court should have analyzed its admissibility under MRE 404(b).[97] Accordingly, we vacate the judgments of the

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[96] MCL 28.722(e)(*iii*), as added by 2005 PA 301 (emphasis added). This amended version of § 2 of SORA became effective February 1, 2006.

[97] By "fail[ing] to see how the trial court can apply MRE 403 to [the indecent exposure] evidence differently if it is admitted under MRE 404(b) rather than MCL 768.27a," *post* at 515, the dissent apparently fails to understand part III(D) of this opinion. In part III(D), we explain that MRE 403 applies differently to evidence admissible under MCL 768.27a. The difference is that courts must weigh the propensity inference in favor of the evidence's probative value. Nonetheless, the dissent is correct in pointing out that because MRE 404(b) does not allow other-acts evidence to be admitted to show propensity, the evidence of indecent exposure may well be *less* probative under MRE 404(b) than under MCL 768.27a. However, this does not mean that "there is no basis for concluding that the trial court's MRE 403 balancing would come out differently." *Post* at 516. In this case, the inquiry of outcome-determinative error is complicated by the fact that the trial court improperly lumped all the evidence together for purposes of applying MRE 403. Just because the trial court applied MRE 403 to exclude *all* evidence contained in the 1989 police report that it believed was admissible under MCL 768.27a does not mean that it would have applied MRE 403 to exclude the evidence of indecent exposure had it properly considered its admissibility *separately* under MRE 404(b). This is the same reason for our reservations regarding the trial court's second basis for excluding the 1989 police report in its entirety, which was that "it would be fundamentally unfair and a violation of due process to force [Pullen] to defend accusations from over 20 years ago for which charges were never filed." Although every piece of evidence contained in the report would be equally prejudicial on this basis if admitted, not every piece of evidence contained in the report would be equally probative if admitted. Given the varying probative values of the evidence contained in

lower courts in *Pullen* and remand the case to the trial court for further proceedings consistent with this opinion.

V. CONCLUSION

In conclusion, we hold that MCL 768.27a irreconcilably conflicts with MRE 404(b) and that the statute prevails over the court rule. We also hold that evidence admissible under MCL 768.27a remains subject to MRE 403, but that courts must weigh the propensity inference in favor of the evidence's probative value rather than its prejudicial effect. For the foregoing reasons, we affirm the Court of Appeals' judgment in *Watkins*, Docket No. 142031, vacate the judgments of the lower courts in *Pullen*, Docket No. 142751, and remand the latter case to the trial court for further proceedings consistent with this opinion.

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

MARILYN KELLY, J. (*dissenting*). I concur with the result reached in part III(A) of the majority opinion. Specifically, I agree that MCL 768.27a and MRE 404(b) irreconcilably conflict.

However, I strongly dissent from the majority's conclusion in part III(B) that MCL 768.27a prevails over MRE 404(b). I would hold that MCL 768.27a is an unconstitutional legislative intrusion into the power of the judiciary to "establish, modify, amend and simplify the practice and procedure in all courts of this state."[1] Because I would hold that MCL 768.27a is unconstitu-

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the report, in our view, the dissent's preference to affirm the judgments below would involve too much speculation.

[1] Const 1963, art 6, § 5.

tional, I would not reach the issues discussed in parts III(C) and (D) of the majority opinion. Finally, I disagree with the decision in part IV(A) of the majority opinion to affirm defendant Watkins's convictions and the criticism in part IV(B) of the trial court's MRE 403 analysis regarding defendant Pullen.

Accordingly, I would reverse the Court of Appeals' judgment in *Watkins*, overrule its prior holding in *People v Pattison*[2] that MCL 768.27a is constitutional, and remand *Watkins* for a new trial. In *Pullen*, I would affirm the Court of Appeals' judgment and its conclusion that the trial court did not abuse its discretion by excluding the challenged evidence under MRE 403.

LEGAL BACKGROUND

The Michigan Constitution divides the state's government into three branches: the legislative, the executive, and the judicial.[3] Judicial power is vested exclusively in the judiciary.[4] The Constitution grants this Court the authority to make rules that "establish, modify, amend and simplify the practice and procedure

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[2] *People v Pattison*, 276 Mich App 613, 620; 741 NW2d 558 (2007); see *People v Watkins*, 277 Mich App 358; 745 NW2d 149 (2007) (following *Pattison*).

[3] Const 1963, art 3, § 2 provides that "[t]he powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution."

[4] Const 1963, art 6, § 1 provides that

> [t]he judicial power of the state is vested exclusively in one court of justice which shall be divided into one supreme court, one court of appeals, one trial court of general jurisdiction known as the circuit court, one probate court, and courts of limited jurisdiction that the legislature may establish by a two-thirds vote of the members elected to and serving in each house.

in all courts of this state."[5] Therefore, if the Legislature enacts a statute that conflicts with a court rule, the rule prevails over the statute if both address a matter of "practice and procedure."[6]

This constitutional provision was long understood to vest in this Court the power to promulgate all rules of evidence used in court proceedings.[7] However, in *McDougall v Schanz*,[8] a majority of this Court overruled that precedent. The *McDougall* majority held that this Court's authority over "practice and procedure" did not include all matters relating to the admission of evidence.[9] Instead, it held that a legislatively created rule of evidence would not violate article 6, § 5 of the Michigan Constitution unless " 'no clear legislative policy reflecting considerations other than judicial dispatch of litigation can be identified . . . .' "[10] In sum, *McDougall* held that a substantive rule of evidence created by the Legislature prevails over a Court-created substantive rule of evidence. *McDougall* also noted that "this Court is not authorized to enact court rules that establish, abrogate, or modify the substantive law."[11]

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[5] Const 1963, art 6, § 5; see also Const 1908, art 7, § 5 ("The supreme court shall by general rules establish, modify and amend the practice in such court and in all other courts of record, and simplify the same."), and Const 1850, art 6, § 5 ("The supreme court shall, by general rules, establish, modify, and amend the practice in such court and in the circuit courts, and simplify the same.").

[6] See, e.g., *In re Koss' Estate*, 340 Mich 185, 189-190; 65 NW2d 316 (1954).

[7] *People v Mitchell*, 402 Mich 506, 518; 265 NW2d 163 (1978); *Perin v Peuler (On Rehearing)*, 373 Mich 531, 541; 130 NW2d 4 (1964).

[8] *McDougall v Schanz*, 461 Mich 15; 597 NW2d 148 (1999).

[9] *Id*. at 29.

[10] *Id.* at 30, quoting *Kirby v Larson*, 400 Mich 585, 598; 256 NW2d 400 (1977) (opinion by WILLIAMS, J.) (citation and quotation marks omitted).

[11] *McDougall*, 461 Mich at 27, citing *Shannon v Ottawa Circuit Judge*, 245 Mich 220, 223; 222 NW 168 (1928).

In *Pattison*, the Court of Appeals relied on *McDougall* and concluded that MCL 768.27a was a substantive, not a procedural, rule of evidence. As a result, *Pattison* held that the statute did not violate the separation of powers provision of the Michigan Constitution. The panel reasoned that the statute "does not principally regulate the operation or administration of the courts," but instead "reflects the Legislature's policy decision that, in certain cases, juries should have the opportunity to weigh a defendant's behavioral history and view the case's facts in the larger context that the defendant's background affords."[12]

MCL 768.27a VIOLATES THE SEPARATION OF POWERS PROVISION UNDER *McDOUGALL* WHEN *McDOUGALL* IS CORRECTLY APPLIED[13]

MCL 768.27a should fail the *McDougall* test. The statute does not implement a "clear legislative policy reflecting considerations other than judicial dispatch of litigation."[14] To be sure, the statute may very well have been enacted to address legislative policy concerns; such a conclusion seems beyond dispute. The majority

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[12] *Pattison*, 276 Mich App at 619-620.

[13] The *McDougall* test does not predetermine the conclusion reached by the majority that MCL 768.27a is substantive. However, as I stated in my dissent in *People v Hickman*, 470 Mich 602, 613 n 3; 684 NW2d 267 (2004), "I did not then, nor do I now, agree with the majority opinion in *McDougall*." Rather, I continue to agree with the analysis in Justice CAVANAGH's dissenting opinion in *McDougall*, 461 Mich at 37-72, which I signed.

For this reason, it is difficult to know where to begin: with my disagreement with the *McDougall* test itself or merely with this Court's application of it. Because *McDougall* is binding precedent, but proper application of the *McDougall* test nevertheless supports my conclusion that MCL 768.27a is not "substantive," I begin by applying *McDougall*. However, as I conclude later in this opinion, there are numerous reasons why this Court should discard the *McDougall* test.

[14] *McDougall*, 461 Mich at 30 (citations and quotation marks omitted).

identifies several public policy concerns supporting the Legislature's decision to enact MCL 768.27a. They include (1) the high rate of recidivism among child molesters, (2) the difficulty of obtaining evidence that secures convictions in child-molestation cases, and (3) the desire to further protect children from molestation.

These are laudable public policy concerns. But their laudatory nature is irrelevant for purposes of this Court's analysis of the issue involved in this case. The Legislature's public policy considerations in enacting a statute can neither dictate nor disguise whether the statute enacted to address those considerations is a proper exercise of legislative authority.[15]

The crucial question is not whether the *policy concerns themselves* are substantive. Rather, it is whether the *effect* of the statutory enactment changes substantive law. If the statute affects strictly procedural rather than substantive matters, that statute violates Const 1963, art 6, § 5.[16] Contrary to the majority's conclusion, enacting MCL 768.27a to achieve the Legislature's policy goals does not, as the Constitution puts it, reflect considerations beyond the judicial dispatch of litigation.

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[15] This point is aptly demonstrated by illustration. Consider a statute that states only that everyone present in a courtroom must, before proceedings commence, recite the Pledge of Allegiance. Such a statute would be an unconstitutional regulation of "practice and procedure" because it would establish a mandatory prerequisite to the "judicial dispatch of litigation." This would be true even if the Legislature identified some "substantive" policy considerations unrelated to the "judicial dispatch of business," such as encouraging patriotism, as its motivation for enacting the statute. The Legislature is free to try to achieve that substantive goal by other means, but not by dictating a mandatory procedure in the courts.

[16] See Joiner & Miller, *Rules of practice and procedure: A study of judicial rule making*, 55 Mich L R 623, 634 (1957) ("[T]he word 'practice' . . . clearly embraces all 'how,' leaving to the legislature 'what' in substantive law creating legal rights and duties.").

When the Legislature enacted MCL 768.27a, the sole mechanism it used to achieve its policy concerns was to alter the standard under which other-acts evidence is admissible in court.[17] Thus, the relevant policy consideration that we must analyze is precisely that: Is the admission of previously inadmissible evidence in child-sex-abuse cases a substantive or a procedural issue?[18] This conclusion is consistent with our rule of statutory construction that "[i]n determining the intent of the Legislature, this Court must first look to the language of the statute."[19] The majority's application of *McDougall* fails this principle by failing to look first at the statutory language.

"It is fundamental to American jurisprudence that 'a defendant must be tried for what he did, not for who he is.' "[20] MRE 404(b) regulates how and when relevant

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[17] It is noteworthy that the Legislature enacted MCL 768.27a at the same time that it passed other laws in an effort to protect children from convicted sex offenders. The great majority of these provisions caused substantive changes in the law. See, e.g., 2005 PA 133, creating MCL 722.115e, which made it a crime for an employee of a childcare center to fail to report that he or she had been arraigned for certain criminal offenses involving children.

Moreover, the Legislature has enacted numerous substantive laws advancing many of the same policy considerations the majority identified in this case. See, e.g., 2006 PA 165, amending MCL 750.520b to increase the penalty for first-degree criminal sexual conduct against a minor under 13 years of age by repeat offenders under certain circumstances. Thus, if the Court were to hold MCL 768.27a unconstitutional, it would not greatly deter the Legislature from advancing its policy goals.

[18] See also *Pattison*, 276 Mich App at 620, which identified "the Legislature's policy decision" behind MCL 768.27a as what *juries* should be allowed to consider by regulating what evidence *courts* may admit.

[19] *Bush v Shabahang*, 484 Mich 156, 166-167; 772 NW2d 272 (2009), citing *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999).

[20] *United States v Foskey*, 204 US App DC 245, 251; 636 F2d 517 (1980), quoting *United States v Myers*, 550 F2d 1036, 1044 (CA 5, 1977); see also

evidence of a defendant's other crimes, wrongs, or acts may be admitted in court. As such, it is fundamentally procedural in nature because it concerns a matter that is solely within the province of the judiciary: the "judicial dispatch of litigation."[21]

It is also noteworthy that the Legislature's placement of MCL 768.27a supports my conclusion that MCL 768.27a is a procedural rule. MCL 768.27a is contained within the Code of Criminal *Procedure*.[22]

The majority correctly observes that the statute "reflects a substantive legislative determination that juries should be privy to a defendant's behavioral history in cases charging the defendant with sexual misconduct against a minor."[23] But this observation only makes my point. This observation is relevant not as a "substantive" basis for the statute. Rather, it is relevant to demonstrate what the Legislature attempted to do by enacting it: to regulate the courts by telling them what evidence juries can hear. The course of action the Legislature prescribes to accomplish its policy goals in MCL 768.27a—telling courts how to operate—is a regulation of the judicial dispatch of litigation. It does nothing more. Simply put, the Legislature cannot "modify . . . the practice and procedure in all courts of this state."[24]

The Washington Supreme Court very recently reached a similar conclusion and invalidated its state's

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People v Allen, 429 Mich 558, 566; 420 NW2d 499 (1988) ("[I]n our system of jurisprudence, we try cases, rather than persons . . . .").

[21] *McDougall*, 461 Mich at 30.

[22] See MCL 760.1 ("This act shall be known and may be cited as 'The Code of Criminal Procedure.' "); see also *People v Glass (After Remand)*, 464 Mich 266, 282 n 13; 627 NW2d 261 (2001) ("[T]his Court's authority regarding the rules of practice and procedure derives from Const 1963, art 6, § 5, and is not subservient to the Code of Criminal Procedure.").

[23] *Ante* at 476.

[24] Const 1963, art 6, § 5.

similarly worded statute permitting the admission of propensity evidence in sexual abuse cases.[25] Relying on its inherent power to prescribe rules of "procedure and practice," the court reasoned that "admission of evidence in a criminal trial is generally a procedural matter."[26] The court invalidated the statute, all the while recognizing its stated purpose: " 'to ensure that juries receive the necessary evidence to reach a just and fair verdict . . . .' "[27]

In another analogous case, the New Hampshire Supreme Court provided the following persuasive analysis:

> Rule 404(b) is a prime example of an internal procedural rule designed to effectuate a constitutional right. . . . Rule 404(b) is simply a procedural means by which the fair trial right is secured. Giving deference to the legislature would, in this instance, abolish the rule's purpose and interfere with the judiciary's sound discretion in determining to what extent the rule serves its function in the circumstances of a particular case.
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> * * *
>
> Because the proposed bill directly conflicts with Rule 404(b), a rule concerning a uniquely judicial function, the separation of powers doctrine is violated. The legislature has no more right to break down the rules prescribed by this court to assure fundamental due process in criminal and civil trials than the court has to prescribe the mode and manner in which the legislature shall perform its legislative duties.[28]

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[25] *State v Gresham*, 173 Wash 2d 405; 269 P3d 207 (2012).

[26] *Id.* at 431.

[27] *Id.* at 425, quoting Wash Rev Code 10.58.090.

[28] *Opinion of the Justices (Prior Sexual Assault Evidence)*, 141 NH 562, 574, 578; 688 A2d 1006 (1997); see also *State v Mallard*, 40 SW3d 473, 483 (Tenn, 2001) ("[T]he legislature can have no constitutional authority

In sum, when a statute's *only* function is to tell the courts what evidence they may admit in a court proceeding, the statute must give way to a conflicting court rule. MCL 768.27a is such a statute, and it conflicts with MRE 404(b). Accordingly, MCL 768.27a violates Const 1963, art 6, § 5, and this Court should declare it null and void.

My reasoning is not inconsistent with *McDougall*, nor would it restore the holding of *Perin v Peuler (On Rehearing)*[29] that *all* rules of evidence are procedural. Numerous authorities, including some cited by the *McDougall* majority, have identified evidentiary rules that are likely substantive declarations of policy outside the scope of the judiciary's rulemaking power.[30] It is unsurprising that courts and commentators might identify these rules as substantive for reasons I have previously identified. These rules do far more than dictate what evidence is admissible in a court proceeding; they directly affect people's out-of-court behavior.[31]

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to enact rules, either of evidence or otherwise, that strike at the very heart of a court's exercise of judicial power . . . . Among these inherent judicial powers are the powers to hear facts, to decide the issues of fact made by the pleadings, and to decide the questions of law involved. As an essential corollary to these principles, any determination of what evidence is *relevant*, either logically or legally, to a fact at issue in litigation is a power that is entrusted solely to the care and exercise of the judiciary.") (citation omitted).

[29] *Perin*, 373 Mich 531.

[30] 3 Honigman & Hawkins, Michigan Court Rules Annotated (2d ed), ch 60, p 403 (referring to the parol-evidence rule and the statute of frauds as examples of evidentiary rules that appear to be procedural but are substantive in nature); see also Joiner & Miller, 55 Mich L R at 651 (labeling the doctor-patient privilege as a substantive evidentiary rule).

[31] See Comment, *Rules of evidence: An exercise of constitutional power by the Michigan Supreme Court*, 1980 Det C L R 1062, 1085 (indicating that whether a rule has an effect on in-court or out-of-court behavior is relevant to evaluating whether it is substantive or procedural); see also Baughman, *The emperor's old clothes: A prosecutor's reply to Mr. Leitman*

The majority asserts that "as a purely functional matter . . . , all evidentiary rules tell the courts what evidence is admissible."[32] Noting my reference to privileges as possible substantive rules of evidence, the majority proclaims that "rules relating to privilege still serve the exclusive function of telling the courts what evidence is admissible at trial and, therefore, would be procedural under [my] test."[33] Not so. Most rules relating to privileges create a substantive right to confidentiality between parties such as doctors and patients,[34] attorneys and clients,[35] or clergy and penitents.[36] These privileges exist independently from judicial proceedings. They also regulate courts by preserving confidentiality in the courtroom. That these privileges were created to exist outside the courtroom indicates the existence of a "legislative policy reflecting considerations other than judicial dispatch of litigation . . . ."[37]

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concerning exclusion of evidence for statutory violations, 1999 L R Mich St U Det C L 701, 716 (concluding that "privileges are substantive in nature" in part because "[t]hey seek to control out of court behavior" and the purpose of the rule governing them "is non-adjudicative").

[32] *Ante* at 478 (emphasis omitted).

[33] *Ante* at 478 (emphasis omitted).

[34] MCL 600.2157.

[35] MCL 767.5a(2).

[36] MCL 600.2156.

[37] For similar reasons, the majority misses the point when it concludes that my approach would result in court rules yielding to statutes that are based on some policy concerns but not others. Nor is it an accurate statement of my position that I believe that "legislative policy concerns are irrelevant." *Ante* at 479. The legislative policy considerations *reflected in a statute's function* are relevant. As noted, the *function* of statutes governing privileges is to create a substantive right of confidentiality between certain individuals. But the majority fails to grasp that a statute's function, the creation of those privileges, is far different from the Legislature's policy reasons *for enacting it*. If the *function* of a statute born of policy concerns about high recidivism rates among sexual offenders of children is substantive, it will be no less valid than the

The function of these statutes is to create a substantive right, with an incidental effect on the admissibility of evidence in a court proceeding.[38]

The majority insists that my analysis would render Michigan's rape-shield statute[39] unconstitutional. It cites a Colorado Supreme Court case holding that that state's rape-shield statute did not violate its state constitution's separation of powers clause.[40] There is a large problem with the majority's attempt to use this case to undermine my analysis. The Colorado Supreme Court specifically noted that its rape-shield statute had a "mixed policy and procedural nature," and upheld it because of the "absence of any conflicting rule adopted by this court . . . ."[41] Thus, the Colorado Supreme Court strongly implied that it might very well have reached the opposite result had there been a conflicting court rule. By contrast, the decisions from the Supreme Courts of Washington, New Hampshire, and Tennessee cited in this opinion are persuasive and directly on point.[42]

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privilege statutes. See, e.g., note 17 of this opinion (identifying statutes altering substantive law that advance the policy considerations identified by the majority). Thus, it is entirely sensible that my approach might result in court rules yielding to statutes "grounded in some policy concerns . . . but not others[.]" *Ante* at 479. The policy reasons behind the statute are simply not part of the inquiry.

[38] The majority's response to this argument is to cite a single privilege statute that establishes spousal privilege solely in the context of court proceedings.

[39] MCL 750.520j.

[40] See *ante* at 480 & n 75, citing *People v McKenna*, 196 Colo 367, 371-372; 585 P2d 275 (1978).

[41] *McKenna*, 196 Colo at 373.

[42] The majority's attempt to distinguish *Mallard* and *Opinion of the Justices* is not persuasive. Those decisions were not based solely on the determination that the statutes at issue restricted courts' discretion to ascertain the relevancy of evidence. Rather, they also focused on the fact that the statutes at issue would undermine the standards for the

In sum, MCL 768.27a differs from those rules that create, modify, or eliminate legal rights or duties. It exists *solely* to change the standard for the admission of evidence in a courtroom, a procedural matter solely within the province of the judiciary. For the reasons previously stated, I conclude that MCL 768.27a is a quintessential "procedural" rule involving the "dispatch of judicial business" under *McDougall*. Because it conflicts with MRE 404(b) and regulates a matter of procedure, the Legislature overstepped its constitutional authority under Const 1963, art 6, § 5 by enacting it.[43]

THE MAJORITY ERRS BY RELYING ON *McDOUGALL* BECAUSE IT IS FUNDMENTALLY FLAWED AND NOT FAITHFUL TO THE AUTHORITIES ON WHICH IT RELIED

Unfortunately, the entire previous discussion regarding the proper application of *McDougall* amounts to much ado about nothing. This is so because, just as in *McDougall*, once any "policy consideration" is identified that supports the statute, our corresponding rule—should it conflict—becomes a nullity.[44]

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admissibility of certain types of evidence set by court rules. This is precisely what MCL 768.27a does. See also Paine, *Significant differences between state and federal evidence law*, 42 Tenn B J 28, 28 (2006) (concluding that Tennessee's version of MCL 768.27a is likely unconstitutional under *Mallard*).

[43] Because I reach this conclusion, I need not address whether MCL 768.27a is an unconstitutional legislative intrusion into the judiciary's authority to exercise "[t]he judicial power of the state" under Const 1963, art 6, § 1.

[44] See *McDougall*, 461 Mich at 62-63 (CAVANAGH, J., dissenting) ("The effect of the majority's decision, however, is to invite the Legislature to trample whatever rules of the judiciary might arguably concern something other than judicial efficiency, and the majority's decision herein offers so little to support its conclusion that the matter discussed today is substantive that it invites legislative 'questions' far more fanciful than the ones above. . . . All the Legislature need do is determine some

The majority applies *McDougall* perfunctorily and concludes that MCL 768.27a prevails over MRE 404(b) because it is based on "policy considerations 'over and beyond matters involving the orderly dispatch of judicial business' . . . ."[45] As previously explained, the majority's conclusion is not a foregone one under *McDougall*, nor is it in accord with the bulk of existing authority addressing this issue. Hence, because the majority reaches an incorrect result due to its flawed application of the *McDougall* test, I must address the validity of the *McDougall* test.

I conclude that the *McDougall* test for analyzing whether a statute is substantive or procedural (or, at a minimum, the majority's application of that test) is overly simplistic and underinclusive. Thus, I disagree with the majority's assertion that *McDougall* "established a sensible approach to separate procedural rules of evidence . . . from substantive rules of evidence . . . ."[46] The test should be either refined or discarded because it is not consistent with the historical authority on which it purports to be based.[47]

First, the majority's application of *McDougall* is cursory. The majority takes a mere four paragraphs of analysis to support its conclusion that "MCL 768.27a is

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questions outside the 'mere dispatch of judicial business,' and the Court's own regulation of its own judicial function may be cast aside.").

[45] *Ante* at 474-475, quoting *McDougall*, 461 Mich at 31 (citation and quotation marks omitted).

[46] *Ante* at 473-474.

[47] And, it bears repeating, that authority is scant. See *McDougall*, 461 Mich at 56 (CAVANAGH, J., dissenting) (noting that the sole bases for the majority's opinion were "a Court of Appeals opinion of recent vintage and identical authorship as the majority opinion," "a 1957 law review article," and "dicta offered by Justice WILLIAMS in *Kirby* [400 Mich at 598], in a portion of his opinion that failed to garner the allegiance of a majority of the Court").

a valid enactment of substantive law . . . ."[48] That the *McDougall* test allows for such brevity of analysis in resolving this issue is a liability, not an asset. The substance/procedure divide is a far thornier question than the majority's application of *McDougall* acknowledges. Other courts, as well as many commentators, have recognized and readily conceded this tension.[49] Indeed, even the *McDougall* majority acknowledged it.[50] But that prescient acknowledgment dies a quick death at the hands of this majority, given that its substance/procedure analysis begins with shovel in hand and a six-foot-deep hole. Its analysis is as effortless as it is superficial.

Second, the *McDougall* test as applied is also vastly underinclusive in defining what rules qualify as procedural.[51] Nor is it faithful to the authority on which it

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[48] *Ante* at 475.

[49] See, e.g., Joiner & Miller, 55 Mich L R at 635 ("[A] clear-cut distinction [between substance and procedure] for all purposes is impossible of formulation."), citing Riedl, *To what extent may courts under the rule-making power prescribe rules of evidence?*, 26 ABAJ 601, 604 (1940); *Seisinger v Siebel*, 220 Ariz 85, 92-93; 203 P3d 483 (2009) (observing that "the precise dividing line between substance and procedure 'has proven elusive' " and that "[s]tatutes relating to evidence present particularly difficult problems, as such statutes, like rules of evidence, often have both substantive and procedural aspects"); *State v Pavelich*, 153 Wash 379, 383; 279 P 1102 (1929) (noting that "the distinction between procedure and substantive law is not always well understood, and is sometimes vague and indistinct").

[50] *McDougall*, 461 Mich at 36 ("We appreciate the difficulty that attends the drawing of the line between 'practice and procedure' and substantive law.").

[51] See, e.g., Levin & Amsterdam, *Legislative control over judicial rule-making: A problem in constitutional revision*, 107 U Pa L R 1, 23 (1958) ("There is a substantial risk in ceding too much to the legislature, particularly if in so doing courts are to abdicate completely from the exercise of any rule-making authority in the ceded area. The point is illustrated in considering a reformulation of the Riedl test by Joiner and Miller. While asserting that their version 'approximates' Riedl's, Joiner

purports to be grounded. The language "orderly dispatch of judicial business" and "public policy, having as its basis something other than court administration" seized on in *McDougall* lacks the proper context and is grossly overstated. The authors of the law review article that articulated this language themselves recognized as much.[52] One authority on which the *McDougall* majority relied said that rules of "practice" include those that "prescribe the methodology for initiating, conducting, and concluding litigation . . . ."[53] Another authority that the *McDougall* majority cited identified procedural

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and Miller propose something very different. The question for them is whether a particular area involves 'something more than the orderly dispatch of judicial business.' If it does, then it is not an appropriate subject for treatment by court rule. The difficulty with this position is that it excludes too much."); Lawson, *Modifying the Kentucky rules of evidence—A separation of powers issue*, 88 Ky L J 525, 570 & n 259 (2000) (criticizing a standard almost identical to that adopted by the *McDougall* majority—allowing courts to promulgate certain evidentiary rules as long as " 'there is no other policy as established by the state involving matters other than the orderly dispatch of judicial business' "—as "excluding too much of the law from the procedure category" and noting that "many evidence rules have both substantive and procedural elements and that insistence upon procedural purity would unduly restrict judicial rulemaking authority") (citation omitted); Dickey, *The Florida evidence code and the separation of powers doctrine: How to distinguish substance and procedure now that it matters*, 34 Stetson L R 109, 123 (2004) (recognizing as one problem of the *McDougall* test that "treating rules of evidence as procedural only if they relate to court administration seems too narrow").

[52] Levin & Amsterdam, 107 U Pa L R at 23-24 (noting that the "orderly dispatch of judicial business" test, if "[a]pplied rigorously," "would exclude not only such matters as venue and costs, but also such questions as the procedural effect of presumptions. *This is not to suggest that the proponents of the test would so apply it. Indeed, they recognize that theirs is not a formulation which should be expected to answer all questions of rule-making authority.*") (emphasis added), citing Joiner & Miller, 55 Mich L R at 629; see also Joiner & Miller, 55 Mich L R at 653 ("The power of a court to establish rules of practice is very broad indeed.").

[53] Joiner & Miller, 55 Mich L R at 635-636.

rules as those "based upon policies concerned with the reliability or relevance of proof or the orderly dispatch of judicial business."[54]

The *McDougall* test also ignores that the vast majority of courts and commentators, again *including those relied on by the* McDougall *majority*, have concluded that most rules of evidence are procedural.[55] Thus, the majority's attempt to counter my criticism of the *McDougall* test as "vastly underinclusive" by calling my approach "vastly overinclusive" is unavailing.[56] *McDougall*'s sharply limited "judicial dispatch of business" test, at least as applied, invites the Legislature to supersede most of the Michigan Rules of Evidence. Under *McDougall*, nearly every rule can be characterized as substantive.[57]

Finally, the *McDougall* test gives the Legislature license to intrude with impunity into the province of the judiciary provided that it divines a "substantive" label for its statutory enactments.[58] This is so irrespective of

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[54] 3 Honigman & Hawkins, ch 60, p 403.

[55] Joiner & Miller, 55 Mich L R at 651 ("Most rules of evidence involve only the orderly dispatch of judicial business and should be subject to court rule."); *Opinion of the Justices*, 141 NH at 570 ("Rules of evidence, in most instances, relate only to practice and procedure."); *State ex rel Collins v Seidel*, 142 Ariz 587, 590; 691 P2d 678 (1984) ("Rules of evidence have generally been regarded as procedural in nature."), citing *Ammerman v Hubbard Broadcasting, Inc*, 89 NM 307, 310; 551 P2d 1354 (1976).

[56] *Ante* at 478.

[57] See also *McDougall*, 461 Mich at 60-62 (CAVANAGH, J., dissenting) (citing many of the Michigan Rules of Evidence that might be said to be based on a "policy judgment" and, consequently, subject to legislative abrogation).

[58] See *id*. at 53 n 21 (CAVANAGH, J., dissenting) ("The majority's view effectively allows the Legislature to determine, at its will, what might be substantive, and thus, when it is inclined, to override a judiciary decision with its own preferences. . . . The majority's approach, however, is so

whether that which the statute accomplishes is substantive or procedural. Surely the delegates involved in crafting article 6, § 5 did not intend to allow the Legislature to neuter this Court's authority to regulate "practice and procedure" in this fashion.

For all these reasons, I conclude that the *McDougall* test for resolving the substance/procedure question is fundamentally flawed. At a minimum, the majority's mechanical application of it demonstrates how inadequate it is to resolve the difficult questions presented by cases such as this. I would refine the test in the manner described in this opinion if the test cannot be discarded altogether, because the majority appears unwilling or unable to apply it consistently with its intellectual genesis.[59]

MCL 768.27a AND MRE 403

Because I would strike down MCL 768.27a as unconstitutional, it is unnecessary for me to reach the ques-

ill-defined as to allow the Legislature to change its cards as it sees fit."); Glicksman, *Separation of powers conflict: Legislative versus judicial roles in evidence law development*, 17 TM Cooley L R 443, 456-457 (2000) ("Should the *McDougall* case ever find uniform application, many of our rules of evidence that contain and reflect policy judgments, such as the hearsay rule, character evidence rules, subsequent repair proofs, impeachment by prior conviction, and compromises of medical payment expenses, could be changed by the legislature by merely suggesting that they are substantive law and remain free targets for change."); *State v Sypult*, 304 Ark 5, 13; 800 SW2d 402 (1990) (Turner, J., concurring) ("[I]t is not sufficient to say simply that we will defer to legislative enactment on all 'matters of public policy'; in fact, all enactments of the General Assembly become matters of 'public policy.' ").

[59] See *McDougall*, 461 Mich at 30, citing 3 Honigman & Hawkins, p 404, and Joiner & Miller, 55 Mich L R at 650-651. As noted in the text and footnotes throughout this opinion, the *McDougall* test (as applied by the majority) is utterly unfaithful to those sources. Accordingly, it is a test born both of the *McDougall* majority's misapprehension of those sources and its own imagination.

tion of how MCL 768.27a and MRE 403 interact. Other-acts evidence admitted pursuant to MRE 404(b) is indisputably subject to balancing under MRE 403. Thus, I do not reach the issues discussed in parts III(C) and (D) of the majority opinion.

APPLICATION

I would hold that MCL 768.27a is an unconstitutional violation of the separation of powers provision set forth in Const 1963, art 6, § 5. In *Watkins*, the Court of Appeals erroneously concluded that the statute did not violate the separation of powers and that much of the evidence against Watkins had been properly admitted under MCL 768.27a. Therefore, I would reverse the judgment of the Court of Appeals and remand *Watkins* for a new trial. I would direct the trial court to use MRE 404(b) and MRE 403 on remand to evaluate the admissibility of the other-acts evidence.

In *Pullen*, I would affirm the judgment of the Court of Appeals. Although the trial court erred by concluding that the other-acts evidence was admissible under MCL 768.27a, the error was harmless because the court excluded the evidence under MRE 403. "Rule 403 determinations are best left to a contemporaneous assessment of the presentation, credibility, and effect of testimony" by the trial court.[60] In this case, the trial court's decision to exclude the evidence was within the range of principled outcomes and, therefore, not an abuse of discretion.[61]

The majority identifies four purported flaws in the *Pullen* trial court's application of MRE 403. I disagree

[60] *People v VanderVliet*, 444 Mich 52, 81; 508 NW2d 114 (1993).

[61] *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003) (holding that an abuse of discretion occurs when a trial court chooses an outcome that falls outside the range of principled outcomes).

with each analysis. With respect to the first two, as previously noted, I would conclude that MCL 768.27a is unconstitutional. Thus, I need not reach the question of whether MRE 403 would apply differently to evidence admitted under the statute rather than under MRE 404(b). Other-acts evidence is admissible only under MRE 404(b), which does not allow its admission to show that a defendant had a propensity to commit the charged offenses.[62] Hence, the other-acts evidence in *Pullen* was not admissible for that purpose.

Because the evidence was not admissible to show propensity, the trial court did not err by "fail[ing] to weigh the propensity inference in favor of the evidence's probative value."[63] Nor was it required to "weigh in favor of the evidence's probative value the extent to which the other-acts evidence supported the victim's credibility and rebutted the defense's attack thereof."[64]

Next, I question the majority's criticism that the trial court "lumped" together all the other-acts evidence rather than considering each act separately. Neither the majority nor the prosecution cites any authority to support the proposition that a trial court must consider each other act separately when conducting an MRE 403 analysis.[65] Consequently, I see no basis for concluding

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[62] See MRE 404(b) ("Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.").

[63] *Ante* at 492.

[64] *Ante* at 492.

[65] I do not cite authority for my position either. However, it is the majority, in making new law on this point, that bears the burden of providing authority. It attempts to rely on the language of MRE 403, but that reliance is dubious. First, one can just as easily read MRE 403 as providing that "[*all* other-acts] evidence may be excluded if *its* probative value is substantially outweighed by the danger of unfair prejudice . . . ." (Emphasis added.) Second, the majority selectively quotes the rule by

that the trial court made a legal error in this respect. For this reason, I believe the majority's decision otherwise violates our often stated rule that "[a]n abuse of discretion involves far more than a difference in judicial opinion."[66]

Finally, the majority remands for further proceedings for the trial court to consider whether evidence of Pullen's previous indecent exposure is admissible under MRE 404(b). I fail to see how the trial court can apply MRE 403 to that evidence differently if it is admitted under MRE 404(b) rather than under MCL 768.27a.[67] Under either avenue of admissibility, MRE 403 requires exclusion if, among other things, the evidence's "probative value is substantially outweighed by the danger of unfair prejudice . . . ."[68]

On remand, evidence of the prior indecent exposure may be admitted only under MRE 404(b). MRE 404(b) does not allow other-acts evidence to be admitted to show propensity or bad character. Therefore, if anything, the prior-indecent-exposure evidence will have *less* probative value under MRE 404(b) than it did when the trial court evaluated it under MCL 768.27a. Moreover, MRE 403 continues to apply with full force to that evidence. Conse-

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omitting all the language preceding "needless presentation of cumulative evidence" to bolster its conclusion that the rule's language supports its conclusion. But the "needless presentation of cumulative evidence" is but *one* basis for finding the evidence excludable.

[66] *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 227; 600 NW2d 638 (1999), citing *Williams v Hofley Mfg Co*, 430 Mich 603, 619; 424 NW2d 278 (1988).

[67] The majority also appears to suggest that the MRE 403 balancing would come out differently because the trial court would evaluate the evidence of the indecent exposure independently of the other-acts evidence. I disagree that reevaluation is necessary because, as previously noted, I do not agree with the majority that the trial court improperly "lumped" together the other-acts evidence.

[68] MRE 403.

quently, there is no basis for concluding that the trial court's MRE 403 balancing would come out differently.

The majority also summarily dismisses the trial court's second stated basis for finding the other-acts evidence unfairly prejudicial to Pullen. After concluding that the other-acts evidence would be "highly probable" to prejudice the jury, the court stated:

> The Court also finds that it would be fundamentally unfair and a violation of due process to force [Pullen] to defend accusations from over 20 years ago for which charges were never filed. [Pullen] is in an untenable position to try to disprove more serious and greatly dated charges. It is unlikely that he would be able to do so, and to require him to do so would be manifestly unjust.

The majority does not explain how this alternative basis for excluding the other-acts evidence also constituted an abuse of discretion. Instead, it suggests that the evidence in the 1989 police report alleging sexual abuse of Pullen's daughter, while "equally prejudicial on this basis," has "varying probative values."[69] How is this relevant? Whether the introduction of 20-year-old evidence is "fundamentally unfair" and "manifestly unjust" has nothing to do with its probative value, and everything to do with its prejudicial effect. The trial court's conclusion was inherently a determination that *whatever* the evidence's probative value, it would be outweighed by its prejudicial effect and violate Pullen's rights. Thus, that the evidence may have "varying probative values" does nothing to undermine the trial court's ruling in this context.

Accordingly, I am not convinced that the *Pullen* trial court abused its discretion in conducting its MRE 403 balancing. I would affirm the Court of Appeals' judgment.

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[69] *Ante* at 495-496 n 97.

CONCLUSION

I agree with the majority that MCL 768.27a and MRE 404(b) irreconcilably conflict. However, I dissent from the majority's conclusion that MCL 768.27a prevails over MRE 404(b). I would hold that MCL 768.27a is an unconstitutional legislative intrusion into the power of the judiciary. Accordingly, I would vacate the convictions in *Watkins* and remand the case for a new trial. I would affirm the lower court judgments in *Pullen* that excluded the other-acts evidence as substantially more prejudicial than probative under MRE 403.

CAVANAGH and HATHAWAY, JJ., concurred with MARILYN KELLY, J.

MICHIGAN PROPERTIES, LLC v MERIDIAN TOWNSHIP

TOLL NORTHVILLE LIMITED PARTNERSHIP v NORTHVILLE TOWNSHIP

Docket Nos. 143085, 143086, 143087, and143281. Argued March 7, 2012 (Calendar Nos. 5 and 6). Decided June 14, 2012.

Michigan Properties, LLC, filed a petition in the Tax Tribunal, appealing Meridian Township's decision to increase the 2007 taxable values of three parcels of property that Michigan Properties had purchased in 2004. Although Michigan Properties had timely notified Meridian Township of the transfers in ownership in 2004, the township failed to reset the caps placed on the properties' taxable values by the 1994 amendment of Const 1963, art 9, § 3 (Proposal A) and reassess their posttransfer taxable values for 2005 as required by MCL 211.27a(3), a provision of the General Property Tax Act (GPTA), MCL 211.1 *et seq*. After an audit revealed the error, Meridian Township notified Michigan Properties in 2006 that it planned to uncap the taxable values of the properties and adjust their taxable values for 2005 and 2006 accordingly. Litigation ensued, and in February 2007 the parties entered into a consent judgment with regard to tax years 2005 and 2006 that reserved Meridian Township's right to petition the March board of review for tax year 2007, or for any year thereafter, to uncap the properties' taxable values because of the transfers in 2004. Meridian Township subsequently exercised this right, and the March board of review uncapped the taxable values for tax year 2007. Michigan Properties appealed in the Tax Tribunal, arguing that because Meridian Township had not timely challenged the 2005 assessments, it could not challenge the 2005 taxable values or any subsequent values based on the 2005 assessments. Meridian Township moved for summary disposition, asserting that the March board of review had acted within its authority under MCL 211.29 and MCL 211.30 to bring taxable values into compliance with the GPTA. The tribunal granted Meridian Township's motion for summary disposition, and Michigan Properties appealed. The Court of Appeals, FORT HOOD, P.J., and BORRELLO and STEPHENS, JJ., reversed, holding that the March board of review could not uncap the taxable values related to the

2004 transfers because its authority to uncap extended only to the year immediately following the transfers. 292 Mich App 147 (2011). The Supreme Court granted Meridian Township's application for leave to appeal. 490 Mich 877 (2011).

Toll Northville Limited Partnership installed road access, streetlights, sidewalks, and utility services for a residential development project in Northville Township owned by Biltmore Wineman LLC. On this basis, the township increased the tax assessments on the property pursuant to MCL 211.34d(1)(b)(*viii*), which defined public-service improvements as additions for which a property's taxable value may be adjusted under Proposal A. Toll Northville and Biltmore did not timely challenge the increase in 2000, but did contest the assessments in the Tax Tribunal the next year after the property was divided into parcels and also brought an action for a declaratory judgment against Northville Township in the Wayne Circuit Court, challenging the validity of MCL 211.34d(1)(b)(*viii*). The court, John A. Murphy, J., ruled that MCL 211.34d(1)(b)(*viii*) was unconstitutional. The Court of Appeals, WHITBECK, C.J., and HOEKSTRA and WILDER, JJ., affirmed this ruling, 272 Mich App 352 (2006), as did the Supreme Court, 480 Mich 6 (2008). In the Tax Tribunal proceeding, which had been stayed pending the declaratory-judgment action, Toll Northville and Biltmore argued that in light of the Supreme Court's ruling, the value of the public-service improvements had to be removed from the assessments. The Tax Tribunal concluded that it lacked jurisdiction to amend the taxable value of the original parcel that had been assessed in a year not under appeal, but nevertheless amended the taxable values of the divided properties to exclude the public-service improvements in order to conform to the Supreme Court's decision. Northville Township appealed. After consolidating the case with two others, the Court of Appeals, MARKEY, P.J., and FITZGERALD and SHAPIRO, JJ., reversed the Tax Tribunal's order, holding that because the tribunal lacked jurisdiction to review a previous year's taxable value for purposes of determining a timely appealed current year's taxable value, it erred by amending the values. The Court of Appeals ordered reinstatement of the taxable values, including the unconstitutional additions for public-service improvements. *MJC/Lotus Group v Brownstown Twp*, 293 Mich App 1 (2011). The Supreme Court granted Toll Northville and Biltmore's application for leave to appeal, limited to whether the Tax Tribunal had jurisdiction to reduce an unconstitutional increase in the taxable value of property if the improperly increased taxable value was not challenged in the year of the increase. 490 Mich 877 (2011).

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

A March board of review and the Tax Tribunal, once the tribunal's jurisdiction is properly invoked, have the authority to adjust an erroneously assessed taxable value in a subsequent year in order to bring the current tax rolls into compliance with the GPTA.

1. Proposal A places a cap on the taxable value of a property. The taxable value is uncapped when the property is transferred. MCL 211.27a(2) and (3) provide the statutory framework to implement the capping and uncapping mechanisms required by Proposal A. Unless a property's ownership was transferred in the previous year, the calculation for the current taxable value is set forth in MCL 211.27a(2), which directly predicates the current year's taxable value on the immediately preceding year's taxable value unless the current state equalized valuation is lower. If a property was transferred in the previous year, it must be valued at the state equalized valuation for the calendar year following the transfer rather than on the previous year's taxable value under MCL 211.27a(3). This uncapping event sets a base valuation on which future taxable values will be determined. Because MCL 211.27a(2)(a) is predicated on the previous year's taxable value, any error in the uncapping valuation carries the resulting erroneous taxable value into future years. MCL 211.27a(2) and MCL 211.27a(3) unambiguously provide that the taxable value for a property falling under each respective subsection is the value that results from the parameters contained in the applicable subsection. Therefore, if the mandates from the applicable subsection were not followed when placing a property's assessment on the tax rolls for a given tax year, the resulting taxable value from that year would not be in compliance with the GPTA and would thus be erroneous as a matter of law. Because Meridian Township's assessor failed to update the tax rolls to reflect the uncapped taxable values of Michigan Properties' properties for tax year 2005, the taxable value entered on the tax rolls for 2005 violated the requirement in MCL 211.27a(3) that the taxable value for the year following the transfer be the uncapped value. As a result, the 2005 taxable values of the three properties at issue were erroneous.

2. MCL 211.29 and MCL 211.30 give a March board of review the authority and the duty to correct errors in taxable values. There are no limitations in the GPTA that would prevent a March board of review from considering previous erroneous taxable values when bringing current taxable values into compliance with the GPTA. While MCL 211.29 and MCL 211.30 do not grant a March board of review the authority to alter a previous year's tax

rolls, under MCL 211.29(3), a March board of review has the power to review the tax rolls currently before it according to the facts existing on the tax day, which includes the fact that a previous taxable value did not comply with the GPTA. The Legislature's directive to March boards of review to do whatever else is necessary to make the roll comply with the act includes correcting errors of law pertaining to taxable values that have carried over from previous years. In *Mich Props*, the March board of review correctly brought the 2007 taxable values into compliance with the GPTA by adjusting the current values because of the uncapping of the 2005 taxable values. The Court of Appeals incorrectly prevented the erroneous taxable values from being remedied until another uncapping event occurs. Accordingly, the judgment of the Court of Appeals must be reversed, and the Tax Tribunal's decision affirming the March board of review's correction of the tax rolls to reflect the properly adjusted taxable values must be reinstated.

3. The Tax Tribunal was created by the Tax Tribunal Act, MCL 205.701 *et seq*., which sets forth its powers and jurisdiction. MCL 205.731 gives the Tax Tribunal exclusive and original jurisdiction to review decisions of an agency relating to valuation under the property tax laws of this state. This language pertains to local taxing authorities such as a township's March board of review. Pursuant to MCL 205.735(2) and MCL 205.735a(2), proceedings before the tribunal are original and independent and are considered de novo. Under MCL 205.732, the Tax Tribunal's powers include affirming, reversing, modifying, or remanding a final decision, finding, ruling, determination, or order of an agency and granting other relief or issuing writs, orders, or directives that it deems necessary or appropriate in disposing of a matter over which it may acquire jurisdiction. Additionally, MCL 205.737(1) requires the tribunal to determine a property's taxable value pursuant to MCL 211.27a. Therefore, the Tax Tribunal has the authority to carry out a March board of review's duty to bring an erroneous taxable value into compliance with the GPTA and Proposal A. Because the 2000 taxable value of the undivided parcel owned by Biltmore and developed by Toll Northville was erroneous as a result of the inclusion of unconstitutional additions, the Tax Tribunal had the authority to prospectively adjust the timely challenged taxable values of the divided parcels for tax year 2001 and subsequent years. The Court of Appeals' judgment in *MJC/Lotus* pertaining to Toll Northville and Biltmore must be reversed.

Mich Props reversed and Tax Tribunal decision reinstated.

Toll Northville reversed and case remanded to the Court of Appeals for consideration of remaining issues.

1. TAXATION — REAL PROPERTY — TAXABLE VALUES — ERRONEOUS TAXABLE VALUES — CORRECTIONS — MARCH BOARDS OF REVIEW.

A March board of review may adjust an erroneous taxable value of a property in a subsequent year in order to bring the current taxable value into compliance with the General Property Tax Act, MCL 211.1 *et seq*. (MCL 211.27a; MCL 211.29; MCL 211.30).

2. TAXATION — REAL PROPERTY — TAXABLE VALUES — ERRONEOUS TAXABLE VALUES — CORRECTIONS –TAX TRIBUNAL.

The Tax Tribunal has the authority to reduce an unconstitutional previous increase in taxable value for purposes of adjusting a taxable value that was timely challenged in a subsequent year; once its jurisdiction is properly invoked, the Tax Tribunal has the same powers and duties as those assigned to a March board of review, including the duty to adjust erroneous taxable values to bring the current tax rolls into compliance with the General Property Tax Act, MCL 211.1 *et seq*. (MCL 205.731; MCL 205.732; MCL 205.737[1]).

Honigman Miller Schwartz and Cohn LLP (by *John D. Pirich*, *Michael B. Shapiro*, and *Jason Conti*) for Michigan Properties, L.L.C.

The Hubbard Law Firm, P.C. (by *Peter A. Teholiz* and *Michael G. Woodworth*), for Meridian Township.

Hoffert & Associates, P.C. (by *David B. Marmon*), for Toll Northville Limited Partnership and Biltmore Wineman LLC.

Hallahan & Associates, P.C. (by *Laura M. Hallahan*, *Amy K. Driscoll*, and *Neil H. Goodman*), and *Rose & Abramson, P.C.* (by *Nevin A. Rose*), for Northville Township.

Amici Curiae:

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Richard A. Bandstra*, Chief Legal

Counsel, and *Matthew B. Hodges*, Assistant Attorney General, for the State Tax Commission, Revenue & Collections Division, in *Mich Props*.

Bauckham, Sparks, Lohrstorfer, Thall & Seeber, P.C. (by *Robert E. Thall*), for the Michigan Townships Association and the Michigan Municipal League in *Mich Props*.

McClelland & Anderson, LLP (by *Gregory L. McClelland* and *Melissa A. Hagen*), for the Michigan Association of Realtors in *Toll Northville*.

Kitch Drutchas Wagner Valitutti & Sherbrook (*Daniel R. Shirey*, *John M. Sier*, and *Andrew M. Harris*) for the Building Owners and Managers Association of Metropolitan Detroit in *Toll Northville*.

Bauckham, Sparks, Lohrstorfer, Thall & Seeber, P.C. (by *Robert E. Thall*), for the Michigan Townships Association in *Toll Northville*.

HATHAWAY, J. The cases before us involve the proper interpretation of the General Property Tax Act (GPTA), MCL 211.1 *et seq*. In *Michigan Properties, LLC v Meridian Township*, we address whether a tax assessor's failure to adjust the taxable value of a parcel of real property in the year immediately following its transfer[1] precludes a March board of review from adjusting the taxable value in a later year.

We hold that the failure to adjust the taxable value in the year immediately following the transfer produced an erroneous taxable value because the taxable value was not in compliance with the GPTA. Further, the GPTA does not preclude a March board of review from

[1] See MCL 211.27a(3).

correcting an erroneous taxable value that resulted from the failure of an assessor to adjust a property's taxable value in the year immediately following its transfer. Accordingly, we also hold that a March board of review may adjust the erroneous taxable value in a subsequent year in order to bring the current taxable value into compliance with the GPTA. The Court of Appeals held that the error in this case could not be remedied and, therefore, we reverse the judgment of the Court of Appeals and reinstate the Michigan Tax Tribunal's decision affirming the March board of review's correction of the tax rolls to reflect the properly adjusted taxable values.

Next, in *Toll Northville Limited Partnership v Northville Township*, we address whether the Tax Tribunal has the authority to reduce an unconstitutional increase in the taxable value of property when the erroneous taxable value was not challenged in the year of the increase.[2] We hold that the Tax Tribunal does have the authority to reduce an unconstitutional previous increase in taxable value for purposes of adjusting a taxable value that was timely challenged in a subsequent year. The Tax Tribunal Act[3] sets forth the Tax Tribunal's jurisdiction.[4] Once its jurisdiction is properly invoked, the Tax Tribunal possesses the same powers and duties as those assigned to a March board of review under the GPTA, including the duty to adjust erroneous taxable values to bring the current tax rolls into com-

[2] This appeal marks the second time that Toll Northville Limited Partnership and Northville Township have come before us with this dispute. In *Toll Northville Ltd v Northville Twp*, 480 Mich 6, 13-14; 743 NW2d 902 (2008), we unanimously declared that the statutory provision allowing the value of the properties at issue to increase because of public-service improvements was unconstitutional.

[3] MCL 205.701 *et seq*.

[4] MCL 205.731.

pliance with the GPTA. Because the Court of Appeals erroneously held that the Tax Tribunal did not have jurisdiction to review taxable values in years not under appeal, we reverse the Court of Appeals' judgment and remand to that Court to consider Northville Township's remaining issues on appeal regarding the Tax Tribunal's valuation of the properties.[5]

I. *MICHIGAN PROPERTIES, LLC v MERIDIAN TOWNSHIP*

A. FACTS AND PROCEDURAL HISTORY

Michigan Properties, L.L.C., purchased three apartment complexes located in Meridian Township in December 2004. Michigan Properties timely filed a required affidavit in January 2005, notifying Meridian's assessor of the transfers of ownership. Meridian's assessor failed to comply with MCL 211.27a(3)[6] by not adjusting, or "uncapping,"[7] the taxable values of the properties for tax year 2005 to reflect their posttransfer taxable values. As a result of this failure, the taxable values for tax year 2005 were entered into the tax rolls using pretransfer values that were not in compliance with MCL 211.27a(3).

In October 2006, Meridian sent a letter notifying Michigan Properties of the erroneous values. The letter

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[5] We will discuss each case separately. We begin with *Mich Props* because the issue in *Toll Northville* is predicated on whether a March board of review has the power to correct a previous erroneous taxable value.

[6] MCL 211.27a(3) provides: "Upon a transfer of ownership of property after 1994, the property's taxable value for the calendar year following the year of the transfer is the property's state equalized valuation for the calendar year following the transfer."

[7] After ownership of a property has been transferred, the taxable value of the property is "uncapped" and is subject to reassessment based on the property's actual value. *Klooster v City of Charlevoix*, 488 Mich 289, 297; 795 NW2d 578 (2011).

informed Michigan Properties that it would receive a revised tax bill for tax year 2005 reflecting new taxable values because of the 2004 transfer and that the taxable values for tax year 2006 would be revised accordingly by Meridian's December board of review.[8] Litigation ensued, and the parties ultimately entered into a consent judgment for each property in February 2007 pertaining to tax years 2005 and 2006. The consent judgments stipulated that Meridian reserved the right to petition the March board of review for tax year 2007, or for any year thereafter, to uncap the properties' taxable values because of the transfers in December 2004. Meridian subsequently exercised its right to petition the March board of review to adjust the 2007 taxable values. The March board of review granted Meridian's requested relief, uncapping the taxable values for tax year 2007 on the basis of the December 2004 transfers of ownership.[9]

Michigan Properties filed the instant appeals of those decisions in the Tax Tribunal, arguing that the time frame for challenging the 2005 taxable values, and any subsequent values based on the 2005 assessments, had expired because Meridian had not timely challenged the 2005 assessments. Meridian moved for summary disposition, arguing that the March board of review had acted within its authority to bring taxable values into

[8] The December board of review, however, took no action. Michigan Properties appealed Meridian's decision for tax years 2005 and 2006 in the Tax Tribunal. Michigan Properties argued that the time frame for challenging the 2005 taxable values, and any subsequent values based on the 2005 assessment, had expired because Meridian had not timely challenged the 2005 assessments when the 2005 values were first placed on the tax rolls.

[9] Thus, 2007 is the only tax year before us in *Mich Props*. For tax year 2007, the total pretransfer taxable value for the three properties combined was assessed at $10,376,535. By including the uncapping based on the 2004 transfers, the March board of review adjusted the assessments for 2007 to a total taxable value of $14,905,107.

compliance with the GPTA pursuant to MCL 211.29 and MCL 211.30. The tribunal granted Meridian's motion for summary disposition.

Michigan Properties appealed the Tax Tribunal's decision in the Court of Appeals. In a published decision, the Court of Appeals reversed the Tax Tribunal and held that the March board of review could not uncap the taxable values relating to the December 2004 transfers.[10] Meridian sought leave to appeal in this Court. We granted leave to appeal, directing the parties to discuss "whether the failure of the taxing authority's assessor to adjust the taxable value of real property in the year immediately after a transfer of the property in accordance with MCL 211.27a(3) precludes the board of review from adjusting the taxable value in a later year." *Mich Props, LLC v Meridian Twp*, 490 Mich 877 (2011).

B. STANDARD OF REVIEW

Review of decisions by the Tax Tribunal is limited. *Mt Pleasant v State Tax Comm*, 477 Mich 50, 53; 729 NW2d 833 (2007). "In the absence of fraud, error of law or the adoption of wrong principles, no appeal may be taken to any court from any final agency provided for the administration of property tax laws from any decision relating to valuation or allocation." Const 1963, art 6, § 28. The Tax Tribunal's factual findings are final if they are supported by competent, material, and substantial evidence on the whole record. *Id.*; *Meadowlanes Ltd Dividend Housing Ass'n v City of Holland*, 437 Mich 473, 482; 473 NW2d 636 (1991). If the facts are not disputed and fraud is not alleged, our review is limited to whether the Tax Tribunal made an error of

[10] *Mich Props, LLC v Meridian Twp*, 292 Mich App 147; 808 NW2d 506 (2011).

law or adopted a wrong principle. *Meadowlanes*, 437 Mich at 482-483. The cases before us present a question of statutory interpretation, which this Court reviews de novo. *Wexford Med Group v City of Cadillac*, 474 Mich 192, 202; 713 NW2d 734 (2006). When interpreting statutes, this Court must "ascertain and give effect to the intent of the Legislature." *People v Koonce*, 466 Mich 515, 518; 648 NW2d 153 (2002). In interpreting a statute, this Court avoids a construction that would render any part of the statute surplusage or nugatory. *People v McGraw*, 484 Mich 120, 126; 771 NW2d 655 (2009), citing *Baker v Gen Motors Corp*, 409 Mich 639, 665; 297 NW2d 387 (1980). When considering the correct interpretation, the statute must be read as a whole. *Sun Valley Foods Co v Ward*, 460 Mich 230, 237; 596 NW2d 119 (1999). Individual words and phrases, while important, should be read in the context of the entire legislative scheme. *Herman v Berrien Co*, 481 Mich 352, 366; 750 NW2d 570 (2008).

C. ANALYSIS

1. TAXABLE VALUES IN PROPOSAL A AND THE GPTA

The specific issue before us in *Mich Props* is whether the failure of a taxing authority's assessor to adjust the taxable value of real property in the year immediately following a transfer of the property, in accordance with MCL 211.27a(3), precludes a March board of review from adjusting the taxable value in a subsequent year.

Resolving this issue requires an analysis of the GPTA, which sets forth the parameters for determining taxable values of real property. These parameters are a direct response from the Legislature to the limitations on taxable values established in Proposal A of 1994, which amended article 9, § 3 of Michigan's Constitu-

tion.[11] In *Klooster*, we stated that "[t]he purpose of Proposal A was to limit tax increases on property as long as it remains owned by the same party, even though the actual market value of the property may have risen at a greater rate."[12]

Proposal A places a cap on the taxable value of a property so that, based on the previous year's taxable value, any yearly increase in taxable value is limited to either the rate of inflation or 5 percent, whichever is less.[13] That cap on taxable value applies only to the current owner of the property, and the property's taxable value is uncapped when the property is trans-

[11] Proposal A amended Const 1963, art 9, § 3 to read as follows:

> The legislature shall provide for the uniform general ad valorem taxation of real and tangible personal property not exempt by law except for taxes levied for school operating purposes. The legislature shall provide for the determination of true cash value of such property; the proportion of true cash value at which such property shall be uniformly assessed, which shall not, after January 1, 1966, exceed 50 percent; and for a system of equalization of assessments. For taxes levied in 1995 and each year thereafter, the legislature shall provide that the taxable value of each parcel of property adjusted for additions and losses, shall not increase each year by more than the increase in the immediately preceding year in the general price level, as defined in [Const 1963, art 9, § 33], or 5 percent, whichever is less until ownership of the parcel of property is transferred. When ownership of the parcel of property is transferred as defined by law, the parcel shall be assessed at the applicable proportion of current true cash value. The legislature may provide for alternative means of taxation of designated real and tangible personal property in lieu of general ad valorem taxation. Every tax other than the general ad valorem property tax shall be uniform upon the class or classes on which it operates. A law that increases the statutory limits in effect as of February 1, 1994 on the maximum amount of ad valorem property taxes that may be levied for school district operating purposes requires the approval of 3/4 of the members elected to and serving in the Senate and in the House of Representatives.

[12] *Klooster*, 488 Mich at 296.

[13] Also, the valuation must be adjusted when there are additions or losses to the property that affect the property's value.

ferred. The uncapped taxable value for the year after the transfer sets a new baseline value that is subject to a new cap. The GPTA is the enabling legislation that carries out the edicts of Proposal A.[14]

The GPTA provides a comprehensive system for the assessment of property for ad valorem tax purposes and the collection of those taxes. It also provides for the administration of the system. When read in conjunction, MCL 211.27a(2) and (3) provide the statutory framework to implement the capping and uncapping mechanisms required by Proposal A. To establish taxable values of property, MCL 211.27a contains parameters that comply with the requirements of Proposal A.

Unless a property's ownership has been transferred in the previous year, the calculation for the current taxable value is set forth in MCL 211.27a(2), which provides:

> Except as otherwise provided in [MCL 211.27a(3)], for taxes levied in 1995 and for each year after 1995, the taxable value of each parcel of property is the lesser of the following:
>
> (a) The property's taxable value in the immediately preceding year minus any losses, multiplied by the lesser of 1.05 or the inflation rate, plus all additions. For taxes levied in 1995, the property's taxable value in the immediately preceding year is the property's state equalized valuation in 1994.
>
> (b) The property's current state equalized valuation.

In short, MCL 211.27a(2) establishes that, except as otherwise provided in MCL 211.27a(3), the taxable value of property for each year after 1995 is the value reached after applying the formula in MCL 211.27a(2)(a) or the current state equalized value,

[14] *Id*. at 296-297.

whichever is less. Under MCL 211.27a(2), the current year's taxable value is directly predicated on the immediately preceding year's taxable value unless the current state equalized valuation is lower.

MCL 211.27a(3) sets forth an exception to the MCL 211.27a(2) calculation. It provides:

> Upon a transfer of ownership of property after 1994, the property's taxable value for the calendar year following the year of the transfer is the property's state equalized valuation for the calendar year following the transfer.

This language requires that when a property has been transferred, it must be valued at the state equalized valuation for the calendar year following the transfer. Accordingly, once the property is transferred, its taxable value is no longer predicated on the previous year's taxable value; rather, it is "uncapped." This uncapping event sets a base valuation on which future taxable values will be determined.[15] Because MCL 211.27a(2)(a) is predicated on the previous year's taxable value, any error in the uncapping valuation carries the resulting erroneous taxable value over into future years.

The provisions establishing taxable values in MCL 211.27a(2) and MCL 211.27a(3) are both mandatory and automatic. Both subsections unambiguously provide that the taxable value for a property falling under each respective subsection "is" the value that results from the parameters contained in the applicable subsection.[16] Therefore, if the mandates from the appli-

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[15] Valuations after uncapping will again be based on MCL 211.27a(2), until the next time that the property's ownership is transferred. MCL 211.27a(4).

[16] The pertinent language in MCL 211.27a(3) states that "the property's taxable value for the calendar year following the year of the transfer *is* the property's state equalized valuation . . . ." (Emphasis added.) The Court of Appeals' analysis implies that the phrase "calendar year

cable subsection were not followed when placing a property's assessment on the tax rolls for a given tax year, the resulting taxable value from that year would not be in compliance with the GPTA and would thus be erroneous as a matter of law.

In *Mich Props*, Meridian's assessor failed to update the tax rolls to reflect the uncapped taxable values of Michigan Properties' recently purchased properties for tax year 2005. Because of this failure to uncap the taxable value, the taxable value as entered on the tax rolls for 2005 violated the automatic requirement in MCL 211.27a(3) that the taxable value for the year following the transfer "is" the uncapped value. As a result, the 2005 taxable values of the three properties at issue were erroneous.[17]

2. A MARCH BOARD OF REVIEW'S DUTIES AND POWERS

We must next determine whether the erroneous previous year's values can be corrected for purposes of adjusting the timely challenged 2007 taxable values. We hold that they can because a March board of review is authorized and required, pursuant to MCL 211.29 and MCL 211.30, to correct errors in valuation to bring taxable values into compliance with the

following the year of the transfer" establishes a period of limitations during which MCL 211.27a(3) can be applied and that it cannot be applied to adjust a taxable value in years subsequent to the year immediately following a transfer. However, MCL 211.27a(3) does not contain a period of limitations. Rather, it sets forth that the state equalized value during the designated period of time—the year immediately following a transfer—is the basis for the uncapped taxable value. Thus, the purpose of MCL 211.27a(3) is to override the limitation in MCL 211.27a(2) when a property is transferred and allow the property's taxable value to "catch up" with the value of the property.

[17] Our conclusion does not mean that because a previous year's taxable value is erroneous, it is subject to correction for purposes of a property owner's tax obligation for that previous year.

GPTA. To hold otherwise would allow errors in taxable value to run with the property until the next transfer of ownership occurs. The Legislature clearly did not intend this result. Judging by the plain language of the GPTA, the Legislature intended that a township's March board of review have the power to bring previous erroneous taxable values back into compliance with the GPTA, as long as that power is only exercised to bring the taxable value in line with the GPTA for the current tax year.[18] Our decision is limited to adjusting a current year's taxable value to prevent previous errors from running in perpetuity against the current taxpayer. While actions to collect or receive a refund of a previous year's taxes are subject to various limitations,[19] there are no such limitations within the GPTA prohibiting correction of a previous year's taxable value so that a taxpayer may receive relief for the tax year under appeal.

As noted earlier, the GPTA sets forth a comprehensive property tax system. Part of this system involves

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[18] The facts before us in both cases are distinguishable from those presented in *Leahy v Orion Twp*, 269 Mich App 527; 711 NW2d 438 (2006). In *Leahy*, the Court of Appeals refused to allow a taxpayer's challenge to a property's taxable value from a previous year for purposes of adjusting a subsequent year's taxable value. The taxpayer in *Leahy* had already challenged that previous year's taxable value in the year that the value was entered, claiming that the taxable value was erroneous. The taxpayer's challenge went to the Tax Tribunal, which ruled against him, and the taxpayer did not appeal that decision. Accordingly, the Court of Appeals correctly concluded that the taxpayer was collaterally estopped from relitigating the issue. *Id*. at 530-531.

[19] See *Briggs Tax Serv, LLC v Detroit Pub Sch*, 485 Mich 69; 780 NW2d 753 (2010) (holding that refund claims for previously paid taxes are subject to a 30-day limitations period unless a mutual mistake of fact occurred); see also MCL 211.53a (setting forth a three-year limitation on claims to collect a refund of previously paid taxes after a mutual mistake of fact occurred).

oversight and error correction by various entities.[20] In this system, assessors are responsible for assessing properties in accordance with various guidelines set forth in the GPTA.[21] However, once an assessment has been entered, an assessor is powerless to change that assessment.[22] If there is a challenge to an assessment, or if an error is discovered, the GPTA provides various circumstances in which the error can be corrected and specifies who can correct the error.[23]

Meridian argues that the taxable values are subject to the March board of review's error-correction mechanisms found in MCL 211.29 and MCL 211.30, which set forth the duties and powers of all townships' March boards of review. MCL 211.29 provides, in pertinent part:

> (1) On the Tuesday immediately following the first Monday in March, the board of review of each township shall meet at the office of the supervisor, at which time the supervisor shall submit to the board the assessment roll for the current year, as prepared by the supervisor, and the board shall proceed to examine and review the assessment roll.
>
> (2) During that day, and the day following, if necessary, the board, of its own motion, or on sufficient cause being shown by a person, shall add to the roll the names of persons, the value of personal property, and the description and value of real property liable to assessment in the township, omitted from the assessment roll. *The board*

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[20] See, e.g., MCL 211.53b (setting forth the process for the correction of "qualified error[s]") and MCL 211.34(4) (setting forth the process for appeals to the state tax commission regarding county equalization of taxes).

[21] MCL 211.10; MCL 211.10d(1); MCL 211.10e.

[22] In preparing assessments, an assessor is limited to using approved assessment manuals to carry out his or her duties. See MCL 211.10e.

[23] See, e.g., MCL 211.29, MCL 211.30, MCL 211.34(4), and MCL 211.53b.

> *shall correct errors* in the names of persons, in the descriptions of property upon the roll, and *in the assessment and valuation of property*. *The board shall do whatever else is necessary to make the roll comply with this act*.
>
> (3) The roll shall be reviewed according to the facts existing on the tax day. The board shall not add to the roll property not subject to taxation on the tax day, and the board shall not remove from the roll property subject to taxation on that day regardless of a change in the taxable status of the property since that day.
>
> (4) The board shall pass upon each valuation and each interest, and shall enter the valuation of each, as fixed by the board, in a separate column. [Emphasis added.]

These provisions give a March board of review the authority and the duty to correct errors in taxable values. When an error is brought to the attention of a March board of review, whether it is brought to the board's attention by another person or the board itself, the board must correct the error. Subsection (2) provides that "[t]he board shall correct errors . . . in the assessment and valuation of property."[24] A March board of review also has broad authority to correct a mistake in valuation because "[t]he board shall do whatever else is necessary to make the roll comply with this act."[25] This authority is further enforced by the language of MCL 211.30(4), which allows a March board of review to change an assessed or tentative taxable value as long as there is an opportunity for the person affected to file objections to any of the March board of review's changes.[26]

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[24] MCL 211.29(2).

[25] *Id*.

[26] MCL 211.30(4) states in pertinent part:

> The board of review, on its own motion, may change assessed values or tentative taxable values or add to the roll property omitted from the roll that is liable to assessment if the person who is assessed for the altered valuation or for the omitted property is

Most importantly, there are no limitations contained in the GPTA that would prevent a March board of review from considering previous erroneous taxable values when bringing current taxable values into compliance with the GPTA. Had the Legislature intended to preclude errors from being corrected in subsequent years, it would have included such a limitation. While MCL 211.29 and MCL 211.30 do not grant a March board of review the authority to alter a previous year's tax rolls, and thus alter previous tax obligations, a March board of review *does* have the power to correct previous errors *for the purpose of* updating the current year's tax rolls.

A March board of review has the power to review the tax rolls currently before it "according to the facts existing on the tax day." MCL 211.29(3). Among the facts existing on a current year's tax day would be the fact that a previous taxable value did not comply with the GPTA, and that fact is within the purview of the duties of the March board of review. Having considered the language of the GPTA, we agree with Meridian that the Legislature's directive to March boards of review to "do whatever else is necessary to make the roll comply with" the act includes correcting errors of law pertaining to taxable values that have carried over from previous years. By correcting previous errors of law for purposes of determining a current year's taxable value, a March board of review "make[s] the roll comply with" the GPTA.

Finally, allowing a March board of review to prospectively correct previous erroneous taxable values provides taxpayers and municipalities with meaningful review of a current year's taxes. It prevents an error in taxable value from being set in stone and perpetuating a deprivation of the constitutional protections set forth

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promptly notified and granted an opportunity to file objections to the change at the meeting or at a subsequent meeting.

in Proposal A.[27] Whether to prevent windfalls for taxpayers or municipalities,[28] the Constitution must be enforced, and deprivations of constitutional protections must be avoided.

In *Mich Props*, we hold that the March board of review correctly brought the 2007 taxable values into compliance with the GPTA by adjusting the current values because of the uncapping of the 2005 taxable values. The Court of Appeals incorrectly prevented the erroneous taxable values from being remedied until another uncapping event occurs. Accordingly, we reverse the judgment of the Court of Appeals in *Michigan Properties, LLC v Meridian Township*, and we reinstate the Tax Tribunal's decision affirming the March board of review's correction of the tax rolls to reflect the properly adjusted taxable values.

II. *TOLL NORTHVILLE LIMITED PARTNTERSHIP v NORTHVILLE TOWNSHIP*

A. FACTS AND PROCEDURAL HISTORY

This case raises the issue of whether the Michigan Tax Tribunal has the same powers and duties as a March

[27] In the Court of Appeals opinion pertaining to *Toll Northville*, which was decided with two companion cases involving the same issue, the Court of Appeals relied on *Auditor General v Smith*, 351 Mich 162; 88 NW2d 429 (1958), for the proposition that a failure by a board of review to correct an erroneous value in a previous year precludes attack on that value in a subsequent year. *MJC/Lotus Group v Brownstown Twp*, 293 Mich App 1, 9; 809 NW2d 605 (2011). However, *Auditor General* was decided nearly 40 years before Proposal A was enacted in 1994. We now take the opportunity to clarify that *Auditor General* is limited to situations predating Proposal A, and thus it is not applicable to the cases before us.

[28] As is evident from the cases before us, a failure to correct previous errors can either result in taxpayers being forced to pay more property taxes than the Constitution permits or prevent a municipality from receiving property taxes to which it is constitutionally entitled.

board of review to adjust previously entered erroneous taxable values for purposes of bringing the current tax rolls into compliance with the GPTA. The underlying factual basis for the dispute between Toll Northville Limited Partnership and Northville Township[29] began in 2000 when Toll, a residential developer, installed public-service improvements[30] to a "parent" parcel that was to be divided into residential "child" parcels. The value of the public-service improvements, which were legally defined as "additions" pursuant to MCL 211.34d(1)(b)(*viii*), was included in the taxable value for the parent parcel for tax year 2000, thereby substantially increasing the taxable value of Toll's property.[31] Toll did not timely challenge the increase in taxable value for tax year 2000, and the parent parcel was divided into child parcels by tax year 2001.[32] For 2001, the assessor proportionately split the addition to the taxable values among the resulting child parcels, so that each child parcel carried its portion of the addition of the value of the public-service improvements to the taxable value that had previously been assessed to the parent parcel.[33]

Toll timely appealed the taxable values of the child parcels for tax year 2001 in the Tax Tribunal.[34] Also,

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[29] Biltmore Wineman LLC owns the properties at issue along with Toll and is also a party to this dispute. For ease of reading, however, we will refer exclusively to Toll and Northville as the parties in this opinion.

[30] The public-service improvements included infrastructure such as a primary access road, streetlights, sewer service, water service, electrical service, natural gas service, telephone service, and sidewalks.

[31] The inclusion of the public-service improvements as additions increased the taxable value of the property from $4,701,861 to $23,395,587 for tax year 2000.

[32] This division of property did not trigger uncapping under MCL 211.27a(3) because Toll remained the owner of the divided parcels.

[33] The value of the additions is approximately 79.903 percent of the assessed taxable value for each parcel.

[34] Toll eventually amended its petition to include tax years after 2001. Thus, the tax years before us for *Toll Northville* are 2001 and later.

Toll filed a declaratory action in the circuit court to have MCL 211.34d(1)(b)(*viii*), the basis for including public-service improvements as "additions," declared unconstitutional.[35] The Tax Tribunal held Toll's tribunal case in abeyance pending the outcome of the circuit court action. Toll was successful in its circuit court action, culminating in an opinion from this Court that unanimously declared MCL 211.34d(1)(b)(*viii*) unconstitutional.[36]

Following this Court's decision, the Tax Tribunal proceedings were reopened. The tribunal concluded that it lacked jurisdiction to amend the taxable value of the parent parcel for tax year 2000 because that value was not timely appealed. However, the tribunal prospectively amended the taxable value of the properties at issue to conform to this Court's decision. Thus, the tribunal removed the value of the public-service improvement additions from the parcels' taxable values for tax year 2001 and subsequent years.

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[35] Generally speaking, quasi-judicial agencies such as the Tax Tribunal do not have the authority to hold a statute unconstitutional. See *Wikman v City of Novi*, 413 Mich 617, 646-647; 322 NW2d 103 (1982); *Dation v Ford Motor Co*, 314 Mich 152; 22 NW2d 252 (1946).

[36] In *Toll Northville*, 480 Mich at 13-14, we stated:

> The issue is the constitutionality of MCL 211.34d(1)(b)(*viii*), which, as written, defines "public services" as "additions" and, therefore, would allow for the taxation of the value added from the installation of public-service improvements, which are "water service, sewer service, a primary access road, natural gas service, electrical service, telephone service, sidewalks, or street lighting." We agree with the analysis and the decision of the Court of Appeals [*Toll Northville, Ltd v Northville Twp*, 272 Mich App 352; 726 NW2d 57 (2006)], which declared MCL 211.34d(1)(b)(*viii*) unconstitutional. The Court of Appeals correctly concluded that the mere installation of public-service improvements on public property or on utility easements does not constitute a taxable "addition"—as that term was understood when the public adopted Proposal A—in this instance, involving infrastructure improvements made to land destined to become a residential subdivision.

Northville appealed the tribunal's decision in the Court of Appeals.[37] In a published opinion, the Court of Appeals reversed the tribunal's decision[38] and held that the Tax Tribunal did not have jurisdiction to review a previous year's taxable value for purposes of determining a timely appealed current year's taxable value.[39] Accordingly, the Court of Appeals ordered the Tax Tribunal to reinstate and affirm the taxable values assessed by Northville, including the unconstitutional additions for public-service improvements.[40]

Toll sought leave to appeal in this Court. We granted leave to appeal, limiting the issue to "whether the Court of Appeals correctly held that the Michigan Tax Tribunal had no jurisdiction to reduce an unconstitutional increase in the taxable value of property if the improperly increased taxable value was not challenged in the year of the increase." *Toll Northville Ltd Partnership v Northville Twp*, 490 Mich 877 (2011).

B. ANALYSIS

As noted in the discussion of *Mich Props*, the GPTA provides a March board of review with the authority to

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[37] As noted, the Court of Appeals consolidated Northville's appeal with two other cases involving the same issue regarding the removal of unconstitutional public-service improvements from taxable values.

[38] *MJC/Lotus Group*, 293 Mich App 1.

[39] Because the Court of Appeals held that the Tax Tribunal did not have jurisdiction to review the accuracy of a property's taxable value for a year that was not timely appealed, the Court of Appeals did not address Northville's alternative argument that the adjusted valuation set by the Tax Tribunal did not comport with a stipulation by the parties regarding the valuation. On remand, we direct the Court of Appeals to address this issue.

[40] *MJC/Lotus Group*, 293 Mich App at 16. Because the Court of Appeals held that the tribunal lacked jurisdiction, it did not reach Northville's remaining arguments on appeal concerning the valuation methods used by the Tax Tribunal to adjust the taxable values of Toll's parcels. *Id*. at 14-15. On remand, we direct the Court of Appeals to address these issues as well.

bring previous erroneous taxable values into compliance with the GPTA for purposes of determining the taxable value in a subsequent year. As in *Mich Props*, the initial taxable value in this case was erroneous as a matter of law,[41] and it was not challenged in the year that it was placed on the tax rolls; rather, it was challenged in a subsequent year. However, unlike the proceedings in *Mich Props*, the proceedings in this matter involved the Tax Tribunal instead of the March board of review. Therefore, we must determine whether the Tax Tribunal possesses the same powers of correction as a March board of review. We hold that under the plain language of the Tax Tribunal Act,[42] it does.

The Michigan Tax Tribunal was created by the Tax Tribunal Act.[43] The Tax Tribunal is charged with original jurisdiction over tax proceedings, including appeals of cases arising from March boards of review. In *Wikman v City of Novi*, 413 Mich 617, 629; 322 NW2d 103 (1982), we described the tribunal as follows:

> The Tax Tribunal is a "quasi-judicial agency" designed to provide a forum in which taxpayers may obtain relief from adverse agency decisions. The primary functions of the Tax Tribunal are to find facts and review the decisions of agencies within its jurisdiction. The Tax Tribunal specializes in reviewing these determinations. To assure that it possesses the necessary expertise to resolve these cases

[41] In *Toll Northville*, the taxable value for Toll's parcel included an addition for public-service improvements that was declared unconstitutional by this very Court. An unconstitutional addition is no addition at all. See *Toll Northville*, 480 Mich at 14. Because the 2000 taxable value included this unconstitutional addition, the taxable value was not in accordance with MCL 211.27a(2) for that tax year. Moreover, the resulting tax year 2000 taxable values were also unlawfully valued above the constitutional cap set by article 9, § 3.

[42] MCL 205.701 *et seq*.

[43] MCL 205.721. For a discussion of the history and purpose of the Tax Tribunal Act, see *Wikman*, 413 Mich at 626-629.

> efficiently, the Tax Tribunal Act requires that certain members of the tribunal have special qualifications.

The Tax Tribunal Act sets forth the powers and jurisdiction of the tribunal. MCL 205.731 provides[44] in pertinent part:

> The tribunal has exclusive and original jurisdiction over all of the following:
>
> (a) A proceeding for direct review of a final decision, finding, ruling, determination, or order of an agency relating to the assessment, valuation, rates, special assessments, allocation, or equalization, under the property tax laws of this state.
>
> (b) A proceeding for a refund or redetermination of a tax levied under the property tax laws of this state.

Thus, according to the plain language of MCL 205.731, the Tax Tribunal has exclusive and original jurisdiction to review decisions of "an agency relating to . . . valuation . . . under the property tax laws of this state." This language pertains to local taxing authorities such as a township's March board of review.[45] Moreover, pursuant to MCL 205.735(2) and MCL 205.735a(2), the proceedings before the tribunal are "original and independent and [are] considered *de novo*." (Emphasis added.)

MCL 205.732 sets forth the tribunal's powers in reviewing a taxing authority's decision once the tribunal's jurisdiction is properly invoked under MCL 205.735 or MCL 205.735a(6). It provides[46] in pertinent part:

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[44] Although a previous version of MCL 205.731 was in effect during the tax years at issue in this case, the differences do not affect our analysis. See 2008 PA 125; 1973 PA 186.

[45] See MCL 205.703(a) (defining "agency" for purposes of the Tax Tribunal Act); see also MCL 211.29 and 211.30.

[46] Again, the amendments of MCL 205.732 do not affect its application to the case at issue. See 2008 PA 125; 1973 PA 186.

> *The tribunal's powers include*, but are not limited to, all of the following:
>
> (a) *Affirming, reversing, modifying, or remanding a final decision, finding, ruling, determination, or order of an agency*.
>
> (b) Ordering the payment or refund of taxes in a matter over which it may acquire jurisdiction.
>
> (c) Granting other relief or issuing writs, orders, or directives that it deems necessary or appropriate in the process of disposition of a matter over which it may acquire jurisdiction.
>
> (d) Promulgating rules for the implementation of this act, including rules for practice and procedure before the tribunal . . . under the administrative procedures act of 1969, 1969 PA 306, MCL 24.201 to 24.328. [Emphasis added.]

Additionally, MCL 205.737(1) provides that "[t]he tribunal shall determine a property's taxable value pursuant to [MCL 211.27a]."[47]

It is apparent from these provisions that the Tax Tribunal has original jurisdiction over appeals regarding the valuation of property by an assessor or a March board of review and that the tribunal reviews those appeals de novo. As part of the tribunal's powers, the tribunal can affirm, reverse, or modify the decision of a March board of review, and in doing so, the tribunal is authorized to determine the property's taxable value in accordance with MCL 211.27a.

The Legislature has granted the tribunal the authority to enforce a March board of review's error corrections under MCL 211.29 and MCL 211.30. Thus, the

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[47] Further, Mich Admin Code, R 205.1283(1) indicates that once the Tax Tribunal's jurisdiction is properly invoked, the scope of its inquiry in determining the validity of an assessment for the appealed tax year is broad and limited only by relevancy.

Tax Tribunal has the authority to carry out a March board of review's duty to correct a previous erroneous taxable value in order to adjust the current taxable value, thereby bringing the taxable value back into compliance with the GPTA and Proposal A.[48] Accordingly, the Tax Tribunal Act grants the Tax Tribunal the authority to provide the relief that Toll argues for in this case.[49]

Thus, in *Toll Northville*, we agree with the Tax Tribunal that it has the ability to prospectively adjust the timely challenged taxable values of Toll's parcels for tax year 2001 and subsequent years because the tax year 2000 taxable value of the parent parcel was erroneous as a result of the inclusion of unconstitutional

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[48] As discussed in note 27 of this opinion, the Court of Appeals in this case relied on *Auditor General*, 351 Mich 162, for the proposition that a previous failure to correct an erroneous value by a board of review precludes attack on that value in a subsequent year. Again, we note that *Auditor General* is limited to situations predating Proposal A and thus it is not applicable to this case.

[49] Northville argues that the Tax Tribunal did not have jurisdiction to change the 2001 taxable values because the 2000 taxable value of the parent parcel was not timely appealed in accordance with the time limitations contained in MCL 205.735. Despite the fact that Toll did not timely appeal the 2000 taxable value in the Tax Tribunal, Toll did timely appeal the 2001 values of the child parcels. Thus, Toll properly invoked the tribunal's jurisdiction with respect to the 2001 values, and, notably, Toll does not seek a refund or a reduction of taxes for tax year 2000. Although the Tax Tribunal cannot adjust the tax year 2000 taxable value because of Toll's failure to timely appeal that value, the tribunal can consider data from that year when adjusting the timely challenged 2001 taxable values. Because the 2001 taxable values are predicated on the 2000 taxable value, the information from 2000 is therefore relevant for determining the correct values for 2001. In holding that the tribunal did not have jurisdiction to review taxable values of a year not timely appealed, the Court of Appeals erred by confusing the difference between the Tax Tribunal's inability to change and grant relief regarding the tax year 2000 taxable value and its ability to consider evidence of how the tax year 2000 assessment was determined in reviewing taxable values for a year that was timely appealed.

additions.[50] Accordingly, we reverse the Court of Appeals' judgment pertaining to Toll in *MJC/Lotus Group v Brownstown Twp*, 293 Mich App 1; 809 NW2d 605 (2011). However, because the Court of Appeals did not reach Northville's remaining issues on appeal regarding the valuation of the subject properties, we remand this case to the Court of Appeals for consideration of those issues.

III. CONCLUSION

In *Mich Props*, we hold that the failure to adjust the taxable values in the year immediately following the transfer produced erroneous taxable values because the taxable values were not in compliance with the GPTA. Further, the GPTA does not preclude a March board of review from correcting an erroneous taxable value that resulted from the failure of an assessor to adjust a property's taxable value in the year immediately following its transfer. Accordingly, we also hold that a March board of review may adjust the erroneous taxable value in a subsequent year in order to bring the current taxable value into compliance with the GPTA. The Court of Appeals held that the error in this case could not be remedied and, therefore, we reverse the judgment of the Court of Appeals and reinstate the Tax Tribunal's decision affirming the March board of review's correction of the tax rolls to reflect the properly adjusted taxable values.

In *Toll Northville*, we hold that the Tax Tribunal does have the authority to reduce an unconstitutional previous increase in taxable value for purposes of adjusting a taxable value that was timely challenged in a

[50] In carrying out this adjustment, the Tax Tribunal is required to ensure that the taxable values comply with the Michigan Constitution and apply the parameters set forth in MCL 211.27a.

subsequent year. The Tax Tribunal Act sets forth the Tax Tribunal's jurisdiction. Once its jurisdiction is properly invoked, the Tax Tribunal possesses the same powers and duties assigned to a March board of review under the GPTA, including the duty to adjust erroneous taxable values to bring the current tax rolls into compliance with the GPTA. Accordingly, we reverse the judgment of the Court of Appeals pertaining to Toll Northville Limited Partnership, and we remand the case to the Court of Appeals to consider Northville Township's remaining issues on appeal regarding the Tax Tribunal's valuation of the subject properties.

YOUNG, C.J., and CAVANAGH, MARILYN KELLY, MARKMAN, MARY BETH KELLY, and ZAHRA, JJ., concurred with HATHAWAY, J.

TITAN INSURANCE COMPANY v HYTEN

Docket No. 142774. Argued March 8, 2012 (Calendar No. 4). Decided June 15, 2012.

Titan Insurance Company filed an action in the Oakland Circuit Court against McKinley Hyten, Howard Holmes, and Martha Holmes, seeking a declaratory judgment allowing it to reform an automobile no-fault insurance policy it had issued to Hyten in August 2007 by reducing the liability coverage limits to the statutory minimums. At the time Titan issued the policy, Hyten's driver's license was suspended, a fact she failed to indicate on the insurance application. In September 2007, her license was restored. The following February, she had a motor vehicle accident in which the Holmeses were injured. Titan alleged that it would not have issued the policy had it been informed that Hyten had a suspended license. Farm Bureau Insurance Company, the Holmeses' insurer, was allowed to intervene in the action. Farm Bureau, Titan, and Hyten filed cross-motions for summary disposition. The court, Edward Sosnick, J., denied Titan's motion and granted summary disposition to Hyten and Farm Bureau, concluding that the evidence did not clearly show fraud and that Titan could have easily ascertained whether Hyten had a valid driver's license. Titan appealed. The Court of Appeals, GLEICHER, P.J., and K. F. KELLY, J. (ZAHRA, J., not participating), affirmed, concluding that, when the claimant is a third party, an insurer who has collected premiums may not deny coverage on the basis of fraud that it could have easily ascertained at the time the contract was formed. Because Titan's agent could have easily ascertained whether Hyten had a license, Titan could not reform Hyten's policy to reduce the residual coverage to the statutory minimum limits. 291 Mich App 445 (2011). The Supreme Court granted plaintiff leave to appeal. 490 Mich 868 (2011).

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

State Farm Mut Auto Ins Co v Kurylowicz, 67 Mich App 568 (1976), and its progeny are overruled, and *Keys v Pace*, 358 Mich 74 (1959), which had held that an insurance company may avail itself

of traditional legal and equitable remedies to avoid liability under an insurance policy on the basis of fraud in the application for insurance even when the fraud was easily ascertainable and the claimant is a third party, is reaffirmed.

1. Because an insurance policy is a contract that is generally subject to the same principles that apply to any other species of contract, common-law defenses, including duress, waiver, estoppel, fraud, and unconscionability, may be invoked to avoid enforcement of an insurance policy, unless those defenses are prohibited by statute.

2. Michigan's contract law recognizes several interrelated but distinct common-law doctrines—loosely aggregated under the rubric of fraud—that may entitle a party to a legal or equitable remedy if a contract was obtained as a result of fraud or misrepresentation. These doctrines include actionable fraud, also known as fraudulent misrepresentation; innocent misrepresentation; and silent fraud, also known as fraudulent concealment. None of these doctrines requires proof that the fraud could not have been discovered through the exercise of reasonable diligence.

3. In 1959, the Supreme Court held in *Keys* that an insurance company has no duty to investigate or verify the representations of a potential insured and may avail itself of traditional legal and equitable remedies to avoid liability under an insurance policy on the basis of fraud in the application for insurance even when the fraud was easily ascertainable and the claimant is a third party. In *Kurylowicz*, the Court of Appeals erred by disregarding *Keys* and adopting what has become known as the "easily ascertainable" rule, holding that when an automobile liability insurer retains premiums notwithstanding grounds for cancellation reasonably discoverable by the insurer, the insurer will be estopped from asserting that ground for rescission thereafter when a third-party claimant is involved. *Kurylowicz*'s claimed public policy rationale for the rule was without foundation in the actual text of the no-fault act.

4. The legal and equitable remedies for fraud are manifold, but the available remedies may be limited by statute. MCL 257.520(f)(1) limits the ability of an insurer to avoid liability on the basis of fraud in obtaining a motor vehicle liability policy with respect to the insurance required by the financial responsibility act, MCL 257.501 *et seq*. That statute, however, only applies to a motor vehicle liability insurance policy that has been certified as provided in MCL 257.518 or MCL 257.519 as proof of financial responsibility. To the extent that *State Farm Mut Auto Ins Co v Sivey*, 404 Mich 51 (1978), *Farmers Ins Exch v Anderson*, 206 Mich

App 214 (1994), and *League Gen Ins Co v Budget Rent-A-Car of Detroit*, 172 Mich App 802 (1988), suggested otherwise, they are overruled.

5. Because the record was not clear regarding whether the trial court had found that the elements of actionable fraud had been satisfied, the case had to be remanded for further proceedings. If Titan prevailed on its assertion of actionable fraud, it could avail itself of a traditional legal or equitable remedy to avoid liability under the insurance policy, notwithstanding that the fraud may have been easily ascertainable, although the available remedies might be limited by statute.

Reversed and remanded.

Justice HATHAWAY, joined by Justices CAVANAGH and MARILYN KELLY, dissenting, would have affirmed the decision of the Court of Appeals. The "easily ascertainable" rule should remain the law of the state because it is soundly based in existing caselaw and this state's policy regarding automotive liability insurance and compensation for innocent third-party victims. The majority discarded 36 years of thoughtfully analyzed caselaw interpreting the no-fault act even though there have been no relevant intervening statutory amendments. The Court of Appeals correctly applied the "easily ascertainable" rule to hold that Titan could not reform its insurance policy in order to avoid the maximum liability owed under the policy to the innocent third-party defendants.

1. INSURANCE — NO-FAULT — FRAUD — MISREPRESENTATION BY APPLICANT — EASILY ASCERTAINABLE MISREPRESENTATION — REMEDIES.

An insurer has no duty to investigate or verify the representations of a potential insured; an insurance company may avail itself of traditional legal and equitable remedies to avoid liability under a policy of no-fault insurance on the basis of fraud in the application for insurance, even when the fraud was easily ascertainable and the claimant is a third party.

2. INSURANCE — NO-FAULT — FRAUD — MISREPRESENTATION BY APPLICANT — REMEDIES — LIMITATION OF REMEDIES BY STATUTE — CERTIFICATION OF POLICY AS PROOF OF FINANCIAL RESPONSIBILITY.

The legal and equitable remedies for fraud are manifold, but the available remedies may be limited by statute; an insurer's ability to avoid liability on the basis of fraud in obtaining a motor vehicle liability policy with respect to the insurance required by the financial responsibility act is statutorily limited, but the limitation only applies to a motor vehicle liability insurance policy that has

been certified under the act as proof of financial responsibility (MCL 257.518, MCL 257.519, MCL 257.520).

3. INSURANCE — NO-FAULT — RISK ASSESSMENT — CANCELLATION PERIOD — FRAUD — REMEDIES.

A no-fault insurer has 55 days during which it may reassess its risk and cancel a no-fault insurance policy if the risk is unacceptable to the insurer; the statute does not preclude an insurer from pursuing traditional legal and equitable remedies if the insurer uncovers fraud after the 55-day period for risk reassessment has expired (MCL 500.3220).

4. INSURANCE — NO-FAULT — FRAUD — ACTIONABLE FRAUD — FRAUDULENT MISREPRESENTATION — ELEMENTS.

To establish actionable fraud, the party asserting fraud must prove that (1) the opposing party made a material misrepresentation; (2) it was false; (3) when the opposing party made the representation, he or she knew it was false or else made it recklessly, without any knowledge of its truth and as a positive assertion; (4) he or she made it with the intention that it should be acted on by the asserting party; (5) the asserting party acted in reliance on it; and (6) the asserting party thereby suffered injury.

Law Offices of Ronald M. Sangster, PLLC (by *Ronald M. Sangster*), for Titan Insurance Company.

Amicus Curiae:

Plunkett Cooney (by *Mary Massaron Ross* and *Hilary A. Ballentine*) for the Insurance Institute of Michigan.

MARKMAN, J. We granted leave to appeal to address whether an insurance carrier may avail itself of traditional legal and equitable remedies to avoid liability under an insurance policy on the ground of fraud in the application for insurance, when the fraud was easily ascertainable and the claimant is a third party. In accordance with this Court's precedent in *Keys v Pace*, 358 Mich 74; 99 NW2d 547 (1959), we answer this question in the affirmative. There being nothing in the law to warrant the establishment of an "easily ascer-

tainable" rule, we overrule *State Farm Mut Auto Ins Co v Kurylowicz*, 67 Mich App 568; 242 NW2d 530 (1976), and its progeny[1] and reverse the judgment of the Court of Appeals.

I. FACTS

McKinley Hyten obtained a provisional driver's license in April 2004. In January 2007, Hyten's driver's license was suspended by the Secretary of State because of multiple moving violations and two minor traffic accidents. In light of what she perceived as assurances from her probation officer, Hyten anticipated that her license would be restored at a district court hearing scheduled for August 24, 2007.

That same year, Hyten's mother, Anne Johnson, inherited a motor vehicle that she "earmarked" for Hyten. Given the anticipated restoration of Hyten's driver's license, Johnson sought to obtain automobile insurance for Hyten. Johnson telephoned an independent insurance agent who, after being told that Hyten's license had been suspended, informed Johnson that Hyten could not be insured until her license had been restored. Nonetheless, an application for insurance from Titan Insurance Company was filled out on Hyten's behalf and postdated to August 24, 2007, and on August 22, 2007, Hyten signed the application for insurance. The application form asked, "Does the applicant's household have any

[1] To the extent that *Ohio Farmers Ins Co v Mich Mut Ins Co*, 179 Mich App 355, 357-358, 362-363; 445 NW2d 228 (1989), *Farmers Ins Exch v Anderson*, 206 Mich App 214, 219; 520 NW2d 686 (1994), and *Manier v MIC Gen Ins Corp*, 281 Mich App 485, 489-490; 760 NW2d 293 (2008), held or stated that an insurer is estopped from denying coverage on the basis of fraud when it could have easily ascertained the fraud, these decisions are overruled.

unlicensed drivers or any drivers with a suspended or revoked driver's license?" In response to this question, the "No" box was checked. The form stated that Titan could review Hyten's driving record, but also stated that Titan could rely on the applicant's representations. On August 24, 2007, the policy became effective and provided personal protection insurance coverage for bodily injury of $100,000 per person/$300,000 per occurrence.

At the August 24, 2007, hearing, Hyten's driver's license was not restored, and it was not restored until September 20, 2007. Titan was not informed of this fact. Subsequently, in February 2008, Hyten was driving the insured vehicle and collided with the vehicle of Howard and Martha Holmes, causing injuries to them. In the process of investigating the accident, Titan learned that Hyten did not have a valid driver's license when the policy was issued. In anticipation that the Holmeses would be filing claims against Hyten for their injuries, Titan filed the instant action seeking a declaratory judgment. Titan averred that had it been informed that Hyten's license had been suspended, it would never have accepted the risk and would not have issued the insurance policy. Given Hyten's fraudulent conduct in her application for insurance, Titan sought a declaration that, should the Holmeses prevail in their action, Titan was not obligated to indemnify Hyten.[2]

Farm Bureau Insurance Company, the Holmeses' insurer, intervened as a defendant, and Titan, Farm

[2] Titan did not seek to completely avoid liability under the insurance policy. Rather, Titan sought a declaration that it was not obligated to indemnify Hyten for any amounts *above* the minimum liability coverage limits required by the financial responsibility act ($20,000 per person/$40,000 per occurrence), MCL 257.501 *et seq*., for which Titan acknowledged responsibility.

Bureau, and Hyten each filed cross-motions for summary disposition. Relying on Court of Appeals decisions holding that an insurer may not avoid liability under an insurance policy for fraud that was easily ascertainable, and concluding that whether a person possesses a valid driver's license is easily ascertainable, the trial court granted Farm Bureau's and Hyten's motions for summary disposition. The Court of Appeals affirmed on the basis of *Kurylowicz*, asserting that once an insurable event has occurred and a third party (the Holmeses here) possesses a claim against an insured arising out of that event, an insurer is not entitled to reform the policy to the third-party's detriment when the fraud by the insured was easily ascertainable. *Titan Ins Co v Hyten*, 291 Mich App 445; 805 NW2d 503 (2011) (*Hyten I*). Titan filed an application for leave to appeal in this Court, which we granted. *Titan Ins Co v Hyten*, 490 Mich 868 (2011) (*Hyten II*).[3]

II. STANDARD OF REVIEW

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Shepherd Montessori Ctr Milan v Ann Arbor Charter Twp*, 486 Mich 311, 317; 783 NW2d 695 (2010). In addition, the proper interpretation of a statute is a question of law that this Court reviews de novo. *Eggleston v Bio-Med Applications of Detroit, Inc*, 468 Mich 29, 32; 658 NW2d 139 (2003). The proper interpretation of a contract is also a question of law that this Court reviews de novo. *Rory v Continental Ins Co*, 473 Mich 457, 464; 703 NW 2d 23 (2005).

[3] The Court's order directed the parties to address "whether an insurance carrier may reform an insurance policy on the ground of misrepresentation in the application for insurance where the misrepresentation is 'easily ascertainable' and the claimant is an injured third party." *Hyten II*, 490 Mich at 868-869.

III. ANALYSIS

A. POLICIES AS CONTRACTS

Insurance policies are contracts and, in the absence of an applicable statute, are "subject to the same contract construction principles that apply to any other species of contract." *Id*. at 461. As this Court noted in *Rohlman v Hawkeye-Security Ins Co*, 442 Mich 520, 525 n 3; 502 NW2d 310 (1993), quoting 12A Couch, Insurance, 2d (rev ed), § 45:694, pp 331-332,

> [the insurance] policy and the statutes relating thereto must be read and construed together as though the statutes were a part of the contract, for it is to be presumed that the parties contracted with the intention of executing a policy satisfying the statutory requirements, and intended to make the contract to carry out its purpose.

Thus, when a provision in an insurance policy is mandated by statute, the rights and limitations of the coverage are governed by that statute. See *Rohlman*, 442 Mich at 524-525 (holding that because personal injury protection benefits are mandated by MCL 500.3105, that statute governs issues regarding an award of those benefits). On the other hand, when a provision in an insurance policy is not mandated by statute, the rights and limitations of the coverage are entirely contractual and construed without reference to the statute. See *Rory*, 473 Mich at 465-466 (holding that because uninsured-motorist coverage is optional and not mandated by statute, "the rights and limitations of such coverage are purely contractual and construed without reference to the no-fault act").

In addition, because insurance policies are contracts, common-law defenses may be invoked to avoid enforcement of an insurance policy, unless those defenses are prohibited by statute. See *id.* at 470. *Rory* noted that

common-law defenses include duress, waiver, estoppel, fraud, and unconscionability. *Id.* at 470 n 23. In this case, Titan asserts the defense of fraud to avoid liability under the insurance policy entered into with Hyten.

B. FRAUD

Michigan's contract law recognizes several interrelated but distinct common-law doctrines—loosely aggregated under the rubric of "fraud"—that may entitle a party to a legal or equitable remedy if a contract is obtained as a result of fraud or misrepresentation. These doctrines include actionable fraud, also known as fraudulent misrepresentation; innocent misrepresentation; and silent fraud, also known as fraudulent concealment. Regarding actionable fraud,

> [t]he general rule is that to constitute actionable fraud it must appear: (1) That defendant made a material representation; (2) that it was false; (3) that when he made it he knew that it was false, or made it recklessly, without any knowledge of its truth and as a positive assertion; (4) that he made it with the intention that it should be acted upon by plaintiff; (5) that plaintiff acted in reliance upon it; and (6) that he thereby suffered injury. Each of these facts must be proved with a reasonable degree of certainty, and all of them must be found to exist; the absence of any one of them is fatal to a recovery. [*Candler v Heigho*, 208 Mich 115, 121; 175 NW 141 (1919), overruled in part on other grounds by *United States Fidelity & Guaranty Co v Black*, 412 Mich 99, 116 n 8; 13 NW2d 77 (1981) (citation and quotation marks omitted).][4]

[4] Concerning the reliance prong, it is true that "fraud is not perpetrated upon one who has full knowledge to the contrary of a representation." *Montgomery Ward & Co v Williams*, 330 Mich 275, 284; 47 NW2d 607 (1951). But there is no common-law duty to attempt to acquire such knowledge. For it is "well settled law that a payment . . . may be recovered, even if the mistake be due to lack of investigation." *Id.*, quoting *Couper v Metro Life Ins Co*, 250 Mich 540, 544; 230 NW 929 (1930).

The doctrine of innocent misrepresentation is also well settled in Michigan, recognizing,

> by a long line of cases, that if there was in fact a misrepresentation, though made innocently, and its deceptive influence was effective, the consequences to the plaintiff being as serious as though it had proceeded from a vicious purpose, he would have a right of action for the damages caused thereby either at law or in equity. [*United States Fidelity*, 412 Mich at 115, quoting *Holcomb v Noble*, 69 Mich 396, 399; 37 NW 497 (1888) (MORSE, J., concurring) (emphasis omitted).][5]

The Court of Appeals in the instant case held that "[t]here can be no fraud where a person has the *means* to determine that a representation is not true." *Hyten I*, 291 Mich App at 462, quoting *Nieves v Bell Industries, Inc*, 204 Mich App 459, 464; 517 NW2d 235 (1994) (emphasis added). When read in isolation, this statement might support the panel's conclusion that an insurer has a duty to investigate representations made by a potential insured. However, when the statement is read in the full context of the *Nieves* opinion, as well as other precedent, it is clear that an insurer has no duty to investigate the representations of a potential insured. The Court of Appeals in the instant case failed to recognize that in *Nieves*, and in the two cases relied on by *Nieves* in the pertinent portion of its opinion, *Montgomery Ward*, 330 Mich 275, and *Webb v First of Mich Corp*, 195 Mich App 470; 491 NW2d 851 (1992), the allegedly defrauded party was given direct information refuting the misrepresentations. Ignoring information that contradicts a misrepresentation is considerably different than failing to affirmatively and actively investigate a representation.

In *Mable Cleary Trust v Edward-Marlah Muzyl Trust*, 262 Mich App 485, 501; 686 NW2d 770 (2004), the Court of Appeals held that the rule articulated in *Nieves* is only applied when the plaintiff was "either presented with the information and chose to ignore it *or had some other indication that further inquiry was needed*." (Emphasis added.) To the extent that the latter part of this statement can be read to support the proposition that a party has an independent duty to investigate and corroborate representations, we overrule *Mable Cleary Trust*.

[5] The distinctions between actionable fraud and innocent misrepresentation were outlined by this Court in *United States Fidelity*, 412 Mich at 118-119. There, it was noted that

Silent fraud has also long been recognized in Michigan. This doctrine holds that when there is a legal or equitable duty of disclosure, "[a] fraud arising from the suppression of the truth is as prejudicial as that which springs from the assertion of a falsehood, and courts have not hesitated to sustain recoveries where the truth has been suppressed with the intent to defraud." *Tompkins v Hollister*, 60 Mich 470, 483; 27 NW 651 (1886) (citations omitted); see also *United States Fidelity*, 412 Mich at 125.

As is evident, although the doctrines of actionable fraud, innocent misrepresentation, and silent fraud each contain separate elements, none of these doctrines requires that the party asserting fraud prove that the fraud could not have been discovered through the exercise of reasonable diligence. Stated differently, these doctrines do not require the party asserting fraud to have performed an investigation of all assertions and representations made by its contracting partner as a prerequisite to establishing fraud.

The legal and equitable remedies for fraud are manifold. Fraud in the procurement of the contract may be

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> [o]n the one hand, the innocent misrepresentation rule differs in eliminating the *scienter* and proof of the intention that the misrepresentation be acted upon. However, on the other hand, the innocent misrepresentation rule adds the requirements that the misrepresentation be made in connection with making a contract and the injury suffered by the victim must inure to the benefit of the misrepresenter. Actually what this means is this: while it is unnecessary to show that the innocent misrepresenter knew his representation was false, it is necessary to show that not only does the victim suffer injury, but also the injury must inure to the misrepresenter's benefit. It also means . . . that it is unnecessary to prove separately that the representer intended that the victim rely on the misrepresentation, because the representation must be made "in a transaction between them", where the misrepresenter should realize that the misrepresentation would be relied upon.

grounds for monetary damages in an action at law, see generally *Hord v Environmental Research Institute of Mich*, 463 Mich 399; 617 NW2d 543 (2000), or, as Titan requests in the instant case, grounds to retroactively avoid contractual obligations through traditional legal and equitable remedies such as cancellation, rescission, or reformation, see, e.g., *United States Fidelity*, 412 Mich at 118 n 10. However, because a contract must always be construed to satisfy relevant provisions of law, *Rohlman*, 442 Mich at 524-525, such remedies may be limited or narrowed by statute. For example, the no-fault automobile insurance act, MCL 500.3101 *et seq*., limits the ability of a licensed insurer to "cancel" automobile coverage after a policy has been in effect for at least 55 days. See MCL 500.3220. Similarly, in certain circumstances, the financial responsibility act, MCL 257.501 *et seq*., limits the ability of an insurer to avoid liability on the ground of fraud in obtaining a motor vehicle liability policy with respect to insurance required by the financial responsibility act. See MCL 257.520(f)(1) ("The liability of the insurance carrier with respect to the insurance required by this chapter shall become absolute whenever injury or damage covered by said motor vehicle liability policy occurs; . . . [and] no fraud, misrepresentation, assumption of liability or other act of the insured in obtaining or retaining such policy . . . shall constitute a defense as against such judgment creditor.").

Several appellate decisions of this state have suggested that MCL 257.520 applies to *all* liability insurance policies. For example, in *State Farm Mut Auto Ins Co v Sivey*, 404 Mich 51, 57; 272 NW2d 555 (1978), this Court indicated that MCL 257.520(b)(2) applies to "*all* policies of liability insurance[.]" (Emphasis added.) In addition, in *Farmers Ins Exch v Anderson*, 206 Mich App 214, 220; 520 NW2d 686 (1994), the Court of

Appeals indicated that "when an accident occurs in this state, the scope of liability coverage is determined by the financial responsibility act." See also *League Gen Ins Co v Budget Rent-A-Car of Detroit*, 172 Mich App 802, 805; 432 NW2d 751 (1988) ("When an accident occurs in this state, the scope of the liability coverage required in an insurance policy is determined by Michigan's financial responsibility act[.]"). However, none of these decisions undertook a close analysis of this issue.

We have closely reviewed MCL 257.520(f)(1), and we believe that the statute does not *in every case* limit the ability of an automobile insurer to avoid liability on the ground of fraud; its reference to "motor vehicle liability policy" is not all encompassing. Rather, as used in MCL 257.520(f)(1), "motor vehicle liability policy" refers only to an "owner's or an operator's policy of liability insurance, certified as provided in [MCL 257.518] or [MCL 257.519] as proof of financial responsibility . . . ." MCL 257.520(a). Thus, *absent* this certification, MCL 257.520(f)(1) has no relevant application. Further, MCL 257.520(f)(1) refers only to "the insurance *required by this chapter*," (emphasis added), and the only insurance required by chapter V of the Michigan Vehicle Code is insurance "certified as provided in [MCL 257.518] or [MCL 257.519] as proof of financial responsibility . . . ." MCL 257.520(a). Therefore, as we stated in *Burch v Wargo*, 378 Mich 200, 204; 144 NW2d 342 (1966), MCL 257.520 "applies only when 'proof of financial responsibility for the future' . . . is statutorily required . . . ." See also MCL 257.522 ("This chapter shall not be held to apply to or affect policies of automobile insurance against liability which may now or hereafter be required by any other law of this state . . . ."); and *State Farm Mut Auto Ins Co v Ruuska*, 412 Mich 321, 336 n 7; 314 NW2d 184 (1982) ("[I]n discussing the requisites for an automobile liability policy issued as proof of

future financial responsibility, the Legislature [in MCL 257.520(b)], after requiring an owner's policy to designate by explicit description or appropriate reference all covered motor vehicles, limited the liability coverage to only those automobiles listed in the policy by speaking in terms of the use of 'such' vehicle(s).''). For these reasons, we now clarify that MCL 257.520(f)(1) does not apply to a motor vehicle liability insurance policy unless it has been certified under MCL 257.518 or MCL 257.519 and, to the extent that *Sivey*, *Anderson*, and *League* suggest otherwise, they are overruled.[6]

C. EASILY ASCERTAINABLE

The principal question presented in this case is whether an insurer may avail itself of traditional legal and equitable remedies to avoid liability under an insurance policy on the ground of fraud in the application for insurance, when the fraud was easily ascertainable and the claimant is a third party. As an initial matter, we note that this precise question was addressed in 1959 in *Keys*, 358 Mich 74. In *Keys*, the plaintiff, a third party, was involved in a motor vehicle accident with the defendant, who was insured by the Detroit Automobile Inter-Insurance Exchange (DAIIE). The plaintiff filed suit against the defendant for injuries that she had sustained in the accident. While the suit was pending, the DAIIE notified the defendant that it considered the policy void *ab initio* because it was discovered that he had misrepresented a material fact in the application for insurance, namely, that he had

[6] The dissent's approach of "adopt[ing] the Court of Appeals' well-reasoned opinion in its entirety" would do utterly nothing to address the conflict between our decisions in *Burch* and *Sivey*. *Post* at 574. This conflict is jurisprudentially significant and deserves some reasonable resolution.

falsely stated that his license had not been suspended within the past three years, when, in fact, it had been. Thereafter, judgment was entered in favor of the plaintiff.

After securing her judgment, the plaintiff filed an affidavit for a writ of garnishment against the DAIIE, which opposed the writ arguing that it had no duty to indemnify the defendant because the policy was void *ab initio* as a result of the material misrepresentation. This Court agreed and held that the defendant's material misrepresentation entitled the insurer to avoid liability under the policy. *Id*. at 82-83. In so holding, *Keys* rejected the plaintiff's argument that the insurer had ratified the policy, or, alternatively, had waived its right to avoid liability, because it had failed to declare the policy void at or near the time of the accident, when the insurer could have used available records to discover the misrepresentation. Writing for a unanimous Court, Justice SMITH stated as follows:

> What the [plaintiff's] arguments respecting waiver, ratification, estoppel and so forth actually boil down to is simply that this Court should say that the occurrence of the accident itself should have put the insurer on notice of possible fraud and caused its search of the court files for past traffic violations. If it had done so, it is said, it would have discovered the falsehood. Should we hold that the mere occurrence of an accident is sufficient to place such a burden on the insurer with respect to each of its thousands of policy holders? Rather, is the insurer not entitled to give credence to its insured's honesty until it has actual notice that he is a scoundrel? Moreover, if inquiry is to be demanded, is it enough to stop with the traffic court? Might not the accident suggest physical or psychiatric defects? Should investigations not also be made of the past hospitalizations of the insured? Where will we say this may stop within the existing economic framework? It is doubtful whether one who deliberately sets out to swindle an

> insurance company can be prevented from so doing by any such requirement, and it is even more doubtful that there is enough of this practice to warrant the placing upon the insurance business of a requirement so onerous.
>
> The short answer to the arguments of waiver and estoppel is that a litigant cannot be held estopped to assert a defense, or to have waived his right thereto, because of facts he does not know, unless, as a matter of judicial policy, we are ready to say he "should" know them. This we can always do, of course, but there is nothing before us as a matter of fact or of sound policy, to warrant imposition of such knowledge. This is not to say, of course, that one may wilfully close his eyes to that which others clearly see. But nothing of the sort is here before us. In fact, when actual knowledge was gained, the insurer was not slow to act, cancelling the policy *ab initio* and withdrawing its legal representation of the insured. Such action was well justified. [*Id.* at 84-85.]

Thus, *Keys* answered the precise question presented in this case in the affirmative, holding that an insurer may avail itself of traditional legal and equitable remedies to avoid liability under an insurance policy on the ground of fraud, notwithstanding that the fraud may have been easily ascertainable, and notwithstanding that the claimant is a third party.

However, despite *Keys*, the Court of Appeals in *Kurylowicz*, on similar facts, reached a different conclusion. In *Kurylowicz*, the insured sought insurance coverage for his automobile from State Farm. In filling out the application for insurance, he misrepresented the fact that his driver's license had been suspended. Thereafter, the insured was involved in an automobile accident that killed one person and injured five others. The decedent's estate commenced an action against the insured, and State Farm filed a declaratory judgment action contending that it had no duty to indemnify the insured for injuries that he may have caused because,

given the material misrepresentation in the application, the policy was void *ab initio*. The trial court rejected State Farm's request for declaratory relief, and the Court of Appeals affirmed. In so holding, the Court of Appeals rejected State Farm's argument that *Keys* was controlling. Although acknowledging that *Keys* had never been overruled, the *Kurylowicz* panel disregarded this precedent, stating that it was "interesting to note that no Michigan appellate court has seen fit to cite this case since it was released in 1959." *Kurylowicz*, 67 Mich App at 572. Moreover, the panel concluded that *Keys* was inapplicable "in light of the intervening legislation [the no-fault act] and the public policy of the State of Michigan which such legislation implies . . . ." *Id.* at 577.

Kurylowicz surveyed the caselaw of other jurisdictions and, finding the reasoning in those cases persuasive, approvingly quoted a California case: "[A]n automobile liability insurer must undertake a reasonable investigation of the insured's insurability within a reasonable period of time from the acceptance of the application and the issuance of a policy. This duty directly inures to the benefit of third persons injured by the insured.' " *Id*. at 576, quoting *Barrera v State Farm Mut Auto Ins Co*, 71 Cal 2d 659, 663; 79 Cal Rptr 106; 456 P2d 674 (1969). Ultimately, *Kurylowicz* held that "where an automobile liability insurer retains premiums, notwithstanding grounds for cancellation reasonably discoverable by the insurer . . . , the insurer will be estopped to assert that ground for rescission thereafter." *Kurylowicz*, 67 Mich App at 579.

The *Kurylowicz* rule has become known as the "easily ascertainable" rule, and, as the Court of Appeals noted in this case, it only applies when a third-party claimant is involved. That is, under the *Kurylowicz*

rule, an insurer may not avail itself of traditional legal and equitable remedies to avoid liability under an insurance policy on the ground of fraud when the fraud was easily ascertainable and the claimant is a third party. See, e.g., *Ohio Farmers Ins Co v Mich Mut Ins Co*, 179 Mich App 355; 455 NW2d 228 (1989). However, when it is the insured who seeks benefits under an insurance policy procured through fraud, even an easily ascertainable fraud will not preclude an insurer from availing itself of traditional legal and equitable remedies to avoid liability. See *Hammoud v Metro Prop & Cas Ins Co*, 222 Mich App 485; 563 NW2d 716 (1997).

D. *KURYLOWICZ* REJECTED

Not only did *Kurylowicz* clearly err by disregarding *Keys*,[7] it also clearly erred by concluding that its purported justifications for the "easily ascertainable" rule warranted departing from the common-law rule articulated in *Keys*.

First, *Kurylowicz* justified the "easily ascertainable" rule on the basis of its understanding of the "public policy" of Michigan. In light of the Legislature's then recent passage of the no-fault act, MCL 500.3101 *et seq*., *Kurylowicz* reasoned that

> the policy of the State of Michigan regarding automobile liability insurance and compensation for accident victims emerges crystal clear. It is the policy of this state that persons who suffer loss due to the tragedy of automobile accidents in this state shall have a source and a means of recovery. Given this policy, it is questionable whether a

[7] Although *Keys* was raised by the parties, although *Keys* governed the precise issue before it, and although this Court's unanimous opinion in *Keys* had never been overruled, *Kurylowicz*, nonetheless, ignored its authority because "no Michigan appellate court has seen fit to cite [*Keys*] since it was released in 1959." *Kurylowicz*, 67 Mich App at 572.

> policy of automobile liability insurance can ever be held void *ab initio* after injury covered by the policy occurs. [*Kurylowicz*, 67 Mich App at 574.]

This "public policy" rationale does not compel the adoption of the "easily ascertainable" rule. In reaching its conclusion, *Kurylowicz* effectively replaced the actual provisions of the no-fault act with a generalized summation of the act's "policy." Where, for example, in *Kurylowicz*'s statement of public policy is there any recognition of the Legislature's explicit mandate that, with respect to insurance required by the act, "no fraud, misrepresentation, . . . or other act of the insured in obtaining or retaining such policy . . . shall constitute a defense" to the payment of benefits? MCL 257.520(f)(1). We believe that the policy of the no-fault act is better understood in terms of its actual provisions than in terms of a judicial effort to identify some overarching public policy and effectively subordinate the specific details, procedures, and requirements of the act to that public policy. In other words, it is the policy of this state that all the provisions of the no-fault act be respected, and *Kurylowicz*'s efforts to elevate *some* of its provisions and *some* of its goals above other provisions and other goals was simply a means of disregarding the stated intentions of the Legislature. The no-fault act, as with most legislative enactments of its breadth, was the product of compromise, negotiation, and give-and-take bargaining, and to allow a court of this state to undo those processes by identifying an all-purpose public policy that supposedly summarizes the act and into which every provision must be subsumed, is to allow the court to act beyond its authority by exercising what is tantamount to legislative power. Third-party victims of automobile accidents have a variety of means of recourse under the no-fault act, and it is to those means that such persons must look, not to a judicial articula-

tion of policy that has no specific foundation in the act itself and was designed to modify and supplant the details of what was actually enacted into law by the Legislature.

Second, it is claimed that the "easily ascertainable" rule complements MCL 500.3220, which provides:

> Subject to the following provisions no insurer licensed to write automobile liability coverage, after a policy has been in effect 55 days or if the policy is a renewal, effective immediately, shall cancel a policy of automobile liability insurance except for any 1 or more of the following reasons:
>
> (a) That during the 55 days following the date of original issue thereof the risk is unacceptable to the insurer.
>
> (b) That the named insured or any other operator, either resident of the same household or who customarily operates an automobile insured under the policy has had his operator's license suspended during the policy period and the revocation or suspension has become final.

The Court of Appeals panel below reasoned that

> MCL 500.3220(a) contemplates that no-fault insurers may cancel coverage within 55 days of a policy's issuance if "the risk is unacceptable to the insurer." Alternatively phrased, an insurer may make its own risk assessment, without statutorily imposed restrictions. However, the Legislature limited to 55 days the period in which an insurer can make its risk assessment. We conclude that MCL 500.3220(a) evidences the intent to afford no-fault insurers a definite window of time in which to investigate an insured for the purpose of assessing risk. Stated differently, MCL 500.3220(a) envisions that no-fault insurers will either perform an investigation to determine whether to accept a new risk or forfeit the opportunity to later decide that an insured's driving record or other characteristic should require cancellation of the policy. [*Hyten I*, 291 Mich App at 460-461.]

We agree with the Court of Appeals that MCL 500.3220(a) shows an intent to allow insurers only a

limited period during which to reassess the risk after the formation of a policy and when the risk is deemed unacceptable to "cancel" the policy. However, we disagree that when an insurer elects *not* to reassess the risk and later uncovers fraud, it is somehow precluded from pursuing traditional legal and equitable remedies in response.[8]

Risk assessment and the uncovering of fraud are distinct insurance processes and are not logically interrelated in a manner that would reasonably suggest that any statute addressing one of these processes necessarily addresses the other. Nor within MCL 500.3220(a), in particular, are these processes joined together by any specific language. MCL 500.3220 limits an insurer's ability to "cancel" an insurance policy after it has been in effect for 55 days. In contract law, "cancellation" has acquired a peculiar and appropriate meaning in the law.[9] "When a policy is cancelled, it is terminated as of the cancellation date and is effective up to such date[.]" *United Security Ins Co v Ins Comm'r*, 133 Mich App 38, 42; 348 NW2d 34 (1984) (citation and quotation marks omitted). Other remedies have also acquired their own peculiar and appropriate meanings in the law, including "rescission" and "reformation." See, e.g., *Lash v Allstate Ins Co*, 210 Mich App 98, 102; 532 NW2d 869

[8] The flaw in the Court of Appeals' reasoning is further highlighted by the fact that it would apparently hold that MCL 500.3220, despite nothing even approximating such language, envisions that insurers will investigate an insured, *but* will only do so when the claimant is a third party and not when the claimant is the insured. See *Hammoud*, 222 Mich App 485. How does any of this policy reasonably derive from the actual statute in controversy?

[9] See MCL 8.3a ("All words and phrases shall be construed and understood according to the common and approved usage of the language; but technical words and phrases, and such as may have acquired a peculiar and appropriate meaning in the law, shall be construed and understood according to such peculiar and appropriate meaning.").

(1995); *Mate v Wolverine Mut Ins Co*, 233 Mich App 14, 24; 592 NW2d 379 (1998). Each is conceptually different in its nature and in its breadth from the others, and to interpret "cancellation" as encompassing a broader range of contractual remedies is simply without basis in the statute.[10]

Third, it is contended that the "easily ascertainable" rule is required for the protection of third parties.[11] However, there is simply no basis in the law to support the proposition that public policy requires a private business in these circumstances to maintain a source of funds for the benefit of a third party with whom it has no contractual relationship.[12] While perhaps authority exists in the Legislature to enact such a law, see, e.g., MCL 500.3172 (pertaining to the Michigan Assigned Claims Facility), this authority has not been exercised by the Legislature in this instance. The no-fault act seeks to protect third parties in a variety of ways,

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[10] Accord *United Sec Ins Co*, 133 Mich App at 42 (holding that under MCL 500.3204 *et seq.*, "[r]escission is insufficiently similar to cancellation to support the conclusion that the Legislature's enactment of a statute controlling cancellation of an automobile insurance policy without mentioning rescission demonstrates the Legislature's intent to preclude rescission").

[11] *Ohio Farmers Ins Co*, 179 Mich App at 364-365 ("[B]asic public policy considerations require that, once an innocent third party is injured in an accident in which coverage is in effect on the automobile, an insurer will be estopped from asserting rescission as a basis upon which it may limit its liability to the statutory minimum."); *Kurylowicz*, 67 Mich App at 576 (holding that the insurer's duty to undertake a reasonable investigation "directly inures to the benefit of third persons injured by the insured"), quoting *Barrera*, 71 Cal 2d at 663.

[12] See *Terrien v Zwit*, 467 Mich 56, 66; 648 NW2d 602 (2002) ("In defining 'public policy,' it is clear to us that this term must be more than a different nomenclature for describing the personal preferences of individual judges, for the proper exercise of the judicial power is to determine from objective legal resources what policy *is*, and not to simply assert what such policy *ought* to be on the basis of the subjective views of individual judges.").

including through tort actions, but it states nothing about altering the common law that enables insurers to obtain traditional forms of relief when they have been the victims of fraud. We are not oblivious to the fact that adoption of the "easily ascertainable" rule might in some cases protect a potential source of monetary recovery for persons bringing tort claims, but this does not by itself justify a rule that alters first principles of contract formation, redefines the common-law concept of fraud, reduces disincentives for insurance fraud, and transfers legal responsibility from parties that have acted fraudulently to parties that have not. Absent insurance, the operator of the motor vehicle is personally liable for tort liability. By requiring an insurer to indemnify an insured despite fraud in obtaining an insurance policy, the "easily ascertainable" rule relieves the insured of what would otherwise be the insured's personal obligation in the face of his or her own misconduct. As between the fraudulent insured and the insurer, there can be no question that the former should bear the burden of his or her fraud.[13]

Having concluded that the purported justifications do not support the "easily ascertainable" rule, we overrule *Kurylowicz* and its progeny, there being nothing in the law to warrant the establishment or imposition of an "easily ascertainable" rule.[14]

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[13] It should be noted that the public is not powerless to protect itself against this situation. Optional uninsured-motorist coverage allows an insured to recover from his or her own insurer to the extent that the insured would have been permitted to recover from an at-fault uninsured driver. In this case, the Holmeses, in fact, purchased this additional coverage.

[14] Contrary to the assertions of the dissenting justices, it is *they* who would "discard" precedent pertaining to the "easily ascertainable" rule. In *Keys*, this Court *unanimously* held that insurers have no duty to investigate the representations of a potential insured. Yet the dissenting justices would apparently overrule *Keys* and adopt the "easily ascertain-

E. *KEYS* REAFFIRMED

Although *Keys* was decided before the no-fault act became law, we take this opportunity to reaffirm the principles stated therein, *to wit*, that an insurer has no duty to investigate or verify the representations of a potential insured. See *Keys*, 358 Mich at 84-85. Furthermore, as we held in *Keys*:

> The short answer to the arguments of waiver and estoppel is that a litigant cannot be held estopped to assert a defense, or to have waived his right thereto, because of facts he does not know, unless, as a matter of judicial policy, we are ready to say he "should" know them. This we can always do, of course, but there is nothing before us as a matter of fact or of sound policy, to warrant imposition of such knowledge. [*Id.* at 84.]

The *Keys* rule, which allows an insurer to avail itself of a legal or equitable remedy on the ground of fraud in the application for insurance, notwithstanding that the claimant is a third party and the fraud could have been discovered through further investigation, comports with the long-established understanding of fraud in Michigan.

As already noted, it is well settled in Michigan that fraud in the application for an insurance policy may allow the blameless contracting party to avoid its contractual obligations through the application of traditional legal and equitable remedies. Michigan's common law has consistently defined the elements of fraud without reference to whether the fraud could, upon the exercise of reasonable diligence in carrying out further investigation, have been discovered by the party claiming that it was harmed by the fraud. See *Candler*, 208

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able" rule, which was subsequently created by the Court of Appeals despite there having been absolutely no relevant change in the law.

Mich at 121 (defining the elements of actionable fraud); *United States Fidelity*, 412 Mich at 115-116 (defining the elements of innocent misrepresentation), quoting *Holcomb*, 69 Mich at 399 (MORSE, J., concurring); and *Tompkins*, 60 Mich at 480, 483 (defining the elements of silent fraud). To hold an insurer to a different and higher standard, one that would require it affirmatively to investigate the veracity of all representations made by its contracting partners before it could avail itself of these remedies, would represent a substantial departure from the well-established understanding of fraud. We discern no basis for treating insurers differently from all other parties who enter into contracts in this state.

For these reasons, we reaffirm the principles set forth in *Keys* and hold that an insurer is not precluded from availing itself of traditional legal and equitable remedies to avoid liability under an insurance policy on the ground of fraud in the application for insurance, even when the fraud was easily ascertainable and the claimant is a third party.[15]

F. APPLICATION

Titan alleges that Hyten's representation that no member of her household had any unlicensed drivers or any drivers with a suspended or revoked driver's license was fraudulent. To establish actionable fraud, Titan bears the burden of proving that (1) Hyten made a material misrepresentation; (2) it was false; (3) when she made it, she knew it was false, or else made it

[15] We also take note of the difficulties under *Kurylowicz* of determining what nature of "reasonable investigation" would satisfy the "easily ascertainable" rule and whether such an investigation would have to be undertaken in connection with every representation in an insurance application that might later come to be viewed as material.

recklessly, without any knowledge of its truth, and as a positive assertion; (4) she made it with the intention that it should be acted on by Titan; (5) Titan acted in reliance on it; and (6) Titan thereby suffered injury. See *Candler*, 208 Mich at 121. Titan argues that all the elements of actionable fraud are satisfied; however, it is unclear whether the trial court—before finding that the alleged misrepresentation was easily ascertainable—found that all the elements of actionable fraud had been satisfied. Therefore, we remand this case to the trial court for further proceedings in accordance with the standards set forth in this opinion.[16]

Should Titan prevail on its assertion of actionable fraud, it may avail itself of a traditional legal or equitable remedy to avoid liability under the insurance policy, notwithstanding that the fraud may have been easily ascertainable. However, as discussed earlier in this opinion, the remedies available to Titan may be limited by statute. *Rohlman*, 442 Mich at 525 n 3.[17]

IV. CONCLUSION

In accordance with our longstanding jurisprudence before *Kurylowicz*, an insurer may seek to avoid liability

[16] As an alternative rationale for its holding, the Court of Appeals, relying on 1 Restatement Contracts, 2d (1981), § 165, pp 448-449, concluded that Hyten had retroactively "cured" her misrepresentation by obtaining her driver's license after the application but before the accident. *Hyten I*, 291 Mich App at 465-466. However, the Court of Appeals' application of the "cure" doctrine was improper because it was neither raised by the parties nor addressed by the trial court. Moreover, this section of the Restatement has never been adopted in Michigan, and we decline do so at this juncture without the benefit of full briefing and arguments.

[17] For example, MCL 500.3009(1) provides the policy coverage minimums for all motor vehicle liability insurance policies.

under an insurance policy using traditional legal and equitable remedies including cancellation, rescission, or reformation, on the ground of fraud made in an application for insurance, notwithstanding that the fraud may have been easily ascertainable and the claimant is a third party. This rule is consistent with Michigan's well-settled understanding of fraud. Accordingly, we overrule *Kurylowicz*, 67 Mich App 568, and its progeny, there being nothing in the law to warrant the establishment or imposition of an "easily ascertainable" rule. Because the Court of Appeals relied on *Kurylowicz* and its progeny, we reverse the judgment of the Court of Appeals. Further, because it is unclear whether the trial court found that the insured obtained her policy through fraud, we remand to the trial court for further proceedings in accordance with this opinion.

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

HATHAWAY, J. (*dissenting*). I would affirm the Court of Appeals' well-reasoned opinion in this case. I believe that the "easily ascertainable" rule should remain the law of this state because it is soundly based in existing caselaw and this state's policy regarding automotive liability insurance and compensation for innocent third-party accident victims.

Judges in numerous cases have considered the "easily ascertainable" rule and have concluded that it is consistent with this state's policies. Today, however, the majority discards the analyses of those judges and overrules the unanimous opinion of this Court in *State Farm Mut Auto Ins Co v Sivey*, 404 Mich 51; 272 NW2d 555 (1978); the unanimous Court of Appeals opinion in *State Farm Mut Auto Ins Co v Kurylowicz*, 67 Mich App 568; 242 NW2d 530 (1976); the unanimous Court of

Appeals opinion in *Ohio Farmers Ins Co v Mich Mut Ins Co*, 179 Mich App 355; 445 NW2d 228 (1989); the unanimous Court of Appeals opinion in *Farmers Ins Exch v Anderson*, 206 Mich App 214; 520 NW2d 686 (1994); the unanimous Court of Appeals opinion in *Manier v MIC Gen Ins Corp*, 281 Mich App 485; 760 NW2d 293 (2008); and the unanimous decision by the Court of Appeals pertaining to the facts of this case.[1]

Together, those cases represent 36 years of thoughtfully analyzed and legally sound caselaw interpreting the no-fault act.[2] The majority overrules this entire body of caselaw despite the fact that there have been no amendments of any relevant statute that would indicate that the Legislature intended to do away with the "easily ascertainable" rule.

I would affirm the judgment of the Court of Appeals because it went through a careful and correct analysis of the statutory and common-law underpinnings of the rule and the reasons why the rule is necessary. Furthermore, the Court of Appeals correctly applied the rule in this case to hold that plaintiff, Titan Insurance Company, cannot reform its insurance policy in order to avoid the maximum liability owed under the policy to the innocent third-party defendants, Howard and Martha Holmes. Accordingly, I would adopt the Court of Appeals' well-reasoned opinion in its entirety.

CAVANAGH and MARILYN KELLY, JJ., concurred with HATHAWAY, J.

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[1] *Titan Ins Co v Hyten*, 291 Mich App 445; 805 NW2d 503 (2011).

[2] MCL 500.3101 *et seq*.

PEOPLE v BRYANT

Docket No. 141741. Argued December 6, 2011 (Calendar No. 2). Decided June 28, 2012. Certiorari denied, 568 US ___; 133 S Ct 664.

Ramon L. Bryant was convicted by a jury in the Kent Circuit Court, H. David Soet, J., of first-degree criminal sexual conduct, armed robbery, and possession of marijuana. After the jury was selected, but before it was sworn, defendant had made a timely objection to the racial composition of the venire. The court ultimately denied the objection. Following his conviction, defendant appealed, arguing in part that he had been deprived of his Sixth Amendment right to an impartial jury drawn from a fair cross section of the community because there was only one African-American in the venire of 45 people. The Court of Appeals, SMOLENSKI, P.J., and SAWYER, J. (BORRELLO, J., concurring in part and dissenting in part), affirmed in part in an unpublished opinion per curiam, issued March 16, 2004 (Docket No. 241442), and remanded the case to the trial court for the sole purpose of conducting an evidentiary hearing regarding defendant's challenge to the venire. On remand, the trial court, Dennis C. Kolenda, J., conducted evidentiary hearings and found that as the result of a computer programming error, a disproportionately larger number of jury questionnaires and, hence, summonses were sent to persons residing in zip codes with smaller African-American populations and disproportionately fewer questionnaires and, hence, summonses were sent to persons residing in zip codes with larger African-American populations. The trial court held that defendant's Sixth Amendment right to an impartial jury was not violated because African-Americans were not underrepresented in the venire from which defendant's jury was selected and that Kent County's jury-selection process, at the time of defendant's trial, did not systematically exclude African-Americans. Defendant appealed. The Court of Appeals, JANSEN, P.J., and BORRELLO and STEPHENS, JJ., reversed and remanded for a new trial before an impartial jury, concluding that defendant had established a violation of the Sixth Amendment's fair-cross-section requirement. 289 Mich App 260 (2010). The Supreme Court granted the prosecution's application for leave to appeal. 489 Mich 924 (2011).

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

When determining whether the representation of a distinct group in venires from which juries are selected is fair and reasonable in relation to the number of those persons in the community, courts must examine the composition of jury pools and venires over time using the most reliable data available.

1. The Sixth Amendment of the United States Constitution guarantees a defendant the right to be tried by an impartial jury drawn from a fair cross section of the community. Under *Duren v Missouri*, 439 US 357 (1979), to establish a prima facie case of a violation of the fair-cross-section requirement, a defendant must show (1) that the group alleged to have been excluded is a distinct group in the community, (2) that the representation of this group in venires from which juries were selected was not fair and reasonable in relation to the number of those persons in the community, and (3) that this underrepresentation was a result of systematic exclusion of the group in the jury-selection process.

2. With respect to the first prong of *Duren*, African-Americans are a distinct group in the community for the purpose of determining whether there was a violation of the Sixth Amendment's fair-cross-section requirement.

3. With respect to the second prong of *Duren*, no individual method should be used exclusive of others to test whether the representation of a distinct group in a venire was fair and reasonable. Provided that the parties have proffered sufficient evidence, courts should employ a case-by-case approach that considers the results of all the tests.

4. When applying the relevant statistical tests to determine whether representation was fair and reasonable, courts must examine the composition of jury pools and venires over time—not just the composition of the individual defendant's venire. The Court of Appeals erred by considering the results of tests that only examined the composition of defendant's venire. Those results were misleading and exaggerated because of the incorrect data set.

5. Evaluating the representation of a distinct group in venires over time requires using the most reliable data available to input into the relevant tests. In this case, it was appropriate to evaluate venire composition using statistical estimates. Those estimates showed that 4.17 percent of the summonses issued from January through March 2002 were sent to African-Americans, while the jury-age population of African-Americans in the community was

8.25 percent. Thus, African-Americans were underrepresented in the composition of jury pools and venires during that period.

6. The absolute-disparity test measures a distinct group's underrepresentation by subtracting the percentile representation of the group in jury pools or venires from the percentile representation of that group in the overall population of the relevant community. Courts have generally required an absolute disparity of more than 10 percent to hold that representation of the distinct group was not fair and reasonable, but the absolute-disparity test has often been criticized because it is difficult for a defendant to make this showing if the distinct group has a small population in the community. Courts should look at the results of the test and examine how far above or below the threshold the results are when determining whether the defendant has established that the representation was not fair and reasonable. The Court of Appeals erred by disregarding the results of the absolute-disparity test because of the small African-American population in Kent County.

7. The comparative-disparity test measures the decreased likelihood that members of an underrepresented group will be called for jury service. It is calculated by dividing the results of the absolute-disparity test by the percentage of the distinct group in the overall population of the community. The test has been criticized because it invites distortion of the alleged underrepresentation, particularly when the population of the distinct group is small. The Court of Appeals erred by effectively establishing a bright-line rule favoring the comparative-disparity test when the population of the distinct group is small. Properly examining the composition of venires over a three-month period, the comparative disparity in this case was 49.45 percent. Other courts have found comparative disparities above 50 percent permissible, and the cases the Court of Appeals cited for the proposition that a 30 or 40 percent comparative disparity has been found sufficient to demonstrate unfair and unreasonable representation are distinguishable. Defendant failed to establish that African-American representation was not fair and reasonable under the comparative-disparity test.

8. The standard-deviation test calculates the probability that the underrepresentation of the distinct group was the result of chance, comparing the actual distribution of the distinct group within the data set to the proportional distribution and thus measuring the extent to which an observed result is likely to vary from an expected result. No court has accepted a standard-deviation analysis alone as determinative in a Sixth Amendment challenge to a jury-selection system because whether the degree of underrepresentation is the result of chance does not inform the

determination whether the level of representation was fair and reasonable. The standard-deviation test was not entitled to be given any weight.

9. The disparity-of-risk test measures the likelihood that the difference between a group's representation in the jury pool and its population in the community will result in a significant risk that the jury will not fairly represent the group by comparing the chance that a defendant's jury will include members of a distinct group if that group's representation in the jury pool is consistent with its population in the community with the chance that a defendant's jury will include members of the same group given the alleged underrepresentation. Disparities of risk that exceed 50 percent should be deemed unfair and unreasonable because when measuring a defendant's probabilistic injuries, a risk disparity of 50 percent or lower shows that, more likely than not, removing the underrepresentation would not have altered the composition of the defendant's jury. Defendant's disparity of risk was only 24.39 percent.

10. Given the results of the statistical tests, defendant failed to show under the second prong of *Duren* that the representation of African-Americans in the venires at issue was not fair and reasonable, and he failed to establish a prima facie case of a Sixth Amendment fair-cross-section violation.

11. Under the third prong of *Duren*, a systematic exclusion of a group is one that is inherent in the particular jury-selection process used. The computer programming error was inherent in the jury-selection process used and resulted in the systematic exclusion of African-Americans in venires during the period at issue. The fact that the error was unintentional and fixed upon its discovery was immaterial to whether systematic exclusion occurred. In *People v Hubbard (After Remand)*, 217 Mich App 459 (1996), the Court of Appeals erred by holding that the threshold for underrepresentation under the second prong is lower when the underrepresentation is the result of circumstances less benign than random selection. Even if a defendant can show underrepresentation that was systematic, the defendant must show that the extent of any underrepresentation was not fair and reasonable. *Hubbard* must be overruled to the extent that it was inconsistent with the holding in this case.

Reversed and defendant's convictions and sentences reinstated.

Justice MARKMAN, concurring, joined the majority opinion, which reasonably applied the *Duren* test governing the Sixth Amendment's fair-cross-section requirement, but wrote separately to raise questions concerning that test and the constitutional

standard toward which it is directed. Significant uncertainty exists regarding how to ascertain which statistical tests are relevant in assessing fair-cross-section claims, how to interpret the results of such statistical tests, and how to reconcile conflicting results among such statistical tests.

Justice CAVANAGH, dissenting, concluded that the Court of Appeals did not clearly err by holding that defendant was entitled to a new trial under the unique facts of the case. Although courts have not always analyzed this area of the law with precision, defendant was entitled to relief even if a longer time frame had been used to evaluate whether the representation of African-Americans in Kent County venires was fair and reasonable. The approach taken by the Court of Appeals in *Hubbard*, under which a court may give the defendant the benefit of the doubt on underrepresentation if the jury-selection process bears the mark of a nonbenign influence, should be a relevant consideration in determining whether unfair and unreasonable underrepresentation has been shown. Applying that approach to the facts of the case, the Court of Appeals did not clearly err by holding that defendant was entitled to a new trial. Justice CAVANAGH would further have declined to pass judgment on the merits of the disparity-of-risk test without the benefit of full briefing and oral argument.

Justice MARILYN KELLY, joined by Justice HATHAWAY, dissenting, agreed with the majority that defendant had satisfied the first and third prongs of the *Duren* test for a fair-cross-section violation of the Sixth Amendment, but disagreed that defendant had failed to meet the second prong of the test. The Court of Appeals did not err when it considered the specific disparity in the composition of defendant's venire when evaluating the second prong of the *Duren* test but considered multiple venires over time when considering the third prong of the *Duren* test. The authority cited by the majority for the proposition that *Duren*'s second prong requires consideration of multiple venires over time was not compelling and was contradicted by other authority. The majority opinion also mischaracterized the Court of Appeals' treatment of the comparative-disparity test. The Court of Appeals properly examined the results of the statistical tests presented to it, but found the results of one test more helpful than the results of the other tests under the facts of the case. The majority also erred by importing the disparity-of-risk test into this case when its use was not briefed by the parties or considered by the lower courts. Further, *Hubbard* should not have been partially overruled; instead, courts should be able to consider the reason for the

systematic exclusion and give the defendant the benefit of the doubt on underrepresentation when deciding whether representation of the distinct group was fair and reasonable. Because the showing of underrepresentation was close and defendant established that a systematic exclusion occurred because of an error inherent in the jury-selection process, defendant established a prima facie violation of the Sixth Amendment's fair-cross-section requirement, and the Court of Appeals correctly reversed defendant's convictions and remanded for a new trial.

1. CONSTITUTIONAL LAW — JURIES — VENIRES — FAIR CROSS SECTION OF THE COMMUNITY — PRIMA FACIE CASE.

The Sixth Amendment of the United States Constitution guarantees a defendant the right to be tried by an impartial jury drawn from a fair cross section of the community; to establish a prima facie case of a violation of the fair-cross-section requirement, a defendant must show (1) that the group alleged to have been excluded is a distinct group in the community, (2) that the representation of this group in venires from which juries were selected was not fair and reasonable in relation to the number of those persons in the community, and (3) that this underrepresentation was a result of systematic exclusion of the group in the jury-selection process; parts two and three of the test are distinct; thus, even if a defendant can show underrepresentation that was systematic, the defendant must still show that the extent of any underrepresentation was not fair and reasonable (US Const, Am VI).

2. CONSTITUTIONAL LAW — JURIES — JURY POOLS — VENIRES — FAIR CROSS SECTION OF THE COMMUNITY — DISTINCT GROUPS — FAIR AND REASONABLE REPRESENTATION — EXAMINATION OF COMPOSITION OVER TIME — STATISTICAL TESTS.

When determining whether the representation of a distinct group in venires from which juries were selected was fair and reasonable in relation to the number of those persons in the community, courts must examine the composition of jury pools and venires over time using the most reliable data available, not just the composition of the individual defendant's venire; statistical estimates may be used if they provide the most reliable data available; the United States Supreme Court has not specified the preferred method for measuring whether representation of a distinct group in a venire was fair and reasonable, and no individual method should be used exclusive of others; provided that the parties have proffered sufficient evidence, courts should apply a case-by-case approach that considers the results of all the tests (US Const, Am VI).

3. CONSTITUTIONAL LAW — JURIES — VENIRES — FAIR CROSS SECTION OF THE COMMUNITY — DISTINCT GROUPS — AFRICAN-AMERICANS.

The Sixth Amendment of the United States Constitution guarantees a defendant the right to be tried by an impartial jury drawn from a fair cross section of the community; African-Americans are a distinct group in the community for the purpose of determining whether there was a violation of the fair-cross-section requirement (US Const, Am VI).

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *William A. Forsyth*, Prosecuting Attorney, and *Timothy K. McMorrow*, Assistant Prosecuting Attorney, for the people.

Arthur James Rubiner for defendant.

Amici Curiae:

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Richard A. Bandstra*, Chief Legal Counsel, and *B. Eric Restuccia*, Deputy Solicitor General, for the Attorney General.

Bradley R. Hall for Criminal Defense Attorneys of Michigan.

ZAHRA, J. This case presents the question whether defendant was denied his Sixth Amendment right to an impartial jury drawn from a fair cross section of the community. A fair-cross-section claim under the Sixth Amendment requires a defendant to make a prima facie case as set forth by the United States Supreme Court in *Duren v Missouri*.[1] Namely, a defendant must show:

> (1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in

[1] *Duren v Missouri*, 439 US 357; 99 S Ct 664; 58 L Ed 2d 579 (1979).

> the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.[2]

The Court of Appeals concluded that defendant had satisfied the three *Duren* prongs, establishing a violation of his right to an impartial jury drawn from a fair cross section of the community, and granted defendant a new trial. We conclude that the Court of Appeals erred because defendant failed to show under the second prong that the representation of African-Americans in venires from which juries were selected was not fair and reasonable in relation to the number of African-Americans in the community. The Court of Appeals erred in evaluating the second prong in two significant ways.

First, the Court of Appeals wrongly relied on misleading representation data by considering the representation of African-Americans *only* in defendant's venire when addressing whether representation was fair and reasonable. *Duren* explicitly requires courts to consider the representation of a distinct group in *venires*. The use of this inadequate sample from only defendant's venire caused the tests evaluating the degree of any underrepresentation to produce skewed and exaggerated results.

Second, the Court of Appeals misapplied our decision in *People v Smith*.[3] In *Smith*, we held that an evaluation of the second prong requires courts to employ a case-by-case approach that considers *all* the relevant statistical tests for evaluating the data regarding representation of a distinct group without using any one individual method *exclusive* of the others. Contrary to this holding, the Court of Appeals effectively adopted a bright-line rule in favor of

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[2] *Id*. at 364.

[3] *People v Smith*, 463 Mich 199; 615 NW2d 1 (2000).

the comparative-disparity test in all instances in which the population of the distinct group is small. Given that all the relevant tests have shortcomings, *Smith* requires courts to take a comprehensive view of the degree of underrepresentation without elevating one test over the others. Nonetheless, the Court of Appeals, using a skewed result from the comparative-disparity test, elevated this test above the others in precisely the situation in which its use is most criticized—distorting the degree of underrepresentation when the population of the distinct group is small.

We hold that when applying all the relevant tests for evaluating the representation data, a court must examine the composition of jury pools or venires over time using the most reliable data available to determine whether representation of a distinct group is fair and reasonable.[4] Having considered the results of these tests using the most reliable data set, which included the composition of jury pools or venires over a three-month period, we conclude that defendant failed to show that the representation of African-Americans was not fair and reasonable. Accordingly, we reverse the judgment of the Court of Appeals and reinstate defendant's convictions and sentences.[5]

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[4] The terms "venire," "jury pool," "jury panel," and "array" are sometimes used interchangeably. See Black's Law Dictionary (9th ed) (defining "venire" as "[a] panel of persons selected for jury duty and from among whom the jurors are to be chosen. — Also termed *array*; *jury panel*; *jury pool*"). Because of this, our references to "venire" are to the group of potential jurors in the courtroom from which a defendant's petit jury are selected and our references to "jury pool" are to the group of people summoned to appear for jury duty on a particular day.

[5] The dissent believes that this opinion engages in unnecessary error correcting. For obvious reasons, we disagree that addressing a *published* Court of Appeals opinion that misapplied constitutional principles, United States Supreme Court precedent, and our precedent is unnecessary.

I. FACTS AND PROCEDURAL HISTORY

A jury convicted defendant of first-degree criminal sexual conduct, MCL 750.520b(1)(e), armed robbery, MCL 750.529, and possession of marijuana, MCL 333.7403(2)(d). The victim testified that when she attempted to buy crack cocaine from defendant, he put a gun to her head and demanded her money. He then ordered her to perform oral sex on him, taking her car keys and telling her that he would not let her leave until she did so. When the police apprehended defendant, he had marijuana in his possession.

After the jury was selected, but before it was sworn, defendant made a timely objection to the racial composition of his jury venire. The trial court noted that it observed one African-American and one Latino in defendant's 45-person venire, but decided to reserve its ruling on the objection until a hearing the following day.[6]

At the hearing, the jury clerk testified in regard to the procedure for composing jury pools and venires. According to the jury clerk, the Secretary of State provides the court a list of all the residents of Kent County who are at least 18 years of age and have a valid driver's license or valid state identification. From that list, a computer program randomly selects residents to be sent jury questionnaires. The program then randomly selects jurors to be summoned using the names of those who responded to the jury questionnaire and had not been disqualified or opted out of jury service because of age.[7]

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[6] Before the court went off the record, an exchange between defense counsel and the trial court showed confusion about whether the individual that the trial court had identified as an African-American member of defendant's venire was actually defendant's step-father.

[7] See MCL 600.1307a (addressing grounds for disqualification and exemption from jury service).

The jury clerk testified that the Secretary of State database does not include the race of the individuals listed and that the computer program does not account for race when selecting jurors. For the date defendant's jury was selected, January 28, 2002, only 132 of the 182 people who had been randomly selected by the computer program and issued jury summonses appeared for service. By the jury clerk's visual inspection, only one was African-American. Of the 132 appearing, the computer program randomly selected 45 people for defendant's venire. The jury clerk also submitted to the trial court the results of voluntary surveys taken by some of those actually appearing for jury duty on given days in January 2002.[8]

Defendant, relying on the results of the voluntary surveys, argued that the disparity of African-Americans appearing for jury duty compared to the African-American population of the county showed that the current jury-selection method did not include a fair cross section of the community. The trial court ultimately denied defendant's challenge to his venire, ruling that because the jury-selection system was race neutral, the underrepresentation of African-Americans was a function of the voluntary failure of those individuals to participate.

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[8] The results, which were contained in a document entitled "Jury Community Representation Survey Compilation," reflect that on January 7, 160 of 169 of those appearing responded, with 2 individuals indicating that they were African-American and 2 indicating that they were multiracial; on January 9, 3 of the 77 potential jurors appearing responded, with none indicating that he or she was African-American; on January 14, 130 of the 140 potential jurors appearing responded, with 2 indicating that they were African-American and 2 indicating that they were multiracial; on January 22, 16 of the 18 potential jurors appearing responded, with none indicating that he or she was African-American and 1 indicating that he or she was multiracial; and, on January 23, 52 of the 54 potential jurors appearing responded, with 1 indicating that he or she was African-American.

Following his conviction and sentencing, defendant appealed. The Court of Appeals majority affirmed in part, but remanded the case to the trial court for an evidentiary hearing regarding defendant's claim that his venire did not reflect a fair cross section of the community.[9] Addressing whether the representation of the distinct group (African-Americans) was fair and reasonable under *Duren*'s second prong, the majority concluded that defendant had not shown that the representation was not fair and reasonable under the relevant statistical tests.[10] Nonetheless, the majority applied the approach set forth in *People v Hubbard (After Remand)*,[11] in which "the defendant was found to have shown substantial underrepresentation where the disparity resulted from 'non-benign' circumstances; that is, where the underrepresentation did not occur as the result of random chance."[12] Under this approach, the majority assumed that defendant had satisfied the second prong because the evidence indicated the possibility that the underrepresentation was not the result of random selection.[13]

Regarding the third prong, the prosecution admitted that the jury-selection process disproportionately selected jurors from certain zip codes.[14] As a result, the majority remanded the case to the trial court for an evidentiary hearing in which defendant could "present evidence that the Kent County jury selection system

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[9] *People v Bryant*, unpublished opinion per curiam of the Court of Appeals, issued March 16, 2004 (Docket No. 241442) (*Bryant I*).

[10] *Id*. at 2-4.

[11] *People v Hubbard (After Remand)*, 217 Mich App 459, 477-478, 481; 552 NW2d 493 (1996).

[12] *Bryant I*, unpub op at 4.

[13] *Id*.

[14] *Id*.

resulted in systematic exclusion of African-Americans causing this group to be substantially underrepresented in defendant's jury venire."[15]

On remand, the trial court[16] held several hearings and heard testimony from the court's case manager, the jury clerk, a member of the Kent County Jury Board, and two statistical experts. From this testimony, the trial court found that a computer programming error was responsible for the underrepresentation of African-Americans in venires from June 2001 to August 2002.[17]

The trial court found that Kent County, in an effort to save money spent on software fees, switched in April 2001 from using a vendor's software for summoning jurors to software developed by its information technology department. Rather than drawing from the entire database[18] of 456,435 names that the Michigan Secretary of State had provided for Kent County, the new computer program had an erroneous setting using only 118,169 of those names. The program selected ran-

[15] *Id*. at 5. The Court of Appeals rejected defendant's remaining issues on appeal. *Id*. at 5-7. Judge BORRELLO concurred with the majority on these issues, but dissented with regard to defendant's fair-cross-section claim because he believed that the evidence established sufficient underrepresentation and that the computer error excluding zip codes having larger minority populations constituted systematic exclusion of African-Americans from the venire. *Id*. at 2 (BORRELLO, J., concurring in part and dissenting in part).

[16] This case was reassigned to Judge Dennis Kolenda on remand because Judge David Soet, who had presided over defendant's trial, had retired.

[17] The frequency with which prospective jurors from certain zip codes were sent jury questionnaires prompted an investigation, which resulted in discovery of the programming error in June 2002, four months after defendant's trial.

[18] As noted in the summary of the jury clerk's testimony, this database included the names and addresses of people shown to have a Michigan driver's license or Michigan personal identification card with an address in Kent County.

domly who from the list of 118,169 names would be sent jury questionnaires. Because the 118,169 individuals selected came disproportionately from certain zip codes, jury questionnaires were disproportionately sent to those zip codes.[19] This resulted in a disproportionately larger number of jury questionnaires going to zip codes with smaller African-American populations and disproportionately fewer questionnaires going to zip codes with larger African-American populations.[20]

For the week that defendant's jury was selected, the court summoned 293 people for jury service. The court specifically summoned 183 of the 293 for January 28, 2002, when defendant's jury was picked. Of the 183 people summoned, 132 appeared and 45 of them were randomly placed in defendant's venire. As noted, the court used voluntary surveys to identify the gender and race of those appearing for jury duty. All 132 potential jurors who appeared on January 28 responded to the voluntary survey, with one individual specifying African-American and one individual specifying multiracial.

Two statistical experts testified at the hearings. First, Dr. Chidi Chidi testified as a statistical expert for defendant. He analyzed the voluntary surveys that potential jurors who appeared completed from 2001 to 2004. Relying on the results of the voluntary surveys, Dr. Chidi concluded that the standard-deviation and comparative-

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[19] The trial court found that the there was no evidence that the underrepresentation of certain zip codes was anything other than the "result of a random draw." There is some evidence, however, that reflects that the original database from the Secretary of State grouped the names by zip code. This discrepancy does not affect our analysis because we conclude in either event that the underrepresentation was inherent in the jury system and thus constituted a systematic exclusion within the meaning of *Duren*'s third prong.

[20] Kent County corrected the error the following month by again hiring an outside vendor and changing the computer program it used.

disparity tests proved that there had been systematic exclusion of African-Americans from jury duty. The trial court, however, rejected Dr. Chidi's testimony, finding that Dr. Chidi showed personal bias and a failure to understand basic statistics because he had analyzed only those individuals who opted to answer the voluntary survey after appearing for jury duty.[21]

Given its disapproval of Dr. Chidi's testimony, and pursuant to MRE 706,[22] the trial court selected Dr. Paul Stephenson as its expert. Using data from the 2000 Census, Dr. Stephenson conducted his analysis with the assumption that the population of African-Americans old enough to serve as jurors constituted 8.25 percent of Kent County.

From court records, Dr. Stephenson identified the number of jurors summoned from each zip code for each month from January 2002 through March 2002. Dr. Stephenson then used those records and the census data for racial population in each zip code to estimate that, as a result of the zip-code bias, only 163 of the 3,898 summonses (4.17 percent) sent out from January through March 2002 went to African-Americans. If 8.25 percent of the summonses sent out during that period had gone to African-Americans, then 322 African-Americans would have been sent them.

Considering only defendant's venire, Dr. Stephenson calculated that the absolute disparity[23] was 6.03 percent

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[21] Defendant summarizes Dr. Chidi's testimony in his brief and asserts without any meaningful analysis that the trial court wrongly rejected the testimony. Our review of the record does not suggest that the trial court's rejection of his testimony amounted to clear error, MCR 2.613(C). Accordingly, we will not consider Dr. Chidi's testimony in our analysis.

[22] MRE 706 permits a court to appoint an expert witness on its own motion.

[23] The absolute-disparity test measures the portion of the overall population of a distinct group that has been excluded by subtracting the

and the comparative disparity[24] was 73.1 percent. However, Dr. Stephenson disregarded the results of these tests, explaining in his report that because of the small population of African-Americans in Kent County, the absolute-disparity test could not identify whether the underrepresentation was statistically significant. He further explained that small changes of representation in the venire had the effect of distorting the result of the comparative-disparity test.

Dr. Stephenson also considered the standard-deviation test,[25] but rejected the use of this test because "the normal approximation is not valid . . . ."[26] Dr. Stephenson, however, applied a test analogous to the standard-deviation test, calculating the binomial distribution to determine whether the venire-selection process was valid.[27] From this calculation, Dr. Stephenson concluded that there was insufficient evidence to find that African-Americans were significantly underrepresented in defendant's venire because even if there had been no bias in how the summonses were sent out, 10.477 percent of randomly selected venires would have

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percentile representation of that group in jury pools or venires from the percentile representation of that group in the overall population of the relevant community. See part III(B)(2)(a) of this opinion.

[24] The comparative-disparity test measures the decreased likelihood that members of an underrepresented group will be called for jury service and is calculated by dividing the result of the absolute-disparity test by the percentage of the distinct group in the overall population of the community. See part III(B)(2)(b) of this opinion.

[25] The standard-deviation test measures the probability that the degree of underrepresentation could be the result of random chance. See part III(B)(2)(c) of this opinion.

[26] The standard-deviation test uses a normal approximation of a binomial random variable. Dr. Stephenson indicated that the sample size was not large enough for the test given the proportion of African-Americans in the community.

[27] This analogous test used the "exact" binomial distribution.

had one or no African-Americans. In Dr. Stephenson's view, this likelihood was sufficient for the disparity in African-American representation to be statistically insignificant, but this conclusion was related to the small sample size when examining just defendant's venire.

Examining the larger three-month sample, Dr. Stephenson performed further calculations using the binomial results to find that there was essentially "no chance" that the reduced numbers of African-Americans in jury pools between January and March 2002 occurred as a result of random chance. Further, a venire selected during the time the zip-code problem occurred was approximately four times more likely to contain no more than one African-American than if this problem had not been present. He concluded that if the estimates matched actual practice, "a systematic bias did exist in the selection of individuals summoned for jury duty . . . [that] inevitably led to the under representation" of African-Americans in the jury pools from January through March 2002.

In a written opinion, the trial court ruled that defendant was not entitled to a new trial because he had failed to satisfy *Duren*'s second and third prongs. Addressing whether the representation of African-Americans was fair and reasonable, the trial court reasoned that there was no proof of actual underrepresentation in the group of individuals that the computer program identified and to whom jury questionnaires were sent because the Secretary of State database does not identify race.[28] In the trial court's view, comparing an estimate of how many African-Americans were sent questionnaires and how many would

[28] The trial court only considered this group of individuals, not the resulting pools, because the pools were affected by considerations for which the court was not responsible such as racial disparities in whether the questionnaire was delivered, response rates, disqualifications, hardships, and people who failed to appear.

have been sent questionnaires absent the computer program flaw was not sufficient because hard data is required under *Smith*.[29]

The trial court also concluded that there was no systematic exclusion under *Duren*'s third prong because there was no evidence that the defective computer setting had any bias. Rather, it simply randomly reduced the number of individuals whom jurors were selected from. Therefore, the end result—that these individuals were taken disproportionately from certain zip codes—was not inherent in the court's jury-selection processes.

On defendant's second appeal, the Court of Appeals concluded in an authored opinion that defendant had established a violation of the Sixth Amendment's fair-cross-section requirement and reversed and remanded the case for a new trial.[30] The panel referred to each of the tests generally used to measure whether representation of a distinct group is fair and reasonable, purportedly following the case-by-case approach set forth in *Smith*.[31]

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[29] *Smith*, 463 Mich 199. The trial court read *Smith* for the holding that statistical estimates are mere speculation, insufficient to show underrepresentation. As we discuss, the trial court misapprehended *Smith* on this point. As an alternative rationale, the trial court concluded that even if *Smith* did permit statistical estimates, these estimates had a marginal value because of the many variables involved in their accuracy and defendant could not prove his claim because no hard data included what percentage of African-Americans were sent jury questionnaires. As an additional alternative rationale, the trial court concluded that even if statistical estimates could satisfy the second prong, defendant failed to show that the representation was not fair and reasonable because he was not actually the victim of underrepresentation in his particular venire. In particular, the trial court found that it was not statistically significant that there was only one African-American in defendant's venire because such a result would occur 10 percent of the time even if the pools had been derived without the zip-code problem.

[30] *People v Bryant*, 289 Mich App 260; 796 NW2d 135 (2010) (*Bryant II*).

[31] *Id*. at 267.

First, relying on Dr. Stephenson's calculations for only defendant's venire, the panel stated that the absolute disparity was 6.03 percent. Although acknowledging that such a result does not indicate substantial underrepresentation, the panel declined to find the absolute-disparity test controlling because it viewed it as an ineffective measure of acceptable disparity in circumstances, like this one, in which the group in question makes up a small percentage of the total population.[32]

Next, the panel addressed the comparative-disparity test and acknowledged the difficulties in applying this test to a group that makes up a small percentage of the population.[33] Nonetheless, the panel decided that the comparative-disparity test was the most appropriate to measure the underrepresentation in cases in which the percentage of the distinct group in the population is low.[34] Relying on Dr. Stephenson's calculations for only defendant's venire, the panel stated that the comparative disparity was 73.1 percent, which it viewed as a significant disparity and "sufficient to demonstrate that the representation of African-Americans in the venire for defendant's trial was unfair and unreasonable."[35]

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[32] *Id*. at 269.

[33] *Id*. at 269-270.

[34] *Id*. at 270-271. On this point, the panel relied on *United States v Rogers*, 73 F3d 774, 777 (CA 8, 1996), which concluded that "the comparative disparity calculation provides a more meaningful measure of systematic impact *vis-a-vis* the 'distinctive' group: it calculates the representation of African Americans in jury pools relative to the African-American[s] [in the] community rather than relative to the entire population."

[35] *Bryant II*, 289 Mich App at 271. The panel concluded that the 73.1 percent comparative disparity was sufficient to demonstrate an unfair and unreasonable representation because it was substantially higher than the 30 or 40 percent that has been deemed sufficient in other cases. *Id*. at 271-272.

In addition, the panel briefly addressed the standard-deviation test. It concluded that because Dr. Stephenson testified that the test was not appropriate because the normal approximation was not valid and no court has accepted the standard-deviation analysis as determinative in this type of challenge, it had little value here.[36]

Addressing the third prong from *Duren*, the panel held that the underrepresentation was caused by the systematic exclusion of African-Americans.[37] The panel concluded that the underrepresentation in this case was inherent in the Kent County jury-selection process in which a computer programming error resulted in over-selection of jurors from zip codes with small minority populations and underselection of jurors from zip codes with large minority populations. Further, the evidence showed that this underrepresentation occurred over a significant period of time.[38] Therefore, because defendant established a prima facie case for a fair-cross-section claim under the Sixth Amendment that the prosecution failed to rebut, the panel reversed and remanded for a new trial.[39]

The prosecution sought leave to appeal in this Court, which we granted.[40]

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[36] *Id*. at 272-273.

[37] *Id*. at 274.

[38] *Id*. at 273-275.

[39] *Id*. at 275-276.

[40] *People v Bryant*, 489 Mich 924 (2011) (*Bryant III*). Our order stated in part:

> The parties shall include among the issues to be briefed: (1) whether, in evaluating whether a distinctive group has been sufficiently underrepresented under *Duren v Missouri*, 439 US 357 (1979), so as to violate the Sixth Amendment's fair cross-section requirement, courts may choose to examine only the composition of the defendant's particular jury venire, or whether courts must always examine the composition of broader pools or arrays of

II. STANDARD OF REVIEW

Whether defendant was denied his Sixth Amendment right to an impartial jury drawn from a fair cross section of the community is a constitutional question that we review de novo.[41] We review the factual findings of a trial court for clear error, which exists "if the reviewing court is left with a definite and firm conviction that the trial court made a mistake."[42]

III. ANALYSIS

A. FAIR-CROSS-SECTION JURISPRUDENCE

The Sixth Amendment of the United States Constitution guarantees a defendant the right to be tried by an impartial jury drawn from a fair cross section of the community.[43] The United States Supreme Court recog-

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> prospective jurors; (2) whether a defendant's claim of such underrepresentation must always be supported by hard data, or whether statistical estimates are permissible and, if so, under what circumstances; and (3) whether any underrepresentation of African-Americans in the defendant's venire, or in Kent County jury pools between 2001 and 2002, was the result of systematic exclusion under the third prong of *Duren*. [*Id*.]

[41] See *People v Armstrong*, 490 Mich 281, 289; 806 NW2d 676 (2011).

[42] *Id*.

[43] *Berghuis v Smith*, 559 US 314, 319; 130 S Ct 1382, 1384; 176 L Ed 2d 249 (2010). The Sixth Amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence. [US Const, Am VI.]

Although the text of the Sixth Amendment only provides in reference to a jury "the right to . . . an impartial jury," the United States Supreme Court

nized the fair-cross-section guarantee in *Taylor v Louisiana*.[44] In *Taylor*, the defendant successfully challenged Louisiana's jury-selection scheme in which women would not be considered for jury service unless they filed a written declaration of their willingness to serve.[45] For the defendant's jury district, in which 53 percent of the population was female, of the 1,800 individuals drawn to fill venires in a period of nearly a year, only 12 were female.[46] The Court held that Louisiana's practice systematically eliminated women, a "numerous and distinct" group, from the jury pool, denying the defendant his right to a jury drawn from a fair cross section of the community in violation of the Sixth Amendment.[47]

In *Duren*, the United States Supreme Court set forth

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has ascribed to that right that the jury must be drawn from sources reflecting a fair cross section of the community in order to effectuate the purpose of a jury: "guard[ing] against the exercise of arbitrary power [by making] available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of a judge." *Taylor v Louisiana*, 419 US 522, 530; 95 S Ct 692; 42 L Ed 2d 690 (1975), citing *Duncan v Louisiana*, 391 US 145, 155-156; 88 S Ct 1444; 20 L Ed 2d 491 (1968). We are cognizant that there is a reasonable argument that fair-cross-section claims should be exclusively evaluated under the Equal Protection Clause of the Fourteenth Amendment, not the Sixth Amendment, see *Berghuis*, 559 US at 334 (THOMAS, J., concurring), but we will not consider such an argument because we are bound by the United States Supreme Court's decisions evaluating this claim under the Sixth Amendment, see *Taylor*, 419 US at 526; see also *Duncan*, 391 US at 154-155 (incorporating the right to a jury trial in the Sixth Amendment to the states through the Due Process Clause of the Fourteenth Amendment).

[44] *Taylor*, 419 US 522.

[45] *Id*. at 523, 525.

[46] *Id*. at 524.

[47] *Id*. at 531. In reaching its decision, the Court emphasized that it was not imposing a requirement "that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population." *Id*. at 538.

a more substantive framework designed to evaluate fair-cross-section challenges. Specifically, to make a prima facie case of a violation of the Sixth Amendment's fair-cross-section requirement, a defendant must show:

> (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.[48]

The defendant in *Duren* successfully argued that the underrepresentation of women in jury venires violated the fair-cross-section requirement. Regarding the first prong, there was no dispute that women were a distinct group in the community.[49] The defendant established the second prong "by [his] statistical presentation," showing that while women were 54 percent of the county's population, women were only 26.7 percent of the persons summoned for jury service and 14.5 percent of veniremembers during an approximately nine-month period.[50] The Court concluded that "[s]uch a gross discrepancy between the percentage of women in jury venires and the percentage of women in the community requires the conclusion that women were not fairly represented in the source from which petit juries were drawn . . . ."[51]

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[48] *Duren*, 439 US at 364.

[49] *Id*.

[50] *Id*. at 362, 364.

[51] *Id*. at 366. The Court, without naming its calculation, applied the absolute-disparity test by comparing the difference between the percentage of the distinct group in the population and the percentage of the distinct group appearing in venires.

Regarding the third prong, the Court concluded that the underrepresentation was a result of the systematic exclusion of the group in the jury-selection process. Specifically, the defendant's statistics, evidence that the selection scheme automatically exempted women from jury service upon their request, and evidence that a large discrepancy had occurred in every weekly venire for almost a year established "that the cause of the underrepresentation was systematic—that is, inherent in the particular jury-selection process utilized."[52]

B. APPLICATION OF THE *DUREN* TEST

1. WHETHER A DISTINCT GROUP IS ALLEGED TO HAVE BEEN EXCLUDED

There is no dispute that African-Americans, the group alleged to be excluded, are a distinct group in the community for the purposes of determining whether there is a violation of the Sixth Amendment's fair-cross-section requirement.[53] Accordingly, defendant satisfied *Duren*'s first prong.

2. WHETHER REPRESENTATION IS FAIR AND REASONABLE

The second prong requires defendant to show that "representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community[.]"[54] As we recognized in *Smith*,[55] the United States Supreme Court has not identified a method or test that

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[52] *Id*.

[53] See, e.g., *United States v Carmichael*, 560 F3d 1270, 1280 (CA 11, 2009); *United States v Odeneal*, 517 F3d 406, 412 (CA 6, 2008); *United States v Weaver*, 267 F3d 231, 240 (CA 3, 2001).

[54] *Duren*, 439 US at 364.

[55] *Smith*, 463 Mich at 203.

courts must use to measure whether the representation of distinct groups is fair and reasonable.[56] In light of the United States Supreme Court's decision not to mandate what method or methods should be used, and given the various tests used by lower federal courts, we concluded in *Smith* that "no individual method should be used exclusive of the others," adopting "a case-by-case approach."[57] We further held that "[p]rovided that the parties proffer sufficient evidence, courts should consider the results of all the tests in determining whether representation was fair and reasonable."[58]

But in order to properly consider the results of the relevant tests, we must answer the questions we posed in our grant order to identify what data to input into the tests. Specifically, we asked the parties to brief whether in evaluating the second prong, "courts may choose to examine only the composition of the defendant's particular jury venire, or whether courts must always examine the composition of broader pools or arrays of prospective jurors" and "whether a defendant's claim of such underrepresentation must always be supported by hard data, or whether statistical estimates are permissible . . . ."[59]

We hold that when applying the relevant statistical tests, a court must examine the composition of jury pools and venires *over time* using the most reliable data

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[56] See *Berghuis*, 559 US at 329 (acknowledging that no decision of the Court has specified the proper method or methods by which underrepresentation is appropriately measured and taking no position on the method or methods that should be used). Additionally, the United States Supreme Court has not identified a threshold for what level of underrepresentation is not fair and reasonable. *United States v Maskeny*, 609 F2d 183, 190 (CA 5, 1980).

[57] *Smith*, 463 Mich at 204.

[58] *Id*.

[59] *Bryant III*, 489 Mich 924.

available to determine whether representation is fair and reasonable. Our reading of *Duren* compels this conclusion. Specifically, *Duren* sets forth that the second prong is used to evaluate "representation of [the distinct] group in *venires* from which juries are selected . . . ."[60] The Court again used the plural "venires" when it evaluated the defendant's evidence under the second prong, pointing out the "discrepancy between the percentage of women in jury *venires* and the percentage of women in the community . . . ."[61] In addition, the Court referred back to the requirement that the second-prong underrepresentation must occur over time when introducing its discussion on the third prong, stating, "[I]t was necessary for petitioner to show that the underrepresentation of women, *generally* and on his venire, was due to their systematic exclusion in the jury-selection process."[62] Therefore, when considering whether representation is fair and reasonable, *Duren* requires a court to evaluate the composition of *venires* over a significant time period rather than just the defendant's individual venire.[63]

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[60] *Duren*, 439 US at 364 (emphasis added).

[61] *Id*. at 366 (emphasis added). In particular, *Duren* considered the venires used for nearly a year as a part of its reasoning for concluding that the second prong was satisfied by the defendant's statistical presentation. *Id*. at 362-363, 365-366.

[62] *Id*. at 366 (emphasis added).

[63] See *United States v Miller*, 771 F2d 1219, 1228 (CA 9, 1985) (stating in a discussion of *Duren*'s second prong that "[i]t appears to us that the Supreme Court's use of the plural in setting up the *Duren* test is a clear indication that a violation of the fair cross-section requirement cannot be premised upon proof of underrepresentation in a single jury"); *United States v Allen*, 160 F3d 1096, 1103 (CA 6, 1998) (stating in a discussion of *Duren*'s second prong that "[a]ppellants, however, must show more than that their particular panel was unrepresentative"); *People v De Rosans*, 27 Cal App 4th 611, 621; 32 Cal Rptr 2d 680 (1994) ("The second *Duren* prong requires a showing that the cognizable group is underrepresented in *venires* from which *juries* are selected, not on the panel from which the defendant's jury

Consequently, the Court of Appeals wrongly considered the results of the tests from a data set that included only defendant's venire. Relying solely on the composition of defendant's venire resulted in mislead-

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is selected."); *United States v Verdugo-Munoz*, unpublished order of the United States District Court for the District of Arizona, entered October 12, 2005 (Docket No. CR-03-1161-PHX-SRB), 2005 WL 2571608, * 2; 2005 US Dist LEXIS 23448, * 5 ("[B]ecause of the Supreme Court's use of the plural in describing the second prong of *Duren*, a defendant must proffer evidence that the underrepresentation has occurred in multiple venires."); cf. *United States v Williams*, 264 F3d 561, 568 (CA 5, 2001). In addition, an abundance of caselaw supports that when applying *Duren*'s second prong, courts look to the degree of underrepresentation over time. See, e.g., *United States v Orange*, 447 F3d 792, 798 (CA 10, 2006); *Weaver*, 267 F3d at 238, 243; *United States v Royal*, 174 F3d 1, 5, 10-11 (CA 1, 1999); *Thomas v Borg*, 159 F3d 1147, 1150 (CA 9, 1998); *United States v Rioux*, 97 F3d 648, 657-658 (CA 2, 1996); *Francis v Fabian*, 669 F Supp 2d 970, 984 (D Minn, 2009); *People v Washington*, 179 P3d 153, 162-164 (Colo, 2007); *People v Bell*, 49 Cal 3d 502, 526-527; 262 Cal Rptr 1; 778 P2d 129 (1989).

Despite our straightforward reading of *Duren* and this supporting authority, in her dissent Justice MARILYN KELLY disagrees that the second prong requires a pattern of underrepresentation over time. She does so while choosing not to address the language in *Duren* that compels this treatment of the second prong. She also attempts to critique some of our supporting caselaw by ignoring that those same cases explicitly support our reading of *Duren*'s second prong. Moreover, some of the cases she cites do not even contain a substantive discussion of the second prong, while no case that she cites actually concludes that the second prong may be satisfied by a showing of underrepresentation in only a particular defendant's venire.

In addition, contrary to Justice KELLY's suggestion, our approach does not ignore defendant's venire under the second prong. Instead, we merely follow *Duren* by including it in the data set of venires used to calculate the degree of underrepresentation. See *Duren*, 439 US at 362-366 (considering under the second prong a data set that included January through March 1976, when the defendant's trial began in March 1976). Of course, as in *Duren*, 439 US at 363, the distinct group was underrepresented in defendant's individual venire, giving rise to this claim in the first place. But *Duren* reflects that such underrepresentation does not amount to a constitutional fair-cross-section violation without a showing that includes the degree of underrepresentation over time under the second prong. Thus, defendant's venire is simply part of the larger statistical presentation in this analysis.

ing and exaggerated results.[64] The representation of African-Americans in defendant's venire is only relevant as a part of the larger picture of venires or jury pools. Because underrepresentation in a single venire could result from chance, evaluating whether representation of a distinct group is fair and reasonable requires evaluating venire composition over time. Only then is it possible to see the degree of any underrepresentation.

In addition, evaluating the representation of a distinct group in venires over time requires using the most reliable data available to input into the relevant tests. In this case, hard data regarding the race of those sent questionnaires or appearing for jury service are not available for two primary reasons. First, the Secretary of State did not include the racial identity of individuals in the potential-juror database that was provided to Kent County, and thus the court's computer program did not include a record of the race of the individuals who were selected. Second, the voluntary surveys that the court made available to potential jurors who appeared for jury service, which included a section in which those persons could identify their race, were plagued by wildly inconsistent participation and therefore do not provide a meaningful data set.

The circuit court did keep records of the zip code of each person sent a jury summons. Reviewing and using those records for the period from January through March 2002, Dr. Stephenson, a statistical expert, was able to estimate, using the racial makeup of each zip code from the census data, the number of African-

[64] When only a particular defendant's venire is examined, the results may look more or less significant depending on the actual composition of the individual venire compared to the broader picture. But it is only by considering the broader picture that a court can evaluate whether the representation of a distinct group was fair and reasonable.

Americans who had been summoned for jury service from January through March 2002. Given the available zip-code data and the limitations regarding the other potential data sources, it is appropriate to evaluate venire composition using Dr. Stephenson's statistical estimate.[65]

Dr. Stephenson estimated that 4.17 percent of the summonses issued were sent to African-Americans from January through March 2002. Given that the census data reflects that the jury-age population of African-Americans in the community is 8.25 percent, it is clear that African-Americans were underrepresented. The pertinent question then is whether this underrepresentation in the composition of jury pools and venires during this time was nonetheless fair and reasonable.

a. ABSOLUTE-DISPARITY TEST

The absolute-disparity test is the most widely applied test and is used by the majority of jurisdictions to evaluate whether the representation of a distinct group was fair and reasonable.[66] This test measures a group's underrepresentation by subtracting the percentile representation of that group in jury pools or venires from the percentile representation of that group in the overall population of the relevant community.[67] The absolute-disparity test is useful because it permits a straightforward and undistorted measure of the per-

[65] We note that Dr. Stephenson's estimate is more relevant than the results of the voluntary survey in determining whether the body of potential African-American jurors as a whole was underrepresented because it actually looked at who was chosen to receive summonses rather than who decided to appear for service on a given day.

[66] See *Delgado v Dennehy*, 503 F Supp 2d 411, 425-426 (D Mass, 2007) (collecting cases).

[67] See *Royal*, 174 F3d at 6-7, 10.

centage of the group that has been excluded.[68] Courts have generally required an absolute disparity of more than 10 percent to indicate that the representation of the distinct group was not fair and reasonable.[69]

The absolute-disparity test, however, is often criticized because it makes it difficult, if not impossible, for a defendant to make this showing if the distinct group has a small population in the community.[70] For example, even if the 8.25 percent African-American population here had been entirely excluded from jury pools and venires for the three-month period analyzed, the absolute disparity would have been only 8.25 percent, falling below the threshold generally applied to determine whether the representation is fair and reasonable.[71]

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[68] See *id*. at 7; see also Note, *Re-justifying the fair cross section requirement: Equal representation and enfranchisement in the American criminal jury*, 116 Yale L J 1568, 1596 (2007).

[69] See *United States v Ashley*, 54 F3d 311, 313-314 (CA 7, 1995); *Maskeny*, 609 F2d at 190. Although the United States Supreme Court has not endorsed the absolute-disparity test, it performed the same calculation to evaluate the disparity in *Duren*. *Duren*, 439 US at 364-366; see also *People v Burgener*, 29 Cal 4th 833, 860; 129 Cal Rptr 2d 747; 62 P3d 1 (2003).

[70] *Smith*, 463 Mich at 203-204. One commentator elaborated on a problem with the absolute-disparity test as follows:

> If the jurisdiction is 99% African American and venires are 49% African American, then defendants would be virtually assured of having African Americans on their petit juries, despite the 50% absolute disparity. If, on the other hand, the overall population is 50% African American and venires are 0% African American, then the odds of having an African American petit juror would drop from near-certainty to total impossibility. The fact that the absolute disparity test cannot distinguish between these radically different scenarios indicates that it does not measure defendants' probabilistic injuries. [Commentary, *Jury poker: A statistical analysis of the fair cross-section requirement*, 8 Ohio St J Crim L 533, 545 (2011).]

[71] See, e.g., *Thomas*, 159 F3d at 1151 (addressing an absolute disparity of approximately 5 percent); *United States v Suttiswad*, 696 F2d 645, 649

Given that the Kent County African-American jury-age population figure is 8.25 percent and the percentage of African-Americans sent jury summonses from January through March 2002 was 4.17 percent, the absolute disparity is 4.08 percent.[72] The Court of Appeals, however, disregarded the result of this test because the African-American population is small. Although the African-American population in Kent County falls below 10 percent, *Smith* nonetheless requires "consider[ation] [of] the results of all the tests in determining whether representation was fair and reasonable" and instructs that "no individual method should be used exclusive of the others."[73] Thus, even when the African-American population is small, *Smith* does not allow a court to simply ignore the absolute-disparity test entirely. Rather, a reviewing court should look at the *results* of each test and how far each test is below or above the necessary threshold in determining whether, on the whole, the defendant has established that the representation was not fair and reasonable. Consequently, despite the criticism of the absolute-disparity test, the Court of Appeals should not have disregarded the test's results.

b. COMPARATIVE-DISPARITY TEST

Some courts have used the comparative-disparity test, which measures "the decreased likelihood that members of an underrepresented group will be called for jury service . . . ."[74] It is calculated by dividing the

(CA 9, 1982) (addressing absolute disparities of 2.8 percent, 7.7 percent, and 4.7 percent); *United States v Clifford*, 640 F2d 150, 155 (CA 8, 1981) (addressing an absolute disparity of 7.2 percent).

[72] 8.25 percent minus 4.17 percent is 4.08 percent.

[73] *Smith*, 463 Mich at 204.

[74] *United States v Shinault*, 147 F3d 1266, 1272 (CA 10, 1998) (emphasis omitted).

result of the absolute-disparity test by the percentage of the distinct group in the overall population of the community.[75] The comparative-disparity test is not widely used and is criticized because it invites distortion of the alleged underrepresentation, particularly when the population of the distinct group is small.[76]

The Court of Appeals, after disfavoring the result of the absolute-disparity test because the percentage of the distinct group in the relevant community was low, effectively established a bright-line rule favoring the

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[75] *Id*. Unlike the absolute-disparity test, the United States Supreme Court has never applied the comparative-disparity test in practice.

[76] *Smith*, 463 Mich at 204; see also *Thomas*, 159 F3d at 1150 (disfavoring the comparative-disparity test because "it exaggerates the effect of any deviation"); accord *Royal*, 174 F3d at 8-9. For example, assuming that the population of the distinct group was one and that person was excluded, the result of the comparative disparity is 100 percent even though a jury without that member "would clearly form a 'fair cross section' of the community." *United States v Hafen*, 726 F2d 21, 24 (CA 1, 1984). As one commentator put it, "[a] test that finds maximal underrepresentation in a situation in which the defendant's chances of jury composition are virtually unaffected cannot be a good one to apply generally." Note, *A proposal for measuring underrepresentation in the composition of the jury wheel*, 103 Yale L J 1913, 1928 (1994). Another commentator described the problem with the comparative-disparity test as follows:

> Yet the comparative disparity test lacks the absolute disparity test's awareness of what fraction of the total [population] has been tampered with. For example, when all African Americans are absent from venires, the result is the highest possible comparative disparity score, 100%. But that figure is useless unless one also accounts for how many African Americans are in the overall population. If the total population is majority African American, then the observed underrepresentation would reduce the odds of drawing an African American juryperson from near certainty to total impossibility. If, on the other hand, African Americans comprise just 0.1% of the total population, then the likelihood of drawing an African American would not have significantly declined. Thus, despite its support among prominent commentators, the comparative disparity test, like the absolute disparity test, simply does not measure the probabilistic injuries generated by fair cross-section violations. [*Jury poker*, 8 Ohio St J Crim L at 545-546.]

comparative-disparity test when the population of the distinct group is small. This holding directly contradicts the case-by-case approach set forth in *Smith*.[77] Again, the comparative-disparity test is particularly defective when the claim involves a small population of a distinct group because it distorts the extent of any underrepresentation. Thus, it does not follow to elevate the comparative-disparity test while disregarding the others tests in precisely the circumstance that the comparative-disparity test is most criticized and apt to produce distorted results.

The Court of Appeals further erred when it considered the 73.1 percent result of the comparative-disparity test for only defendant's venire. Using the proper data from Dr. Stephenson's three-month examination of venires, the comparative disparity was 49.45 percent.[78] The United States Courts of Appeals for the First, Third, Ninth, and Tenth Circuits have each found

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[77] *Smith*, 463 Mich at 204. Justice MARILYN KELLY claims that we have mischaracterized the Court of Appeals' opinion regarding the establishment of a bright-line rule in favor of the comparative-disparity test when the population of the distinct group is small. The Court of Appeals' opinion belies this claim. In particular, the panel, after a discussion of the absolute-disparity test and the comparative-disparity test, stated, "We must apply some test to measure the representation of African-Americans in defendant's venire . . . ." *Bryant II*, 289 Mich App at 270. It continued, "[T]he comparative-disparity test is most appropriate to measure underrepresentation in cases in which the percentage of African-Americans in the relevant community is low." *Id*. Thus, contrary to Justice KELLY's dissent, the Court of Appeals ultimately used *only* the result from the comparative-disparity test to evaluate defendant's claim under the second prong. This approach is clearly contrary to *Smith*, 463 Mich at 204, which requires that "no individual method should be used exclusive of the others." By ultimately using the comparative-disparity test and no other, the Court of Appeals did just the opposite of what *Smith* requires.

[78] The absolute-disparity result of 4.08 percent divided by the 8.25 percent African-American population figure yields a result of 49.45 percent.

permissible comparative disparities above 50 percent.[79] Moreover, the cases cited by the Court of Appeals for the proposition that 30 or 40 percent has been deemed sufficient to demonstrate unfair and unreasonable representation are readily distinguishable.

In *United States v Rogers*, a 30.96 percent comparative disparity was deemed significant by an Eighth Circuit panel, but this determination was made in dicta as the panel was bound by earlier Eighth Circuit precedent regarding the particular jury system under review.[80] Accordingly, the panel had to affirm the defendant's convictions.[81] Thus, given that the Eighth Circuit has not adopted the comparative-disparity test or found it determinative in any case, we do not afford *Rogers* any weight and view it as an outlier in fair-cross-section jurisprudence. Additionally, in *Ramseur v Beyer*, which the Court of Appeals also cited, a 40 percent comparative disparity was deemed "borderline."[82] The minority population in that case was 35.9 percent, and the absolute disparity was 14.1 percent. Thus, the minority population was far larger than in the case at hand. A 40 percent comparative disparity is not a persuasive baseline for this case because the comparative-disparity test distorts the results in cases involving small populations.[83] Given that the

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[79] See *Orange*, 447 F3d at 798-799 (noting that the court had upheld selection procedures involving comparative disparities between 38.17 percent and 51.22 percent); *United States v Sanchez-Lopez*, 879 F2d 541, 547-549 (CA 9, 1989) (concerning a comparative disparity of 52.9 percent); *Hafen*, 726 F2d at 23 (concerning a comparative disparity of 54.2 percent); *Shinault*, 147 F3d at 1273 (concerning comparative disparities between 48.63 percent and 59.84 percent); *Royal*, 174 F3d at 10 n 10 (concerning a comparative disparity of 60.9 percent); *Weaver*, 267 F3d at 243 (concerning comparative disparities between 40.01 percent and 72.98 percent).

[80] *United States v Rogers*, 73 F3d 774, 775-777 (CA 8, 1996).

[81] *Id*. at 775.

[82] *Ramseur v Beyer*, 983 F2d 1215, 1232 (CA 3, 1992).

[83] See *Weaver*, 267 F3d at 243 (distinguishing *Ramseur* for the same reason).

comparative-disparity test distorts the results when the population of the distinct group is small and because the result here falls below the level of disparity that has generally been deemed acceptable by other courts, we conclude that defendant has failed to establish that African-American representation was not fair and reasonable under the comparative-disparity test.

c. STANDARD-DEVIATION TEST

The standard-deviation test, also known as the statistical-significance test, calculates the probability that the observed underrepresentation of the distinct group was the result of chance.[84] The standard-deviation test compares the actual distribution of the distinct group within the data set to the proportional distribution, measuring the "extent to which an observed result is likely to vary from an expected result. The larger the number of standard deviations an observed result is from an expected result, the lower the probability that the observed result is random."[85] The use of this test has its roots in United States Supreme Court caselaw considering juror representation in the equal-protection context.[86] However, " 'no court in the country has accepted [a standard-deviation analysis] alone as determinative in Sixth Amendment challenges to jury selection systems.' "[87]

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[84] See *Jury poker*, 8 Ohio St J Crim L at 549-550.

[85] *Jefferson v Morgan*, 962 F2d 1185, 1189 (CA 6, 1992).

[86] See *Castaneda v Partida*, 430 US 482, 496 n 17; 97 S Ct 1272; 51 L Ed 2d 498 (1977) ("As a general rule for such large samples, if the difference between the expected value and the observed number is greater than two or three standard deviations, then the hypothesis that the jury drawing was random would be suspect to a social scientist.").

[87] *Smith*, 463 Mich at 204, quoting *Rioux*, 97 F3d at 655 (alteration in original).

It is unsurprising that no court has ever accepted the result of this test alone as determinative in this type of challenge because the test in effect has nothing to do with the evaluation of the second prong. That is, whether the degree of underrepresentation is statistically significant and not the result of chance does not inform whether the level of representation is fair and reasonable.[88] Instead, such a result is more appropriately considered in the equal-protection context as an aid in determining whether intentional discrimination exists or perhaps as a part of the evaluation of the third *Duren* prong.[89] This reality is simply a function of what the test *actually measures*—the randomness of a given disparity, not the extent of the disparity.[90]

Further, Dr. Stephenson concluded that it was inappropriate to apply the standard-deviation test in this case because the normal approximation was not valid. He did, however, apply a related test to determine that the extent of underrepresentation from January through March 2002 was not the result of random chance. Nonetheless, all we garner from the result is just that—the underrepresentation was not a random occurrence. The mere fact that the underrepresentation

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[88] As one commentator stated:

> [T]he question answered by [the standard-deviation test], while an interesting one, is not the appropriate one for a fair cross-section analysis. The probability that the composition of a jury wheel arose by random selection from the community is not directly related to the defendant's chances of drawing a jury of a certain composition. [*Measuring underrepresentation*, 103 Yale L J at 1928.]

[89] See *Jefferson*, 962 F2d at 1189 (setting forth that "in the context of racial discrimination claims, the larger the number of standard deviations, the more likely the observed result is the product of discrimination rather than chance").

[90] See *Jury poker*, 8 Ohio St J Crim L at 550.

was not the result of random chance does not establish that it was not fair and reasonable. Thus, we afford the result of this test no weight.[91]

d. DISPARITY-OF-RISK TEST

Another test that is sometimes discussed is the disparity-of-risk test.[92] This test measures "the likelihood that the difference between a group's representation in the jury pool and its population in the community will result in a significant risk that the jury will not fairly represent the group."[93] It does so by comparing the chance that a defendant's jury (before or without voir dire)[94] will include members of a distinct group if that group's representation in the jury pool is consistent with its population in the community with the

[91] Justice MARILYN KELLY's dissent views this treatment of the standard-deviation test as inconsistent with our criticism of the Court of Appeals. Yet she does not contest that the standard-deviation test has nothing to do with measuring whether the representation is fair and reasonable. Thus, it is not that the standard-deviation test merely has flaws like the other tests; it is that it is irrelevant to the consideration of the second prong. Therefore, unlike the other tests, it cannot logically inform our evaluation.

[92] Although occasionally discussed, it appears that no court has applied it.

[93] *Commonwealth v Arriaga*, 438 Mass 556, 566-567; 781 NE2d 1253 (2003); see *Measuring underrepresentation*, 103 Yale L J 1913 (proposing the use of the disparity-of-risk test).

[94] The analysis focuses on the effects of the jury-selection system, not the effects of peremptory or for-cause strikes because the effects of these strikes on a defendant's jury are resolved under an equal-protection analysis. See *Batson v Kentucky*, 476 US 79; 106 S Ct 1712; 90 L Ed 2d 69 (1986). The strategic decisions in voir dire shed no light on whether representation in venires is fair and reasonable at the outset. Thus, this analysis considers the probability of drawing a given number from a distinct group when randomly drawing 12 potential jurors at a time.

chance that a defendant's jury will include members of the same group given the particular underrepresentation alleged.[95]

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[95] See *Jury poker*, 8 Ohio St J Crim L at 537 n 25. This test employs the binomial theorem to obtain the necessary probabilities for comparison. The binomial theorem in this situation expresses as a percentage the difference between what would be the expected normal distribution of a distinct group in 12-person juries assuming that representation in the jury pool is the same as in the community and the actual distribution of a group in 12-person juries assuming that the distinct group is underrepresented in the jury pool. The following results were computed using a binomial calculator available at Texas A&M University Department of Statistics <http://www.stat.tamu.edu/~west/applets/binomialdemo.html> (accessed June 26, 2012), with "n" representing the number of jurors drawn, "p" representing the probability of success in choosing a juror from the distinct group in one drawing, "x" representing the possible number of jurors from that group on the jury, and "Prob (x)" representing the probability of that number resulting. The results show the probabilities for an expected number of members of the distinct group in a 12-person jury if the drawing were fully representative (p = 0.0825) and the probabilities for an expected number of members of the distinct group in a 12-person jury given the known degree of underrepresentation in this case (p = 0.0417):

x	Prob (x) When p = 0.0825 and n = 12	Prob (x) When p = 0.0417 and n = 12
0	0.3559	0.5998
1	0.3840	0.3132
2	0.1899	0.0750
3	0.0569	0.0109
4	0.0115	0.0011
5	0.0017	0.00007
6	0.00002	0.00000
7	0.00001	0.00000
8	0.00000	0.00000
9	0.00000	0.00000
10	0.00000	0.00000
11	0.00000	0.00000

Although this test is not new, the primary reason for its disfavor is because it has yet to garner approval from any court.[96] But given the absence of uniformity for what tests to apply, we will consider it among other measures of underrepresentation. Its purpose—to estimate the probability of actual underrepresentation on a jury—is consistent with the United States Supreme Court's aims to protect *a defendant's right* to an impartial jury and a fair trial by means of a jury drawn from a fair cross section of the community.[97] Moreover, considering this test is consistent with *Smith*'s holding that "[p]rovided that the parties proffer sufficient evidence, courts should consider the results of all the tests in determining whether representation was fair and reasonable."[98] Thus, it is relevant to consider the extent to which a defendant's chances of a representative jury were altered by underrepresentation in the jury pool by measuring the diminished likelihood that a randomly drawn 12-person jury includes a given number from a

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To take an example from these results, a 12-person jury drawn from a pool proportionate to the actual population of African-Americans in Kent County (8.25 percent) would be expected to have one African-American 38.4 percent of the time, while a 12-person jury drawn from a pool containing 4.17 percent African-Americans would be expected to have one African-American 31.32 percent of the time. For a more detailed mathematical description of the binomial theorem see *Jury poker*, 8 Ohio St J Crim L at 537 n 25.

[96] See *Arriaga*, 438 Mass at 566; *United States v Green*, 389 F Supp 2d 29, 54 (D Mass, 2005), overruled on other grounds by *In re United States*, 426 F3d 1 (CA 1, 2005); *Delgado*, 503 F Supp 2d at 425 (D Mass, 2007).

[97] See *Williams v Florida*, 399 US 78, 100; 90 S Ct 1893; 26 L Ed 2d 446 (1970) (stating that juries must be selected so as "to provide a fair possibility for obtaining a representative cross-section of the community").

[98] *Smith*, 463 Mich at 204. The necessary evidence is available in the record to calculate the risk disparity in this case.

distinct group.[99] In this case, when considering the likelihood that a defendant's 12-person jury would contain no African-Americans the disparity of risk was 24.39 percent.[100]

Unlike the absolute-disparity test and the comparative-disparity test, courts have not considered the appropriate threshold under which the disparity of risk should be deemed fair and reasonable. We believe the normative line should be drawn at 50 percent.[101] That is, disparities of risk that exceed 50 percent should be deemed unfair and unreasonable. This is a logical normative line because when measuring a defendant's probabilistic injuries, a risk disparity of 50 percent or lower shows that, more likely than not, removing the

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[99] See *Re-justifying the fair cross section requirement*, 116 Yale L J at 1597 (stating that underrepresentation of what already is a small group does not "appreciably impact the defendant's 'fair possibility' of a representative jury").

[100] We consider the disparity between the ideal risk and the actual risk for having no African-Americans on a randomly selected 12-person jury because it is the largest disparity. Thus, it represents where the underrepresentation most affected the expectations of a particular result. See *Jury poker*, 8 Ohio St J Crim L at 540 n 28.

In any randomly drawn 12-person jury drawn from a pool exactly proportionate to Kent County's African-American population as a whole (8.25 percent), a defendant can expect no African-Americans on the jury 35.59 percent of the time. This is called the "ideal risk" because it measures the probability of a particular result without underrepresentation. However, when randomly drawing from the disproportionate jury pool that occurred in this case (4.17 percent African-American), the probability of a 12-person jury containing no African-Americans rises to 59.98 percent. This is called the "actual risk" because it measures the probability of a particular result given the actual underrepresentation. With a 4.17 percent representation rate, a defendant would expect to have no African-Americans on a 12-person jury 59.98 percent of the time. The disparity-of-risk test, thus, calculates the difference between the ideal risk (35.39 percent) and the actual risk (59.98 percent), resulting in a disparity of risk of 24.39 percent.

[101] See *id*. at 541-542 (proposing a 50 percent threshold).

underrepresentation would not have altered the composition of a defendant's jury.[102] Consequently, defendant has failed to show that the representation of African-Americans was not fair and reasonable under the disparity-of-risk test.[103]

Given the results of the foregoing tests, defendant has failed to show that the representation of African-Americans in the venires at issue was not fair and reasonable. Instead, the results of the absolute-disparity test, comparative-disparity test, and disparity-of-risk test all support the opposite conclusion: that the representation of African-Americans was fair and reasonable. Accordingly, we conclude that defendant did not make out a prima facie case for his Sixth Amendment fair-cross-section claims. Notwithstanding our conclusion on this determinative issue, we will address the third prong in order to consider the argument that a defendant who shows systematic exclusion under the third prong is entitled to make a lesser showing under the second prong.

3. WHETHER UNDERREPRESENTATION RESULTS FROM SYSTEMATIC EXCLUSION

The third *Duren* prong requires a defendant to show that "this underrepresentation is due to systematic exclusion of the group in the jury-selection process."[104] A systematic exclusion is one that is "inherent in the par-

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[102] See *id*. (stating that such a line "parallel[s] the commonplace legal rule that claimants are entitled to no relief when they fail to show it is more likely than not that they have been wronged"). We also note that defendant's risk disparity of roughly 24 percent even falls below the 37 percent threshold proposed by the author who first introduced this test. *Measuring underrepresentation*, 103 Yale L J at 1936-1937. We do not adopt the 37 percent threshold because there is no normative rationale for doing so.

[103] Although the dissenting justices question our use of the disparity-of-risk test, they notably make no substantive critique of the test itself.

[104] *Duren*, 439 US at 364.

ticular jury-selection process utilized."[105] In *Duren*, the United States Supreme Court concluded that the practice of excluding women in every weekly venire for nearly a year constituted underrepresentation that was systematic.[106]

The evidence here shows that a computer programming error in the computer software used to randomly select potential jurors from the Secretary of State database of names of eligible jurors in Kent County truncated that database of names from 453,414 eligible jurors to 118,169. The smaller list of names was used to randomly select potential jurors. This list, however, disproportionately included more individuals in certain zip codes and fewer from other zip codes. The underrepresented zip codes on the whole had higher concentrations of African-Americans. Thus, the computer program error, which was the cause of the systematic exclusion, was one that was "inherent" in the computer program, which was "the particular jury-selection process utilized" to select potential jurors for service.

It is irrelevant for the purpose of this analysis that the computer error was not intentional and was corrected upon its discovery because under the third prong "systematic disproportion *itself* demonstrates an infringement of the defendant's interest in a jury chosen from a fair community cross section."[107] Thus, the fact that the computer error was unintentional, and that it was fixed upon its discovery, is immaterial to whether systematic exclusion was occurring at the time defendant's jury was selected. Accordingly, we conclude that

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[105] *Id*. at 366.

[106] *Id*. at 359, 366.

[107] *Id*. at 368 n 26 (emphasis added).

defendant satisfied the third prong by showing that the exclusion was systematic.[108]

In *Hubbard*, a panel of our Court of Appeals addressed a fair-cross-section claim and held that the threshold for underrepresentation is lower when the underrepresentation is "the result of circumstances less benign than random selection . . . ."[109] In that case, "[t]he evidence produced on remand reveal[ed] that the juror allocation process employed by Kalamazoo County before July 1992—and not random selection—caused the underrepresentation."[110] The panel concluded that "given the lack of benign causation, . . . the level of disparity [absolute disparity of 3.4 percent to 4.1 percent] constituted substantial underrepresentation under the Sixth Amendment."[111]

In lowering the threshold of the second prong in circumstances in which the level of disparity was the result of nonbenign circumstances, the *Hubbard* panel erroneously assumed that the underrepresentation contemplated by the second *Duren* prong depends in part on the reason for the underrepresentation. The reason for the underrepresentation is the basis of the third prong, and the only issue in the second prong is whether the degree of underrepresentation is acceptable. In

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[108] Because defendant presented direct evidence of a systematic exclusion, we need not address whether statistics alone may establish that underrepresentation was the result of a systematic exclusion inherent in the jury-selection process.

[109] *Hubbard*, 217 Mich App at 480. The minority population in *Hubbard* was 7.4 percent. The panel considered only the absolute-disparity test, but found the test flawed, relying largely on *United States v Osorio*, 801 F Supp 966, 978-979 (D Conn, 1992), for its holding that such a level of disparity resulting from nonbenign circumstances satisfied the second *Duren* prong.

[110] *Hubbard*, 217 Mich App at 480.

[111] *Id*. at 481. Although not addressed by the panel in *Hubbard*, given that the minority population in *Hubbard* was 7.4 percent, the comparative disparity ranged from 44.6 percent to 55.4 percent.

other words, *Duren* requires satisfaction of *three* distinct prongs. An approach that arbitrarily gives a defendant the benefit of the doubt on the second prong vitiates the three-part analysis. Even if a defendant can show underrepresentation that was systematic, a defendant must show that the extent of any underrepresentation was not fair and reasonable. Moreover, it would be inconsistent to conclude that a certain level of underrepresentation that would otherwise be fair and reasonable absent systematic exclusion is suddenly not fair and reasonable because the cause of the underrepresentation is nonbenign.

Additionally, *Hubbard*'s rationale for adopting the approach set forth in *United States v Osorio*[112] is belied by our case-by-case approach. Specifically, *Hubbard* articulated concerns about applying the absolute-disparity test in a situation in which the minority population was relatively small. *Smith*, however, instructs courts not to limit the statistical tests to be considered.[113] Thus, the justification for turning to *Osorio* is diminished by our case-by-case approach evaluating all the relevant tests. As a result, because the *Hubbard* approach improperly conflates the second and third prongs as set forth in *Duren* and because its rationale is unnecessary in light of our case-by-case approach, we reject it and overrule *Hubbard* to the extent that it is inconsistent with this opinion.

IV. CONCLUSION

This case presented the issue whether defendant was denied his Sixth Amendment right to an impartial jury

[112] *Osorio*, 801 F Supp 966.

[113] In *Smith*, we disapproved the concurring opinion's endorsement of *Hubbard*, but declined to reach the issue because it was unnecessary to resolve the case. *Smith*, 463 Mich at 205 n 1.

drawn from a fair cross section of the community. Because we conclude that defendant did not establish that the representation of African-Americans was not fair and reasonable under the second prong of the *Duren* test, we reverse the judgment of the Court of Appeals and reinstate defendant's convictions and sentences.

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

MARKMAN, J. (*concurring*). I join in the majority opinion, which reasonably applies the test governing the Sixth Amendment's "fair cross section" requirement, as articulated by the United States Supreme Court in *Duren v Missouri*, 439 US 357, 364; 99 S Ct 664; 58 L Ed 2d 579 (1979). I write separately only because I have questions concerning both *Duren*'s test and the constitutional standard toward which this test is directed.

The Sixth Amendment guarantees criminal defendants the right to a trial "by an impartial jury . . . ." In *Taylor v Louisiana*, 419 US 522, 526; 95 S Ct 692; 42 L Ed 2d 690 (1975), the Supreme Court determined that "the presence of a fair cross section of the community on venires, panels, or lists from which petit juries are drawn is essential to the fulfillment" of this constitutional guarantee. The "fair cross section" requirement is satisfied as long as "distinctive" groups are reasonably represented on the jury venire; however, it does not entitle a defendant to a jury whose composition is proportional to that group's presence within the community from which the venire is chosen. As *Taylor* emphasized:

> Defendants are not entitled to a jury of any particular composition, but the jury wheels, pools of names, panels, or

> venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof. [*Id*. at 538 (citations omitted).]

Under the "fair cross section" analysis, it is unnecessary for a defendant to show that the lack of "reasonable representation" of a "distinctive" group is the result of discrimination in the jury-selection system, as would be required under the Equal Protection Clause of the Fourteenth Amendment. See, e.g., *Castaneda v Partida*, 430 US 482, 494; 97 S Ct 1272; 51 L Ed 2d 498 (1977). Rather, in "fair-cross-section cases, systematic disproportion *itself* demonstrates an infringement of the defendant's interest in a jury chosen from a fair community cross section." *Duren*, 439 US at 368 n 26 (emphasis added). So the critical constitutional inquiry appears to be directed toward the extent or magnitude of the "systematic disproportion." While "proportional" representation of "distinctive" groups is not required, what constitutes "proportional" representation must nonetheless be constantly borne in mind so that the level of "disproportion" can be calculated because, at some uncertain point, a level of "disproportion" that is apparently constitutionally *acceptable* is transformed into a level of "disproportion" that *breaches* the Sixth Amendment. And it is the responsibility of this Court to determine on a "case by case" basis when that point of transformation occurs, principally through the application of myriad statistical tests, some of which have been given the explicit imprimatur of the United States Supreme Court and others of which have not, but at the same time have not been repudiated, in light of the apparent nonexclusivity of the approved tests.

In *Duren*, the Supreme Court set forth a three-part test to evaluate "fair cross section" challenges. Specifically, in order to establish a prima facie case, a defendant must show

> (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process. [*Id.* at 364.]

The dispositive question in this case concerns the second part of *Duren*'s test—i.e., whether the representation of African-Americans in venires from which juries were selected in Kent County during the period in which defendant was tried and convicted is "fair and reasonable in relation to the number of such persons in the community." *Id.*

To determine whether representation is "fair and reasonable" under the *Duren* test, courts have applied yet *more* tests. In *People v Smith*, 463 Mich 199; 615 NW2d 1 (2000), this Court discussed three statistical tests that have been used to measure whether representation of a "distinctive" group in the jury pool is "fair and reasonable": the "absolute disparity" test, the "comparative disparity" test, and the "standard deviation" test. Recognizing that all three tests are imperfect and susceptible to criticisms, *Smith* held:

> We thus consider all these approaches to measuring whether representation was fair and reasonable, and conclude that no individual method should be used exclusive of the others. Accordingly, we adopt a case-by-case approach. Provided that the parties proffer sufficient evidence, courts should consider the results of all the tests in determining whether representation was fair and reasonable. [*Id.* at 204.]

After a decision on habeas corpus review by the United States Court of Appeals for the Sixth Circuit asserting that *Smith* constituted an "unreasonable" application of "clearly established federal law," *Smith v*

Berghuis, 543 F3d 326, 329, 334 (CA 6, 2008), the United States Supreme Court unanimously reversed the Sixth Circuit, holding that "neither *Duren* nor any other decision of this Court specifies the method or test courts must use to measure the representation of distinctive groups in jury pools." *Berghuis v Smith*, 559 US 314, 329; 130 S Ct 1382, 1393; 176 L Ed 2d 249 (2010). Noting that "[e]ach test is imperfect," the Supreme Court declined "to take sides today on the method or methods by which underrepresentation is appropriately measured." *Id*. at 329-330.

Given this state of the law, I join the majority opinion because it engages in a reasoned application of the relevant decisions of the United States Supreme Court and this Court. Consistently with the approach outlined in our decision in *Smith*, the majority opinion considers the results of all three tests for which the parties have proffered evidence in determining whether the representation of African-Americans, the "distinctive" group in question, was "fair and reasonable" in Kent County venires. Specifically, the majority opinion considers the results of the "absolute disparity" and the "comparative disparity" tests, as well as those of an additional test, the "disparity of risk" test,[1] and concludes that the results are insufficient to warrant a finding that African-American representation in the venires during the relevant period was not "fair and reasonable." Thus, defendant has failed to establish a prima facie violation of the Sixth Amendment's "fair cross section" requirement. Although the Court of Appeals' opinion and the dissenting opinions of this Court also, in my

[1] The majority opinion does not analyze the results of the "standard deviation" test because the only expert whom the trial court found credible, Dr. Paul Stephenson, testified that the test was "not appropriate" in the present circumstances.

judgment, reflect reasonable efforts to apply *Duren*, their use of only the results from the "comparative disparity" test to ascertain a "fair cross section" violation, their decisions not to use data from multiple venires over time, and their decisions not to fully consider the results of the "absolute disparity" test cause me to prefer the majority's analysis. See *Smith*, 463 Mich at 204 ("[N]o individual method should be used exclusive of the others.").

That said, the fact that both sides have sought reasonably and in good faith to apply *Duren* underscores questions concerning *Duren*'s test itself. These largely arise from the sense that in applying *Duren*, this Court seems to me engaged more in the judicial equivalent of a Rorschach test, an essentially standardless inquiry in which judicial conclusions are indicative more of personal judgments concerning the "fairness and reasonableness" of the Kent County venire than in the application of any discernible constitutional command.

In particular, I am concerned about the statistical tests used to determine whether *Duren*'s second part has been satisfied. The limitations of these tests have been widely noted, see, e.g., *Berghuis*, 559 US at 329; *ante* at 603-611; *post* at 637-638, and need not be revisited here. It suffices to say that when, as here, members of the "distinctive" group comprise only a relatively small percentage of the community's jury-eligible population, one test arguably makes it difficult for a defendant to ever satisfy the requisite showing of "underrepresentation," another arguably exaggerates this "underrepresentation," and the third appears to be generally disfavored because it does not constitute an appropriate measure of anything obviously relevant to a determination whether the level of

representation on the venires was "fair and reasonable." In light of these deficiencies, how do the results of these tests, either considered individually or collectively, usefully illuminate whether representation was "fair and reasonable"? How do the bench and bar draw a meaningful legal conclusion from the application of these tests to the available statistical data? How rational, and how flexible, are the statistical thresholds that have been established by some courts in distinguishing between "underrepresentations" that are compatible with a "fair cross section," and those that are not? To what extent, if any, may these thresholds be raised or lowered, as a function of the nature or the degree of any "systematic exclusion" under the third part of *Duren*, or must these parts be analyzed entirely discretely? To what extent, if any, should these thresholds be raised or lowered by Fourteenth Amendment considerations of discriminatory purpose or intention, or are those considerations simply irrelevant to the "fair and reasonable" analysis under the Sixth Amendment? To what extent are these thresholds emblematic of what the dissent in *Duren* predicted would become a mere "constitutional numbers game," *Duren*, 439 US at 375 (Rehnquist, J., dissenting), or do these effectively communicate some independent reality as to what is required by the Constitution? Existing statistical tests and thresholds certainly provide one means by which to address *Duren*'s second part, but is it now the law of the land that the fate of criminal defendants, such as Ramon Bryant, as well as the effectiveness of the criminal justice system in communities, such as Kent County, in maintaining the security of their citizens are to be determined as a function of whether the data emerging from a host of statistical tests are to be "rounded up" or "rounded down," the number of decimal points considered, and whether the denominator

reflecting the presence of the "distinctive" group within the community has been determined by the most recent census figures, by mid-census estimates, or by the latest moving-van rental figures? In summary, which specific statistical tests best communicate whether jury representation of "distinctive" groups is constitutionally "fair and reasonable," and under what circumstances, and by the application of which thresholds of deviation from the "proportional" representation standard? If the fate of individual defendants, and the ability of individual communities to carry out the enormous responsibility of protecting their citizens from criminal predators, is to be dependent on statistical testing, then there should be no uncertainty regarding either the relevance of a particular test in a particular circumstance or the standards for assessing, and thereby according legal and constitutional significance to, the results of those tests.

However, perhaps an even more fundamental question is also raised here—why certain statistical tests and not others? The United States Supreme Court has acknowledged that the three tests described in *Smith* are each imperfect, *Berghuis*, 559 US at 329, and has declined "to take sides today on the method or methods by which underrepresentation is appropriately measured," *id.* at 329-330. Doubtless, there is no end to statistical tests by which a court might seek to compare various-sized populations of "distinctive" groups within a community and their representation on venires. Equally doubtless, as evidenced in this very case, tests can be devised that will tend both toward sustaining and repudiating a finding of "underrepresentation." Is the new "disparity of risk" test a genuinely valid means of adducing the existence of a Sixth Amendment violation, or are the dissenting justices correct that it "neither improves nor

clarifies this area of the law"? *Post* at 633. What are the *standards* by which this Court can discern which tests are relevant in identifying Sixth Amendment violations? And what is the relevance of the fact that some tests might point in one direction regarding the second *Duren* part, and others might point in the opposite direction? Does this suggest that these tests are asking and answering different questions, or that one test is asking and answering the wrong question? How do judges *test* the tests to ensure that the right question is being asked? When tests differ in their results, how are these results to be reconciled in answering the ultimate constitutional question? May the court compare and contrast the degree or extent to which different tests deviate from thresholds distinguishing acceptable and unacceptable levels of statistical disparity? Is the court simply free to choose at its discretion among such conflicting tests? If there is some actual decision-making *standard* in selecting among conflicting tests, what is it? If such a standard has anything to do with determining which test better identifies "fair and reasonable" representation of "distinctive" groups in venires, then is this not a Catch-22 tautology, to wit, in choosing among tests that best identify the absence of "fair and reasonable" representation, a court must employ the test that best identifies "fair and reasonable" representation? What if multiple tests are applied, as in the instant case, and these produce split results of 2-1 or 3-1 or 7-6 in favor of the plaintiff or the defendant? Is there some "majority rule" that requires that we resolve conflicts in favor of the outcome of the majority of statistical tests applied? If so, does this not render all-important the court's initial determination of which tests are going to be considered, and how that is to be determined? And if the "majority rule" does not apply, how do courts *distinguish* among conflicting tests

in determining which of these will be dispositive in concluding that the Sixth Amendment has or has not been breached?[2]

These and related questions concern the meaning of *Smith*'s directive that courts must "*consider* all . . . approaches to measuring whether representation was fair and reasonable . . . ." *Smith*, 463 Mich at 204 (emphasis added). Indeed, very different conceptions of this obligation are reflected in the majority and dissenting opinions. Justice MARILYN KELLY argues that the Court of Appeals below "properly considered the results of all tests [including the absolute-disparity test], but decided that the comparative disparity test was 'the most appropriate test to measure underrepresentation in this case,' " *post* at 638, quoting *People v Bryant*, 289 Mich App 260, 271; 796 NW2d 135 (2010), while the majority concludes that *Smith* requires more than simply alluding to a test and then failing to "consider" it. One might think that such a difference of opinion could be easily resolved if there were some clear sense regarding *why* a particular test is or is not "appropriate" in furthering our understanding of whether "fair and reasonable" representation has been achieved, which, of course, would require a clear understanding of what is meant by "fair and reasonable" representation, which in turn would require a clear understanding of whether the constitutional task at hand is simply to calculate the divergence of actual representation on the venire from the "ideal" of proportional representation (an ideal

[2] While these questions may seem a mere quibble to some, when judges are free to pick and choose among disparate tests, pointing to disparate constitutional conclusions, defendants and communities that are not significantly disparate may end up being treated in a disparate manner as a function of the judicial decision-making involved in: (a) choosing appropriate tests; (b) evaluating or considering such tests; and (c) reconciling such tests when they produce conflicting results.

certainly implied by the *Duren* concept of "underrepresentation")[3] and then apply some statistical equivalent of the "I know it when I see it" test once articulated by former United States Supreme Court Justice Potter Stewart in the realm of obscenity law. *Jacobellis v Ohio*, 378 US 184, 197; 84 S Ct 1676; 12 L Ed 2d 793 (1964) (Stewart, J., concurring).[4]

That is, even if I could clearly answer each of the aforementioned questions, and knew which tests to "consider" and how to give legal import to their results, it still would be difficult to apply *Duren* because the ultimate constitutional standard to which it is directed remains unclear. I know what the constitutional standard in "fair cross section" cases is *not*. It is not an equal-protection standard under which any "underrep-

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[3] See also *Duren*, 439 US at 372 n * (Rehnquist, J., dissenting) (observing that if the fair-cross-section requirement "were truly an essential element of the due process right to trial by an impartial jury, a defendant would be entitled to a jury composed of [distinctive groups] in perfect proportion to their numbers in the community"). For a similar perspective, see Leipold, *Constitutionalizing jury selection in criminal cases: A critical evaluation*, 86 Geo L J 945, 965 (1998):

> A defendant is thus placed in a strange position: he is entitled to a jury drawn from a fair cross section specifically because it increases the odds that different groups and perspectives will be represented in the jury pool, which in turn helps ensure that the panel is impartial; when actually seating a jury, however, he may not take those same characteristics into account. He may not base his peremptory strikes on the very same proxy for viewpoints that the Court has already used to justify the cross-section requirement, even if his efforts are designed to bring about the exact benefit that the cross-section requirement provides. An attempt to support the cross-section requirement on impartiality grounds thus runs headlong into the rule that race or gender may not be used as a substitute for inclinations, biases, or possible votes.

[4] As did Justice Stewart, I also recognize that both this Court and the United States Supreme Court are quite possibly faced here with "the task of trying to define what may be indefinable." *Jacobellis*, 378 US at 197 (Stewart, J., concurring).

resentation" resulting from intentional or purposeful discrimination in the jury venire is prohibited by the Constitution. See *Taylor*, 419 US at 526-528; *Duren*, 439 US at 368 n 26. And it is not a "proportional" representation standard under which *any* systematic exclusion that results in the "underrepresentation" of a "distinctive" group is prohibited by the Constitution, *Taylor*, 419 US at 538; *Duren*, 439 US at 364—although references by the Supreme Court to "underrepresentation," "disproportion," and "representative[ness]" would certainly cause some judges to look in precisely that direction, absent the Court's admonition to the contrary. Thus, the "fair cross section" requirement, which purports to eschew both principles of nondiscrimination and proportional representation, must be premised on some alternative standard drawn from the Sixth Amendment's guarantee of an "impartial jury." See *Taylor*, 419 US at 526. But see *Berghuis*, 559 US at 334; 130 S Ct at 1396 (Thomas, J., concurring) (arguing that the fair-cross-section requirement "rests less on the Sixth Amendment than on an 'amalgamation of the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment' ") (citations omitted).

Thus, some amount of "underrepresentation" is "fair and reasonable" and some amount is not, and the courts are to choose where the line is to be drawn. The problem is not that judges are ill equipped to determine what is "fair and reasonable," as such inquiries are made daily by judges in other constitutional contexts. In the context of the *Duren* test, however, there is no agreed-upon standard or "ideal" by which to measure the constitutional mandate of an "impartial jury" at the venire stage. The United States Supreme Court has stated that proportionality constitutes one relevant measure, but that it is also not required in order to satisfy the Constitution, which leads to uncertainty

because there is also no agreed-upon standard by which to measure how close a venire must come to proportionality, or indeed even how one measures proportionality. What "systemic," but nondiscriminatory, deviations are acceptable under the Constitution, and what "systemic," but nondiscriminatory, deviations are not? Given this lack of clear external standards and the wealth of divergent statistical measurements available, how can a judge ensure that his or her own private sensibilities concerning what is "fair and reasonable" in the make-up of the venire do not come to prevail over what is required by the Constitution and that statistical tests do not come to be selected, and standards for evaluating their results not come to be adopted, that merely tend to match those sensibilities? Focusing exclusively on the merits of the various tests obscures the forest for the trees, for without some clear sense of what the constitutional guarantee of an "impartial jury" requires at the venire stage, it will prove difficult, if not impossible, to achieve uniformity in the analyses of the composition of different venires. This, in turn, incurs the risk of making judicial determinations regarding "impartial juries" fraught with partiality and mathematical gamesmanship, while lending credence to Justice Rehnquist's concerns about a "constitutional numbers game." *Duren*, 439 US at 375 (Rehnquist, J., dissenting).

In the end, many trial and appellate judges have reviewed this case, and the question whether the venire here was "fair and reasonable" has closely divided them in favor of a negative response. While I have no doubt that each of these judges has addressed the question in this case "fairly and reasonably," and in accordance with his or her own best understanding of *Duren*, there seems to be little in the way of a coherent constitutional standard that distinguishes between "systematic exclu-

sions" that violate the Constitution and "systematic exclusions" that do not, much less a clear statistical method for giving effect to this constitutional standard. And as a result, I believe that our decision-making in this realm resembles uncomfortably a judicial Rorschach test, in which the judge is ultimately required to look *inward* in determining what is "fair and reasonable," rather than *outward* to a comprehensible constitutional rule of law. In joining the majority opinion, and despite what I believe to be confusion concerning aspects of the *Duren* test, I have sought to the best of my understanding of what is required by the United States Supreme Court to give reasonable meaning to this test and to the guarantees of the Constitution.

CAVANAGH, J. (*dissenting*). I respectfully dissent because I do not think that the Court of Appeals clearly erred by concluding that defendant is entitled to a new trial under the unique facts presented in this case.

I agree with Justice MARILYN KELLY that courts have not always applied *Duren v Missouri*, 439 US 357; 99 S Ct 664; 58 L Ed 2d 579 (1979), with precision and that reasonable minds can disagree regarding the proper application of *Duren*. Regardless of the debate raised in this case, however, I agree with Justice KELLY that defendant is nevertheless entitled to relief, even if a broader time frame for evaluating *Duren*'s second prong is considered.

As I explained in *People v Smith*, 463 Mich 199, 216, 222; 615 NW2d 1 (2000) (CAVANAGH, J., concurring), the approach taken by the Court of Appeals in *People v Hubbard (After Remand)*, 217 Mich App 459; 552 NW2d 493 (1996), should be a relevant consideration in determining whether unfair and unreasonable underrepresentation has been shown. Specifically, "[w]hen the

showing of underrepresentation is close, or none of the methods of analysis are particularly well-suited to a case," I believe courts should "glance ahead" to *Duren*'s third prong and consider a defendant's evidence of systematic exclusion. *Smith*, 463 Mich at 222. Under this approach, if the jury-selection process appears likely to systematically exclude a distinctive group, that is, the jury-selection process bears the mark of a non-benign influence, a court may give a defendant the benefit of the doubt on underrepresentation. *Id.* at 218, 222-224. Applying this approach to the facts of this case, I agree with Justice KELLY's conclusion that the Court of Appeals did not clearly err by holding that defendant is entitled to a new trial.

The majority's decision to hastily adopt the "disparity of risk" test has also given me pause, when, as Justice KELLY aptly observes, the test was not addressed by the lower courts, was not briefed or argued to this Court, and, as the majority concedes, has not been endorsed by *any* court in the country. Thus, because the substantive merits of the disparity-of-risk test and the majority's 50 percent threshold[1] were not presented to this Court, I decline to pass judgment on the merits of the test at this time without the benefit of full briefing and oral argument.

Accordingly, I respectfully dissent.

MARILYN KELLY, J. (*dissenting*). I concur with the majority that defendant satisfied the first and third prongs of the test for a fair-cross-section violation of the

[1] Indeed, aside from the fact that the issue was not raised or argued by the parties in this case, given the majority's conclusion that defendant's risk disparity falls below even the threshold proposed by the author first introducing the disparity of risk test, see *ante* at 615 n 102, I question whether it is necessary to adopt a higher threshold in this case.

Sixth Amendment under *Duren v Missouri*.[1] However, I disagree that defendant failed to meet the second prong of *Duren*. Accordingly, I respectfully dissent from the majority's decision to reverse the judgment of the Court of Appeals.

The Court of Appeals used existing law and, for the most part, applied it properly. The majority opinion imputes error where there is none. Worse, it sua sponte introduces a "disparity of risk" test not accepted by any court in the country. The analysis the majority has set forth today neither improves nor clarifies this area of the law.[2]

The majority concludes that the Court of Appeals erred in two ways when evaluating the second prong of *Duren*. First, it considered the representation of African-Americans only in defendant's venire, not in multiple venires over time. Second, it misapplied our decision in *People v Smith*[3] by "effectively adopt[ing] a bright-line rule in favor of the comparative-disparity test in all instances in which the population of the distinct group is small."[4] With regard to the first contention, the majority does not make a persuasive case that the Court of Appeals erred. And the second allegation of error is based on an inaccurate statement of what the Court of Appeals did.

I generally agree with the majority that, under *Duren*, courts must consider the composition of venires

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[1] *Duren v Missouri*, 439 US 357, 364; 99 S Ct 664; 58 L Ed 2d 579 (1979).

[2] It is also altogether unnecessary. The error in the jury-selection process at issue here occurred between June 2001 and August 2002 as a result of a computer programming error. Accordingly, the number of cases raising this issue that remain in the appellate pipeline is likely low. The majority's decision today is dressed-up error correction, pure and simple.

[3] *People v Smith*, 463 Mich 199; 615 NW2d 1 (2000).

[4] *Ante* at 582-583.

over time. The Court of Appeals considered the specific disparity in the composition of defendant's venire when evaluating the second *Duren* prong. And it considered multiple venires over time when applying the third *Duren* prong.[5] I am not persuaded that this was erroneous.

Some of the authority the majority relies on undermines its conclusion. For example, if a distinctive group is not underrepresented in a defendant's particular venire, there is no cognizable Sixth Amendment claim. Thus, a distinctive group's underrepresentation in a defendant's particular venire is a necessary component of a Sixth Amendment claim. Accordingly, the composition of a defendant's particular venire must be examined at some point in the *Duren* analysis. Yet the majority's approach effectively ignores it.[6]

Other cases that the majority cites do not conclusively demonstrate that the composition of multiple venires over time must be considered under the second *Duren* prong rather than the third. To the contrary, these cases seem to stand for the uncontroversial proposition that a defendant must show underrepresentation in multiple venires over time to satisfy the *Duren* test generally.[7] Indeed, one of the majority's quotations from

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[5] *People v Bryant*, 289 Mich App 260, 273-275; 796 NW2d 135 (2010) (applying the third *Duren* prong using data and statistics for venires over a three-month period).

[6] The majority asserts that its approach takes defendant's venire into account by "including it in the data set of venires used to calculate the degree of underrepresentation." *Ante* at 601 n 63. But disparity in the composition of a defendant's particular venire must be shown in order to demonstrate that the defendant was harmed because a constitutional violation actually occurred. Accordingly, the disparity in that particular venire must be considered independently, not simply lumped in with statistics concerning other venires.

[7] See, e.g., *United States v Miller*, 771 F2d 1219, 1228 (CA 9, 1985) ("[A] *violation of the fair cross-section requirement* cannot be premised upon

Duren supports this analysis.[8] Moreover, cases not cited by the majority contradict its conclusion and suggest that multiple venires over time are relevant to the question of systematic exclusion rather than the question of underrepresentation.[9]

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proof of underrepresentation in a single jury.") (emphasis added); *United States v Allen*, 160 F3d 1096, 1103 (CA 6, 1998) ("Appellants have satisfied the first prong [of] the *Duren* test, but they *have not satisfied the other two*.") (emphasis added). The majority asserts that *Duren* itself "compels" the majority's analysis of the second prong. *Ante* at 599-600. However, the quotations from *Miller* and *Allen*, coupled with the authority that I cite in footnote 9, demonstrate that courts have not applied *Duren* with precision. Thus, the majority's analysis is far from a foregone conclusion. It is also telling that the majority identifies few cases decided since 1979 that attribute such significance to the use of the plural "venires" in *Duren*'s discussion of the second-prong analysis. The reliance in these cases on the use of the plural is also undercut by statements in subsequent caselaw from the United States Supreme Court. See, e.g., *Holland v Illinois*, 493 US 474, 478, 480; 110 S Ct 803; 107 L Ed 2d 905 (1990) ("It has long been established that racial groups cannot be excluded from the *venire* from which a jury is selected. . . . [A] fair-cross-section *venire* requirement is imposed by the Sixth Amendment[.]") (emphasis added).

[8] See *ante* at 600, quoting *Duren*, 439 US at 366 ("Finally, *in order to establish a prima facie case*, it was necessary for petitioner to show that the underrepresentation of women, generally and on his venire, was due to their systematic exclusion in the jury-selection process.") (emphasis added).

[9] *State v Bowman*, 349 NC 459, 469; 509 SE2d 428 (1998) (noting in its discussion of the third *Duren* prong that the "[d]efendant's only evidence in the instant case consisted of the statistical makeup of this particular jury venire" and that "[s]tatistics concerning one jury pool, standing alone, are insufficient to meet the third prong of *Duren*"); *State v Holland*, 2009 Me 72, ¶ 39; 976 A2d 227, 239 (2009) (concluding that the defendant failed to meet the third *Duren* prong because "it is unknown how many African–Americans were in any jury pool other than [the defendant's]"); *United States v DeFries*, 327 US App DC 181, 189; 129 F3d 1293 (1997) ("Underrepresentation of a cognizable group in a single venire, without evidence of a greater pattern, *is insufficient to establish the 'systematic exclusion of the group'* required by *Duren* . . . .") (emphasis added); *United States v Hardwell*, 80 F3d 1471, 1486 (CA 10, 1996) ("[Defendant] has not shown that underrepresentation of African–Americans on his jury venire was the result of systematic exclusion, but simply argues that systematic exclusion can be

Consequently, I do not agree with the majority that *Duren* stands for the proposition that "evaluating whether representation of a distinct group is fair and reasonable requires evaluating venire composition over time."[10] Rather, I believe that evaluating whether *systematic exclusion* occurred requires looking for a pattern of underrepresentation over time. This makes sense because to show a constitutional flaw in a jury-selection system, a defendant must show that the system *consistently* leads to unrepresentative venires. Indeed, in general it is the consistency of the system's failure to produce representative venires that proves systematic exclusion.[11]

Thus, the Court of Appeals did not err by using the comparative disparity in defendant's venire—73.1 percent—when applying the second prong of *Duren*.[12] And it appropriately evaluated the disparity in the racial composition of venires over time when applying

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inferred from the under-representation in a single venire. This argument is without merit."); *United States v Jones*, 687 F2d 1265, 1269 (CA 8, 1982) ("Even assuming that the first two requirements have been met, there is no evidence of systematic exclusion in the jury selection procedure. . . . No evidence was introduced regarding the composition of other venires in the district.").

[10] *Ante* at 602.

[11] *Duren*, 439 US at 366 ("[T]hat a large discrepancy occurred not just occasionally but in every weekly venire for a period of nearly a year manifestly indicates that the cause of the underrepresentation was systematic . . . .").

[12] Other courts also examine the disparity between the racial composition of the community and the composition of the defendant's venire when applying the second *Duren* prong. See, e.g., *State v Hester*, 324 SW3d 1, 42-44 (Tenn, 2010) (applying the second *Duren* prong by calculating the disparity between the racial composition of the county's population and the racial makeup of the defendant's venire); *Bowman*, 349 NC at 467-468 (same); *Holland*, 2009 Me at ¶ 31; 976 A2d at 237-238 (same).

In any event, for reasons explained later in this opinion, I conclude that defendant established a Sixth Amendment fair-cross-section violation even if I use the three-month comparative disparity of 49.4 percent.

the third *Duren* prong. The majority's first assignment of error is therefore without merit.

The majority's second criticism of the Court of Appeals' opinion is that it supposedly established "a bright-line rule favoring the comparative-disparity test" and disregarded the results of the other tests.[13] Respectfully, I believe that the majority misreads or mischaracterizes the Court of Appeals' opinion.

The Court of Appeals did consider the results of both the absolute-disparity test and the standard-deviation test, but found both unhelpful to resolving defendant's appeal.[14] The majority determines that this was error, but offers little explanation why this is so. It repeats that *Smith* mandated that courts consider the results of all the tests when determining whether the second prong of *Duren* is met. But the Court of Appeals specifically recognized that *Smith* requires such an approach and did analyze the results of each test. It simply found the results of one test—the comparative-disparity test—most helpful. It does not follow that because the Court of Appeals ultimately settled on one test as most meaningful, it relied on that test without considering the others. Nothing supports the majority's sweeping assertion that the Court of Appeals established a bright-line rule in favor of the comparative-disparity test.

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[13] *Ante* at 606-607.

[14] See *Bryant*, 289 Mich App at 269 (concluding that " 'the absolute disparity test is an ineffective measure of acceptable disparity' because of the low percentage of African–Americans who were eligible to vote in Kent County" and for that reason "declin[ing] to find the absolute-disparity test controlling in this case"), quoting *People v Hubbard (After Remand)*, 217 Mich App 459, 477; 552 NW2d 493 (1996) (citation omitted); *id*. at 272-273 ("[I]n this case, the standard-deviation test has little value in measuring the underrepresentation of African-Americans in Kent County jury venires.").

Moreover, in what respect does the majority think that the Court of Appeals should have further "regarded" the results of the absolute-disparity test? The panel correctly recognized that if the absolute-disparity test controlled, a successful Sixth Amendment fair-cross-section challenge would be impossible in cases like this one in which the minority population is small. Even the expert who testified at the evidentiary hearing concluded that an analysis of absolute disparity is not a viable method of measuring underrepresentation in this case. Thus, I cannot see what further insight the majority believes that the Court of Appeals should have divined from the results of the absolute-disparity test.

When discussing the results of the standard-deviation test, the majority makes precisely the same error that it accuses the Court of Appeals of making. It notes the flaws in the standard-deviation test and decides to "afford the result of this test no weight."[15] It does so notwithstanding *Smith*'s mandate that courts consider the results of all three tests. This inconsistency highlights why the majority's criticism of the Court of Appeals in this respect is misplaced. *Smith* may mandate consideration of the results of all tests, but it does not dictate that a court give no more weight to one test than another. The Court of Appeals properly considered the results of all tests, but decided that the comparative-disparity test was "the most appropriate test to measure underrepresentation in this case."[16]

Finally, I cannot agree with the majority's importation of a fourth test—its disparity-of-risk test—into this appeal. First, no party or amicus curiae mentioned the disparity-of-risk test, let alone requested that we adopt it. Thus, the test was not properly considered by the

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[15] *Ante* at 611.

[16] *Bryant*, 289 Mich App at 271.

parties or the courts below.[17] Second, as the majority notes, its test has yet to garner approval from a single court as a viable means to test Sixth Amendment fair-cross-section claims. Despite these shortcomings, the majority sua sponte adopts it, applies it to this case, and declares that a violation occurs under that test when the disparity of risk exceeds 50 percent. The majority's decision to do so absent any advocacy, let alone vigorous advocacy, on the issue is highly questionable.

I believe that my analysis dispels the majority's findings of error by the Court of Appeals and demonstrates that the Court of Appeals correctly analyzed this case. The majority's sole remaining basis for reversing the Court of Appeals' judgment is its disagreement with that court's reliance on *People v Hubbard (After Remand)*.[18] I disagree that *Hubbard* should be partially overruled.

Under *Hubbard*, a court may consider the reason for a systematic exclusion when deciding whether representation of the distinctive group was fair and reasonable. If a jury-selection process systematically excludes a distinctive group on the basis of nonbenign factors, a court may give a defendant the benefit of the doubt on underrepresentation.[19] *Hubbard* borrowed this approach from *United States v Biaggi*[20] and *United States v Osorio*.[21] Although *Biaggi* and *Osorio* are not binding on this Court, they are persuasive. Moreover, contrary

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[17] Because the propriety of this test is not properly before us, I decline the majority's invitation to indulge in a substantive critique of it. See *ante* at 37 n 103.

[18] *Hubbard*, 217 Mich App 459.

[19] *Id*. at 478, 481.

[20] *United States v Biaggi*, 909 F2d 662, 678 (CA 2, 1990).

[21] *United States v Osorio*, 801 F Supp 966 (D Conn, 1992).

to the majority's conclusion that this approach "vitiates the three-part analysis,"[22] other courts have endorsed an analysis that merges the second and third *Duren* prongs in this fashion.[23]

Accordingly, I would follow *Hubbard*, as Justice CAVANAGH advocated in his concurring opinion in *Smith*.[24] Thus, I give defendant "the benefit of the doubt on underrepresentation" and "glance ahead" to the third *Duren* prong.[25] Unlike the defendant in *Smith*, defendant here has established that systematic exclusion occurred because the computer error that caused the exclusion was "inherent" in the jury-selection process used. As in *Hubbard*, the exclusion "did not result from 'benign' random selection, but, instead, resulted from a defect inherent in the juror allocation process . . . ."[26]

Because defendant established that systematic exclusion occurred and "the showing of underrepresentation is close,"[27] I conclude that defendant has established a prima facie violation of the Sixth Amendment's fair-cross-section requirement. The prosecution identifies no significant state interest that was advanced by the selection process that systematically excluded African-

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[22] *Ante* at 618.

[23] *United States v Rioux*, 930 F Supp 1558, 1566 (D Conn, 1995) ("[T]he second and third prongs of the *Duren* test, unfair representation and systematic exclusion, are intertwined inextricably."); *Commonwealth v Arriaga*, 438 Mass 556, 566; 781 NE2d 1253 (2003) ("Evidence of a disparity smaller than 10% can support a conclusion of unconstitutional underrepresentation of smaller minority groups, *especially when coupled with persuasive evidence of systematic exclusion*.") (emphasis added).

[24] *Smith*, 463 Mich at 222-224 (CAVANAGH, J., concurring).

[25] *Id*. at 224.

[26] *Hubbard*, 217 Mich App at 481.

[27] *Smith*, 463 Mich at 222 (CAVANAGH, J., concurring); see also *id*. at 219 (identifying comparative disparities as large as 40 percent as "borderline").

Americans from Kent County venires. Thus, defendant's Sixth Amendment claim should prevail.

Finally, we must not lose sight of the fact that the right at issue here—the right to a jury trial—is the cornerstone of the American justice system.[28] The right to be adjudged by a jury of one's peers is a precious part of that right.[29] The majority's careless decision imposes a new, wholly unnecessary restriction on this right by creating error where there is none and new law that no party has advocated.

For these reasons, I believe that the Court of Appeals correctly reversed defendant's convictions and remanded for a new trial. I would affirm its judgment.

HATHAWAY, J., concurred with MARILYN KELLY, J.

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[28] "Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary." *Blakely v Washington*, 542 US 296, 306; 124 S Ct 2531; 159 L Ed 2d 403 (2004).

[29] "Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge." *Duncan v Louisiana*, 391 US 145, 156; 88 S Ct 1444; 20 L Ed 2d 491 (1968).

PEOPLE v VAUGHN

Docket No. 142627. Argued March 8, 2012 (Calendar No. 7). Decided July 9, 2012.

Joseph L. Vaughn was convicted of two counts of assault with intent to do great bodily harm less than murder, possession of a firearm by a felon, and possession of a firearm during the commission of a felony, second offense, after a jury trial in the Wayne Circuit Court, Prentis Edwards, J. A court officer had closed the courtroom to the public during voir dire. The Court of Appeals, M. J. KELLY, P.J., and K. F. KELLY and BORRELLO, JJ., affirmed, concluding that defendant had not been denied his right to a public trial because he had waived any objection by failing to timely assert the right. 291 Mich App 183 (2010). The Supreme Court granted defendant leave to appeal. 490 Mich 887 (2011).

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

The right to a public trial is subject to the forfeiture rule articulated in *People v Carines*, 460 Mich 750 (1999). Defendant was not entitled to a new trial because he failed to establish that his forfeited claim of error seriously affected the fairness, integrity, or public reputation of judicial proceedings.

1. Under the Sixth Amendment of the United States Constitution and article 1, § 20 of the Michigan Constitution, defendants have the right to a public trial, including public voir dire. While a member of the public may invoke the right to a public trial under the First Amendment of the United States Constitution, because it was the accused in this case who invoked the right, albeit after the fact, the analysis proceeded solely under the Sixth Amendment.

2. A violation of the right to a public trial is a structural error, but the right to a public trial does not fall within the narrow class of foundational constitutional rights that are preserved absent a personal waiver because a violation of a defendant's right to a public trial does not necessarily affect qualitatively the guilt-determining process or the defendant's ability to participate in that process. The right, however, cannot be waived by silence, and the Court of Appeals erred by concluding that defendant's failure to timely assert his Sixth Amendment right to a public trial

necessarily foreclosed a later grant of relief. Rather, in the absence of a timely objection, the traditional rule of review regarding forfeited constitutional error, articulated in *Carines*, applies.

3. Under *Carines*, a defendant is not entitled to relief on a forfeited claim of error unless the defendant can establish (1) that the error occurred, (2) that the error was plain, (3) that the error affected substantial rights, and (4) that the error either resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings. The circuit court committed plain error when it closed the courtroom during voir dire in the absence of an overriding interest that was likely to be prejudiced by having the courtroom open. Although the United States Supreme Court has reserved judgment on whether unpreserved structural error automatically affects a defendant's substantial rights, Michigan precedent suggests that a plain structural error satisfies the third prong of the test. However, while any structural error is likely to have an effect on the fairness, integrity, or public reputation of judicial proceedings, under plain-error analysis, a court must consider whether the error seriously affected those factors. Because the closure of the courtroom was limited to the duration of a vigorous voir dire process that ultimately yielded a jury that satisfied both parties, and given that the presence of the veniremembers during the closure subjected the proceedings to a substantial degree of continued public review, the closure did not seriously affect the factors considered under the fourth prong of the plain-error analysis and defendant was not entitled to a new trial on the basis of the forfeited claim of error.

4. A defendant is entitled to the effective assistance of counsel. In order to receive a new trial on the basis of ineffective assistance of counsel, a defendant must establish that counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A claim of ineffective assistance of counsel premised on a structural public-trial-right violation still requires a defendant to demonstrate actual prejudice; otherwise, a defendant would be able to harbor the error as an appellate parachute by failing to object, thereby depriving the trial court of the opportunity to correct the error. Defendant could not establish that his counsel's performance was constitutionally deficient because counsel might reasonably have concluded that the closed voir dire would benefit defendant. Nor could defendant demonstrate actual prejudice. Accordingly, he was not entitled to relief on his claim of ineffective assistance of counsel.

Court of Appeals' opinion vacated in part; judgment affirmed on alternative grounds and convictions affirmed.

Justice CAVANAGH, joined by Justices MARILYN KELLY and HATHAWAY, concurred in the result only. The majority correctly concluded that a violation of the right to a public trial, including the right to public voir dire, is a structural error. The majority also correctly concluded that the right to public voir dire is not subject to waiver by silence and that the Court of Appeals erred by concluding otherwise. The majority erred, however, by concluding that *Johnson v United States*, 520 US 461 (1997), definitively established that some structural errors may be subject to forfeiture analysis. The majority also misapplied *People v Duncan*, 462 Mich 47 (2000), in analyzing whether the structural error in this case required reversal. The need for automatic reversal should be given close consideration whenever a structural error occurs, even if the error is unpreserved. Nonetheless, in the context of an unpreserved claim of a violation of the right to public voir dire, if it can be shown that the ultimate determination of guilt remains reliable, Justice CAVANAGH agreed with the majority that under current Michigan law, the error may be examined under the plain-error analysis set forth in *Carines*. The majority correctly determined that plain error occurred in this case, but equivocated with regard to whether a defendant must prove specific prejudice in order to obtain relief for a violation of the public-trial guarantee. A defendant should not have to make that showing. The majority also erred by considering the presence of the venire under the fourth prong of the plain-error analysis. Members of the venire will always be present during voir dire; therefore, under the majority's approach, the prosecution will always be able to argue that the error did not seriously affect the fairness, integrity, or public reputation of the judicial proceedings independent of defendant's innocence. When weighing the fourth prong of the plain-error analysis in relation to the improper denial of the right to public voir dire, a court should rely most heavily on evidence indicating whether the purpose of voir dire was satisfied. If relevant evidence is not available, or if the court is left with serious concerns regarding whether the voir dire process served its purpose, the court should not hesitate to conclude that the fairness, integrity, or public reputation of the judicial proceedings were seriously affected and that a new trial is required. In this case, the majority correctly concluded that concerns regarding the fairness, integrity, and public reputation of the voir dire process were lessened by the fact that the process ultimately yielded a jury that satisfied both parties.

1. CONSTITUTIONAL LAW — RIGHT TO PUBLIC TRIAL — INVOCATION OF THE RIGHT TO A PUBLIC TRIAL BY THE ACCUSED.

Under the Sixth Amendment of the United States Constitution, criminal defendants have the right to a public trial, including public voir dire; while a member of the public may invoke the right to a public trial under the First Amendment of the United States Constitution, when it is the accused alone who has invoked the right, the analysis proceeds solely under the Sixth Amendment (US Const, Am I; US Const, Am VI).

2. CONSTITUTIONAL LAW — RIGHT TO PUBLIC TRIAL — STRUCTURAL ERRORS — WAIVER — FORFEITURE.

A violation of the right to a public trial is a structural error, but the right to a public trial does not fall within the narrow class of foundational constitutional rights that are preserved absent a personal waiver because a violation of a defendant's right to a public trial does not necessarily affect qualitatively the guilt-determining process or the defendant's ability to participate in that process; the right, however, cannot be waived by silence; rather, in the absence of a timely objection, the traditional rule of review regarding forfeited constitutional error from *People v Carines*, 460 Mich 750 (1999), applies (US Const, Am VI; Const 1963, art 1, § 20).

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Kym L. Worthy*, Prosecuting Attorney, *Timothy A. Baughman*, Chief of Research, Training and Appeals, and *Thomas M. Chambers*, Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *Randy E. Davidson*) for defendant.

Amici Curiae:

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Richard A. Bandstra*, Chief Legal Counsel, and *Bruce H. Edwards*, Assistant Attorney General, for the Department of the Attorney General.

Craig A. Daly, P.C. (by *Craig A. Daly*), on behalf of defendant.

YOUNG, C.J. We granted defendant's application for leave to appeal to determine whether defendant is entitled to a new trial because the circuit court closed the courtroom during voir dire in violation of defendant's constitutional rights.[1] We hold that a defendant's right to a public trial is subject to the forfeiture rule articulated in *People v Carines*[2] and that the Court of Appeals erred by concluding that defendant's failure to assert his public trial right necessarily "forecloses the later grant of relief."[3] In applying the *Carines* forfeiture rule to defendant's appeal, however, we conclude that defendant is not entitled to a new trial because he has not established that his forfeited claim of error "seriously affected the fairness, integrity, or public reputation of judicial proceedings."[4] We further conclude that defendant is not entitled to a new trial on the basis of ineffective assistance of counsel.[5] Accordingly, we vacate the Court of Appeals' opinion to the extent that it is inconsistent with this opinion, affirm on alternative grounds the judgment of the Court of Appeals, and affirm defendant's convictions.

I. FACTS AND PROCEDURAL HISTORY

On the night of June 14, 2002, defendant, Joseph Lashawn Vaughn, parked his car on a Detroit street so that it partially blocked the driveway of Emmitt Smith, a retired police officer. Smith and a neighbor went over to the car, which defendant had exited, and began talking to a woman in the passenger seat of the car.

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[1] US Const, Am VI; Const 1963, art 1, § 20.

[2] *People v Carines*, 460 Mich 750; 597 NW2d 130 (1999).

[3] *People v Vaughn*, 291 Mich App 183, 196; 804 NW2d 764 (2010).

[4] *Carines*, 460 Mich at 774.

[5] US Const, Am VI; Const 1963, art 1, § 20; *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

Defendant then emerged from a nearby alley and began shooting at Smith and the neighbor. In response, Smith returned fire, although defendant ran from the scene. Police traced the parked vehicle to defendant.

Defendant was arrested and charged with possession of a firearm by a felon (felon-in-possession),[6] possession of a firearm in the commission of a felony (felony-firearm),[7] and two counts of assault with intent to murder.[8] He proceeded to a jury trial in the Wayne Circuit Court. After the circuit court discussed a preliminary matter with counsel of record, a court officer closed the courtroom in preparation for voir dire:

> *The Court*: All right, we'll bring the jury in.
>
> *Court Officer*: Okay, folks you're going to have to clear the courtroom until after the selection of the new jury.

Although the record is unclear regarding how many people were subject to the court's order, it is uncontested that the circuit court did not provide a reason for this closure. It is also uncontested that neither defendant nor his counsel objected to closure of the courtroom.

At the conclusion of defendant's trial, the jury found defendant guilty of felon-in-possession, felony-firearm, and two counts of assault with intent to commit great bodily harm less than murder.[9] Defendant raised several claims of error on appeal, among them that the circuit court's closure of the courtroom during voir dire violated his Sixth Amendment right to a public trial and entitled him to a new trial. Alternatively, defendant

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[6] MCL 750.224f.

[7] MCL 750.227b. Defendant was charged as a second offender of MCL 750.227b. See MCL 750.227b(1).

[8] MCL 750.83.

[9] MCL 750.84.

claimed that his trial counsel's failure to object to the circuit court's closure of the courtroom constituted ineffective assistance of counsel and likewise entitled him to a new trial.

The Court of Appeals unanimously affirmed defendant's convictions.[10] The Court of Appeals panel explained that while a defendant has "the right to have the courtroom open to the public during jury voir dire[,] . . . this right is not self-executing [and] the defendant must timely assert the right."[11] Accordingly, "the failure to timely assert the right to a public trial forecloses the later grant of relief."[12] Because "defendant's trial counsel did not object to the trial court's decision to close the courtroom to the public during the selection of his jury," the courtroom's closure "does not warrant relief."[13]

The Court of Appeals also determined that defendant was not entitled to relief on the basis of ineffective assistance of counsel because he could not show "that his trial counsel's decision not to object fell below an objective standard of reasonableness under prevailing professional norms . . . ."[14] It explained that "[d]efendant's trial counsel might have reasonably concluded that proceeding with a jury voir dire that was closed to

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[10] *Vaughn*, 291 Mich App 183.

[11] *Id.* at 195-196, citing *Presley v Georgia*, 558 US 209; 130 S Ct 721, 724; 175 L Ed 2d 675 (2010), and *Levine v United States*, 362 US 610, 619-620; 80 S Ct 1038; 4 L Ed 2d 989 (1960).

[12] *Vaughn*, 291 Mich App at 196, citing *United States v Hitt*, 473 F3d 146, 155 (CA 5, 2006), *Freytag v Internal Revenue Comm'r*, 501 US 868, 896; 111 S Ct 2631; 115 L Ed 2d 764 (1991) (Scalia, J., concurring), and *Peretz v United States*, 501 US 923, 936-937; 111 S Ct 2661; 115 L Ed 2d 808 (1991).

[13] *Vaughn*, 291 Mich App at 196-197.

[14] *Id.* at 197, citing *People v Yost*, 278 Mich App 341, 387; 749 NW2d 753 (2008).

the public benefitted defendant" because a reasonable trial counsel might determine "that the potential jurors will be more forthcoming in their responses when the courtroom is closed, that the proceedings will be less likely to be tainted by outside influences, or . . . [that] it will expedite the proceedings."[15]

This Court granted defendant's application for leave to appeal, limited to the following issues:

> (1) whether the defendant was denied his right to a public trial pursuant to US Const, Am VI, and Const 1963, art 1, § 20, where the Wayne Circuit Court excluded persons other than jurors from the courtroom during the jury voir dire, see *Presley v Georgia*, 558 US 209; 130 S Ct 721; 175 L Ed 2d 675 (2010); (2) whether the defendant, by failing to object, forfeited or waived any error resulting from the exclusion of the public from the courtroom during the jury voir dire, and, if so, whether trial counsel rendered ineffective assistance in failing to object; (3) whether, if some structural errors can be forfeited, the denial of the right to a public trial is among those forfeitable errors; and (4) whether the defendant is entitled to a new trial as a consequence of the trial court's exclusion of the public during the jury voir dire.[16]

II. STANDARD OF REVIEW

Defendant claims that the circuit court violated his constitutional right to a public trial when it closed the courtroom during voir dire.[17] Alternatively, defendant claims that his trial counsel's failure to object to the courtroom's closure rendered the assistance of his counsel constitutionally deficient.[18] Whether the circuit court violated defendant's right to a public trial pre-

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[15] *Vaughn*, 291 Mich App at 197.

[16] *People v Vaughn*, 490 Mich 887 (2011).

[17] See US Const, Am VI; Const 1963, art 1, § 20.

[18] See US Const, Am VI; Const 1963, art 1, § 20.

sents a question of constitutional law.[19] Whether defendant was denied the effective assistance of counsel presents a mixed question of fact and constitutional law.[20] We review for clear error a circuit court's findings of fact.[21] We review de novo questions of constitutional law.[22]

III. RIGHT TO A PUBLIC TRIAL

The right to a public trial "has its roots in our English common law heritage."[23] The Sixth Amendment of the United States Constitution expressly enumerates this right and states that a criminal defendant "shall enjoy the right to a . . . public trial . . . . " The Sixth Amendment right to a public trial is incorporated to the states by the Due Process Clause of the Fourteenth Amendment.[24] Additionally, article 1, § 20 of the 1963 Michigan Constitution guarantees that a criminal defendant "shall have the right to a . . . public trial . . . . "[25] That the right to a public trial also encom-

[19] *United States v Osborne*, 68 F3d 94, 98 (CA 5, 1995).

[20] *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

[21] *Id.*

[22] *Id.*

[23] *In re Oliver*, 333 US 257, 266; 68 S Ct 499; 92 L Ed 682 (1948).

[24] *Presley*, 558 US at 212, citing *Oliver*, 333 US at 273.

[25] This right has existed in every constitution that the people of Michigan have adopted. Const 1835, art 1, § 10 ("In all criminal prosecutions, the accused shall have the right to a . . . public trial . . . ."); Const 1850, art 6, § 28 ("In every criminal prosecution, the accused shall have the right to a . . . public trial . . . ."); Const 1908, art 1, § 19 ("In every criminal prosecution, the accused shall have the right to a . . . public trial . . . .").

Defendant suggested at oral argument that the right to a public trial under the Michigan Constitution is broader than the right to a public trial under the United States Constitution because judges in Michigan are elected, rather than appointed. Compare Const 1963, art 6, §§ 2, 8, 11, and 16 (concerning the election of Supreme Court justices, Court of

passes the right to public voir dire proceedings is "well

Appeals judges, circuit judges, and probate judges, respectively) with US Const, art II, § 2 (concerning the executive appointment of federal judges). "Our goal in construing our Constitution is to discern the original meaning attributed to the words of a constitutional provision by its ratifiers," the people, who "are understood to have accepted the words employed in a constitutional provision in the sense most obvious to the common understanding and to have 'ratified the instrument in the belief that that was the sense designed to be conveyed.' " *People v Nutt*, 469 Mich 565, 573-574; 677 NW2d 1 (2004), quoting 1 Cooley, Constitutional Limitations (6th ed), p 81. In determining whether the Michigan Constitution affords more expansive rights than the Constitution of the United States for identically worded phrases and provisions, we have observed that "an expansion of the Michigan Constitution beyond federal protections for identically worded phrases and provisions" is appropriate only when "such protections [are] deeply rooted in the document." *People v Pickens*, 446 Mich 298, 316; 521 NW2d 797 (1994). Of course, the interpretation of federal provisions by the Supreme Court of the United States is relevant to applying similarly worded provisions in the Michigan Constitution, but only to the extent that we believe the Supreme Court's interpretation accurately conveys the original meaning of the Michigan Constitution. See *Harvey v Michigan*, 469 Mich 1, 6 n 3; 664 NW2d 767 (2003).

Defendant points to language in a previous opinion of this Court suggesting that the elective nature of judicial office "adds a dimension to the societal interests involved" in the public's "concern" over criminal proceedings. *Detroit Free Press v Recorder's Court Judge*, 409 Mich 364, 386; 294 NW2d 827 (1980). While there are societal interests in the fact that the people of Michigan have retained the right to elect their judicial officers, we reject the notion that these societal interests confer any greater, or lesser, constitutional protections than those guaranteed by the federal constitution. Indeed, the public interest in having criminal proceedings open is universal and simply does not depend on any particular judicial selection process. Whether judges are elected or appointed, the right to a public trial exists "as a safeguard against *any* attempt to employ our courts as instruments of persecution." *Oliver*, 333 US at 270 (emphasis added). Thus, defendant has not shown that an expansion of a defendant's protections beyond the rights accorded him under the Sixth Amendment is "deeply rooted" in article 1, § 20 to such an extent that the people ratifying the 1963 Michigan Constitution understood the Michigan Constitution to afford greater protections than the Sixth Amendment. Nor has defendant shown that the drafters of the 1963 Michigan Constitution had, or conveyed to the ratifiers, any intent to expand the protections of article 1, § 20 beyond those of the Sixth

settled."[26]

Although the Sixth Amendment right "is the right of the accused," a member of the public can invoke the right to a public trial under the First Amendment.[27] "The extent to which the First and Sixth Amendment public trial rights are coextensive is an open question, and it is not necessary here to speculate whether or in what circumstances the reach or protections of one might be greater than the other."[28] The existence of this implied First Amendment right enjoyed by members of the public precludes a criminal defendant from enjoying a constitutional right to a *private* trial, even if he waives his Sixth Amendment right to a public trial.[29] Because this case involves "the *accused* who invoked his right to a public trial," albeit after the fact, this case proceeds solely under the Sixth Amendment.[30]

Amendment. Accordingly, we decline to hold that the right to a public trial is more expansive under the Michigan Constitution than it is under the United States Constitution.

[26] *Presley*, 558 US at 213. In *Press-Enterprise Co v Superior Court of California, Riverside Co*, 464 US 501, 510; 104 S Ct 819; 78 L Ed 2d 629 (1984) (*Press-Enterprise I*), the Supreme Court of the United States held that the implied First Amendment right provided citizens with a "presumption of openness" during voir dire that could only be overcome under rare circumstances. *Presley* applied this holding of *Press-Enterprise I* to a Sixth Amendment claim because " 'there can be little doubt that the explicit Sixth Amendment right of the accused is no less protective of a public trial than the implicit First Amendment right of the press and public.' " *Presley*, 558 US at 212, quoting *Waller v Georgia*, 467 US 39, 46; 104 S Ct 2210; 81 L Ed 2d 31 (1984).

[27] *Presley*, 558 US at 212.

[28] *Id*. at 213.

[29] *Singer v United States*, 380 US 24, 35; 85 S Ct 783; 13 L Ed 2d 630 (1965) ("[A]lthough a defendant can, under some circumstances, waive his constitutional right to a public trial, he has no absolute right to compel a private trial[.]"), citing *United States v Kobli*, 172 F2d 919, 924 (CA 3, 1949).

[30] *Presley*, 558 US at 212 (emphasis added).

A defendant's Sixth Amendment right to a public trial is limited, and there are circumstances that allow the closure of a courtroom during any stage of a criminal proceeding, even over a defendant's objection:

> "[T]he party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure."[31]

If there is a timely assertion of the Sixth Amendment public trial right, the remedy for a violation must be "appropriate to the violation," although "the defendant should not be required to prove specific prejudice in order to obtain relief . . . ."[32]

Although the existence of the Sixth Amendment right to a public trial during voir dire is not questioned, neither this Court nor the Supreme Court of the United States has squarely considered whether the right can be forfeited or waived by a defendant's failure to assert the right in a timely fashion. We turn now to this question.

A. PRESERVATION OF RIGHT TO A PUBLIC TRIAL

This Court "has long recognized the importance of preserving issues for appellate review."[33] As a result, "[t]his Court disfavors consideration of unpreserved claims of error," even unpreserved claims of constitu-

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[31] *Id.* at 214, quoting *Waller*, 467 US at 48 (alteration in original).

[32] *Waller*, 467 US at 49-50 (holding that the appropriate remedy for the violation of the public trial right during a pretrial suppression hearing is a new suppression hearing and not necessarily a new trial).

[33] *Carines*, 460 Mich at 762.

tional error.[34] In *People v Carines*, this Court adopted the forfeiture standard articulated by the Supreme Court of the United States in *United States v Olano*.[35] Like this Court's jurisprudence, *Olano* reiterated the importance of asserting a constitutional right in a timely manner:

> "No procedural principle is more familiar to this Court than that a constitutional right," or a right of any other sort, "may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it."[36]

Thus, the failure to assert a constitutional right ordinarily constitutes a forfeiture of that right.[37] In analyzing a forfeited claim of error, a defendant is not entitled to relief unless he can establish (1) that the error occurred, (2) that the error was "plain," (3) that the error affected substantial rights, and (4) that the error either resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings.[38]

Both parties assert that this Court should not follow the *Carines* forfeiture rule when examining a defendant's Sixth Amendment right to a public trial. We turn

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[34] *Id.* at 761, 764-765.

[35] *Id.* at 763-764, citing *United States v Olano*, 507 US 725; 113 S Ct 1770; 123 L Ed 2d 508 (1993). Although *Olano* involved application of the Federal Rules of Criminal Procedure regarding issue preservation, a state procedural requirement can bar an assertion of federal constitutional error when the procedural requirement is "reasonable" and "clearly announced to defendant and counsel . . . ." *Henry v Mississippi*, 379 US 443, 448 n 3; 85 S Ct 564; 13 L Ed 2d 408 (1965).

[36] *Olano*, 507 US at 731, quoting *Yakus v United States*, 321 US 414, 444; 64 S Ct 660; 88 L Ed 834 (1944).

[37] *Olano*, 507 US at 733 ("[F]orfeiture is the failure to make the timely assertion of a right . . . .").

[38] *Carines*, 460 Mich at 763, citing *Olano*, 507 US at 731-734, 736-737.

first to defendant's claim that his Sixth Amendment public trial right is not a forfeitable right, but instead can only be abandoned with his personal and informed waiver of the right.

"What suffices for waiver depends on the nature of the right at issue."[39] Although the violation of the right to a public trial is among the limited class of constitutional violations that are structural in nature,[40] this fact alone does not require that the *waiver* of that right be personal and informed. Indeed, in *Johnson v United States*, the Supreme Court of the United States rejected the argument that *Olano* does not apply to a claimed structural error because it had "no authority" to create "out of whole cloth" an exception to the traditional forfeiture analysis simply because the claimed error was structural.[41]

We likewise decline to create such an exception for the right to a public trial. While certain constitutional rights are preserved absent a personal waiver,[42] those

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[39] *New York v Hill*, 528 US 110, 114; 120 S Ct 659; 145 L Ed 2d 560 (2000).

[40] *Neder v United States*, 527 US 1, 8; 119 S Ct 1827; 144 L Ed 2d 35 (1999); *Waller*, 467 US at 49 ("[D]efendant should not be required to prove specific prejudice in order to obtain relief . . . .").

[41] *Johnson v United States*, 520 US 461, 466; 117 S Ct 1544; 137 L Ed 2d 718 (1997).

[42] *Hill*, 528 US at 114 ("For certain fundamental rights, the defendant must personally make an informed waiver."), citing *Johnson v Zerbst*, 304 US 458, 464-465; 58 S Ct 1019; 82 L Ed 1461 (1938) (right to counsel), and *Brookhart v Janis*, 384 US 1, 7-8; 86 S Ct 1245; 16 L Ed 2d 314 (1966) (right to plead not guilty). The concurring justice appears to favor a general rule of automatic reversal for *all* unpreserved structural errors, subject to exceptions when the ultimate determination of guilt remains reliable despite the structural error. Yet this distinction fails fully to acknowledge the importance of issue preservation to this state's jurisprudence and would situate most *forfeited* structural errors identically with preserved structural errors. This argument is particularly unpersuasive given that the Supreme Court of the United States has already

rights constitute a narrow class of foundational constitutional rights that "are of central importance to the quality of the guilt-determining process and the defendant's ability to participate in that process."[43] Indeed, each of the foundational constitutional rights that are preserved absent a personal waiver necessarily implicates a defendant's *other* constitutional rights.[44] For

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identified, in *Hill*, two constitutional rights distinct from the class of "structural errors" that *do* fall outside the ordinary issue preservation requirements *because* they require a personal waiver. Moreover, application of a plain-error analysis to unpreserved structural error does not deny that error "close consideration," as the concurring justice suggests, *post* at 677, especially because the plain-error analysis already requires reviewing courts to consider carefully whether any forfeited error either resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Carines*, 460 Mich at 763, citing *Olano*, 507 US at 736-737.

While the concurring justice recognizes that a structural error may "defy analysis by 'harmless-error' standards," *United States v Gonzalez-Lopez*, 548 US 140, 148-149; 126 S Ct 2557; 165 L Ed 2d 409 (2006) (citation and quotation marks omitted), he fails to take into account that the caselaw of the Supreme Court of the United States has expressly distinguished plain-error analysis from harmless-error analysis. For instance, the Court has repeatedly withheld judgment on whether a structural error automatically satisfies the *third* prong of plain-error analysis, *Puckett v United States*, 556 US 129, 140; 129 S Ct 1423; 173 L Ed 2d 266 (2009), implying that structural errors do not entirely defy plain-error analysis, even if they *do* defy *harmless*-error analysis. Nor does this Court's opinion in *People v Duncan*, 462 Mich 47; 610 NW2d 551 (2000), compel the rule that the concurring justice would adopt. While *Duncan* acknowledged that "[s]tructural errors . . . are intrinsically harmful," *id.* at 51, this statement is consistent with applying our forfeiture rules because we explicitly follow *Duncan* when applying the third *Carines* prong, as discussed later in this opinion, and *Duncan* does not expressly state that structural errors defy application of plain-error analysis.

[43] *State v Butterfield*, 784 P2d 153, 156 (Utah, 1989).

[44] We think the concurring justice incorrectly suggests that our opinion limits the class of rights that exist outside our ordinary preservation requirements to those specifically identified in *Hill*—the right to counsel and the right to plead not guilty. However, we do not read *Hill* as necessarily limiting the class to those two rights. Instead, we compare the

example, the purpose of the right to counsel "would be nullified by a determination that an accused's ignorant failure to claim his rights removes the protection of the Constitution"[45] because it is counsel's responsibility to "protect an accused from conviction resulting from his own ignorance of his legal and constitutional rights . . . ."[46] Because the right to counsel "invokes, of itself, the protection of a trial court,"[47] preservation of the right does not require an affirmative invocation. Similarly, a waiver of the right to plead not guilty "would shut off the defendant's constitutional right to confront and cross-examine the witnesses against him which he would have an opportunity to do under a plea of not guilty."[48] The right to a public trial is "of a different order" because the violation of that right "does not necessarily affect qualitatively the guilt-determining process or the defendant's ability to participate in the process."[49]

Neither the Supreme Court of the United States nor this Court has held that the Sixth Amendment right to a public trial is so fundamental to the protection of a defendant's other constitutional rights that it falls within this exceedingly narrow class of rights that are placed outside the general preservation requirements and require a personal and informed waiver. Defendant cites two foreign appellate cases, *State v Njonge*[50] and

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public trial right to *Hill*'s examples to determine whether the public trial right is also among the narrow class of foundational constitutional rights that exist outside our ordinary preservation requirements.

[45] *Johnson*, 304 US at 465.

[46] *Id.*

[47] *Id.*

[48] *Brookhart*, 384 US at 8.

[49] *Butterfield*, 784 P2d at 156.

[50] *State v Njonge*, 161 Wash App 568; 255 P3d 753 (2011).

Commonwealth v Lavoie.[51] Neither is persuasive. *Njonge* states that a criminal defendant may raise his public trial right "for the first time on appeal."[52] However, the underlying caselaw—a plurality opinion of the Washington Supreme Court—merely explained that a defendant's failure to object does not "constitute a waiver of his right to a public trial."[53] That statement did not address, much less compel, a personal and intelligent waiver.[54] While *Lavoie* does stand for the proposition that a defendant's "knowing agreement is required for the valid waiver of the right to a public trial,"[55] neither *Lavoie* nor the cases it cited examined the right within the framework of the *other* rights that require a personal and knowing waiver. Accordingly, we do not find it persuasive in explaining *why* the right to a public trial is within the limited class of constitutional rights that require a waiver to be personal and knowing.

Defendant also claims that a Sixth Amendment public trial right should be excepted from our traditional preservation rules because "the whole body politic," not just a criminal defendant, "suffers an actual injury" in the denial of the public trial right.[56] Defendant notes language in this Court's opinion in *Detroit Free Press v Recorder's Court Judge* that posits that a defendant "cannot waive his right to a public trial in absolute

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[51] *Commonwealth v Lavoie*, 80 Mass App Ct 546; 954 NE2d 547 (2011).

[52] *Njonge*, 161 Wash App at 574.

[53] *State v Strode*, 167 Wash 2d 222, 229; 217 P3d 310 (2009).

[54] Another basis for differentiating *Njonge* from the instant case is that *Njonge* analyzed the defendant's claim exclusively under the Washington Constitution rather than the Sixth Amendment of the United States Constitution. *Njonge*, 161 Wash App at 574.

[55] *Lavoie*, 80 Mass App Ct at 554.

[56] *People v Yeager*, 113 Mich 228, 230; 71 NW 491 (1897) (citation and quotation marks omitted).

derogation of the public interest."[57] From this language, defendant argues that a defendant need not invoke his right to a public trial right in order to preserve it.

Defendant's argument is problematic because it conflates his *Sixth Amendment* right to a public trial with the related, but distinct, *First Amendment* right that the public enjoys. It is true that a defendant cannot waive a public trial "in *absolute* derogation of the public interest."[58] However, this "derogation of the public interest" only speaks to the fact that a defendant cannot waive the public's First Amendment right and *demand* a *private* trial. Thus, a defendant cannot affirmatively seek to exclude the public from his trial unless he can overcome the public's First Amendment right. That right exists separately from defendant's Sixth Amendment right, and its mere existence does not prevent this Court from enforcing its traditional rules of forfeiture and waiver when reviewing a defendant's claim that his Sixth Amendment right has been violated.

This Court's decision in *Detroit Free Press* failed to recognize the distinction between the separate but related First and Sixth Amendment rights. *Detroit Free Press* acknowledged that "[f]rom a literal standpoint, the Sixth Amendment provides the right to a public trial to 'the accused,' "[59] and it observed that "[t]he societal interests served by [the right to a public trial] are separate from and at times may be in opposition to the interests of the accused."[60] However, it also suggested that these societal interests are encompassed in the Sixth Amendment rather than the First Amend-

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[57] *Detroit Free Press*, 409 Mich at 385.

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

[59] *Id.* at 382.

[60] *Id*. at 385.

ment. For instance, it noted that "the Sixth Amendment has been held to implicate interests beyond those of the accused"[61] and emphasized that the Sixth Amendment protections provided to the accused were not intended "to denigrate the interests of the public which are at the root of the public-trial guarantee."[62]

United States Supreme Court caselaw undermines the *Detroit Free Press* analysis to the extent that *Detroit Free Press* rooted the public's right to public trial proceedings in the Sixth Amendment instead of the First Amendment.[63] The *Detroit Free Press* decision was issued shortly after the Supreme Court issued *Richmond Newspapers, Inc v Virginia*,[64] which identified the public's right of access to trial proceedings as within the First Amendment.[65] Subsequently, in *Press-Enterprise*

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[61] *Id*. at 384.

[62] *Id.* at 389.

[63] Justice RYAN's dissenting opinion recognized that "the resolution of this case is governed by the First Amendment of the United States Constitution as it is made applicable to the states through the Fourteenth Amendment," and he believed that the majority opinion's emphasis on the Sixth Amendment and common law "assures the irrelevance of today's decision and fuels the increasingly widespread notion that state courts cannot be depended upon to adequately address and resolve cases involving major Federal constitutional issues." *Id.* at 399 (RYAN, J., dissenting). Justice LEVIN's concurring opinion also acknowledged that the majority "should . . . recognize the First Amendment in the disposition of this case." *Id.* at 395 (LEVIN, J., concurring).

[64] *Richmond Newspapers, Inc v Virginia*, 448 US 555; 100 S Ct 2814; 65 L Ed 2d 973 (1980).

[65] Although there was no majority opinion in *Richmond Newspapers*, a majority of the Court specifically identified the relevant right as a First Amendment right. See *Richmond Newspapers*, 448 US at 577 (Burger, C.J., lead opinion on behalf of himself and White and Stevens, JJ.) ("The right of access to places traditionally open to the public, as criminal trials have long been, may be seen as assured by the amalgam of the First Amendment guarantees of speech and press; and their affinity to the right of assembly is not without relevance."); *id.* at 585 (Brennan, J., concurring, on behalf of himself and Marshall, J.) ("[T]he

I, the Court clarified that whether voir dire must be open "focuses on First . . . Amendment values and the historical backdrop against which the First Amendment was enacted."[66] Similarly, when a defendant "requested a *closed* preliminary hearing," the Court emphasized that "the right asserted here is that of the public under the First Amendment."[67] Because a defendant's Sixth Amendment right exists separately from the public's First Amendment right, the existence of the public's First Amendment right simply has no bearing on whether to apply our forfeiture analysis to a defendant's Sixth Amendment claim, and the erroneous conflation of these rights by *Detroit Free Press* does not provide a basis for creating an exception to our traditional rules of forfeiture and waiver.[68]

Alternatively, the prosecution and the Attorney General (acting as amicus curiae) claim, and the Court of Appeals held, that a defendant's Sixth Amendment right to a public trial is not self-executing and, therefore, the failure to assert the right at the time of closure

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First Amendment—of itself and as applied to the States through the Fourteenth Amendment—secures . . . a public right of access [;therefore,] I agree with those of my Brethren who hold that, without more, agreement of the trial judge and the parties cannot constitutionally close a trial to the public."); *id.* at 599 (Stewart, J., concurring) ("[T]he First and Fourteenth Amendments clearly give the press and the public a right of access to trials themselves, civil as well as criminal.").

[66] *Press-Enterprise I*, 464 US at 509 n 8.

[67] *Press-Enterprise Co v Superior Court of California, Riverside Co*, 478 US 1, 7; 106 S Ct 2735; 92 L Ed 2d 1 (1986) (*Press-Enterprise II*).

[68] To the extent *Detroit Free Press* deviates from these holdings on a matter of federal constitutional interpretation, we must follow the holdings of the Supreme Court of the United States rather than our own caselaw. See *People v Gillam*, 479 Mich 253, 261; 734 NW2d 585 (2007). In any event, the nuanced relationship between the First and Sixth Amendment rights expressed in the cases of the Supreme Court of the United States is a better reasoned approach than that of *Detroit Free Press*.

results in the waiver of that right.[69] Indeed, many other jurisdictions have concluded that a defendant's public trial right is waived when it is not asserted contemporaneously with the courtroom's closure.[70] To support the conclusion that the right is waived by silence, the prosecution points to language in *United States v Levine*, wherein the Supreme Court of the United States observed:

> Due regard generally for the public nature of the judicial process does not require disregard of the solid demands of the fair administration of justice in favor of a party who, at the appropriate time and acting under advice of counsel, saw no disregard of a right, but raises an abstract claim only as an afterthought on appeal.[71]

Although *Levine* examined a defendant's right to open criminal contempt proceedings under the Due Process Clause of the Fifth Amendment,[72] a subsequent Supreme Court opinion, *Peretz v United States*, cited *Levine* in dictum for the proposition that the "failure to object to [the] closing of [the] courtroom is [a] waiver of [the] right to public trial."[73]

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[69] Although the Court of Appeals did not expressly use the term "waiver" in its core holding, it explained that "the failure to timely assert the right to a public trial forecloses the later grant of relief," and parenthetically quoted caselaw that discussed the matter in terms of waiver. *Vaughn*, 291 Mich App at 196, quoting *Hitt*, 473 F3d at 155 ("Where a defendant, with knowledge of the closure of the courtroom, fails to object, that defendant waives his right to a public trial.").

[70] See, e.g., *Robinson v State*, 410 Md 91, 108; 976 A2d 1072 (2009) ("[W]e are in accord with the majority of the federal and state courts that a claimed deprivation of the right to a public trial can be waived by counsel's failure to lodge a contemporaneous objection to the closure.").

[71] *Levine*, 362 US at 619-620.

[72] *Id.* at 616.

[73] *Peretz*, 501 US at 936. The core holding in *Peretz* was that "a defendant has no constitutional right to have an Article III judge preside at jury selection if the defendant has raised no objection to the judge's absence." *Id.*

We decline to follow the dictum of the Supreme Court of the United States because it conflates the concepts of waiver and forfeiture that we have historically recognized in Michigan. Both this Court and the Supreme Court of the United States have distinguished the failure to assert a right—forfeiture—from the affirmative waiver of a right.[74] *Olano* explained that "[w]aiver is different from forfeiture" in that waiver is "the '*intentional* relinquishment or abandonment of a known right.' "[75] A defendant who waives a right extinguishes the underlying error and may not seek appellate review of a claimed violation of that right.[76] "Mere forfeiture, on the other hand, does not extinguish an 'error.' "[77]

The prosecution and the Attorney General claim that we should adopt an exception to this traditional definition of "forfeiture" because any result other than a waiver will encourage defense counsel to withhold objection as an appellate parachute. However, this argument fails to take into consideration the heightened standard of review already applied to forfeited claims of error. *Carines* requires a defendant who has forfeited his claim of error to prove (1) that the error occurred, (2) that the error was "plain," (3) that the error affected substantial rights, and (4) that the error either resulted in the conviction of an actually innocent defendant or

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[74] Of course, appellate courts have not always used the terms with precision. See *Freytag*, 501 US at 894 n 2 (Scalia, J., concurring) ("The two [i.e., waiver and forfeiture] are really not the same, although our cases have so often used them interchangeably that it may be too late to introduce precision.").

[75] *Olano*, 507 US at 733 (emphasis added) (citation omitted).

[76] *Carter*, 462 Mich at 215, citing *United States v Griffin*, 84 F3d 912, 924 (CA 7, 1996), and *Olano*, 507 US at 733-734.

[77] *Carter*, 462 Mich at 215, citing *Olano*, 507 US at 733, and *Griffin*, 84 F3d at 924-926.

seriously affected the fairness, integrity, or public reputation of judicial proceedings.[78] In other words, the prosecution and the Attorney General have not shown that the *Carines* forfeiture requirements permit an appellate parachute in this circumstance.[79]

Because neither party has persuasively shown that this Court should deviate from the general *Carines* rule regarding forfeited constitutional error, we hold that *Carines* applies to defendant's forfeited claim that the trial court violated his Sixth Amendment public trial right. The Court of Appeals erred by concluding that defendant's failure to assert his Sixth Amendment right to a public trial *necessarily* "forecloses the later grant of relief."[80]

B. APPLICATION

As stated, in order to receive relief on his forfeited claim of constitutional error, defendant must establish

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[78] *Carines*, 460 Mich at 763, citing *Olano*, 507 US at 731-734, 736-737.

[79] Likewise, we do not consider persuasive the prosecution's comparisons to the right against compelled self-incrimination and the right of self-representation, which must be asserted or they are waived. See *Roberts v United States*, 445 US 552, 559; 100 S Ct 1358; 63 L Ed 2d 622 (1980) ("The Fifth Amendment privilege against compelled self-incrimination is not self-executing."); *Munkus v Furlong*, 170 F3d 980, 983 (CA 10, 1999) ("[B]ecause the right to self-representation arises only when a defendant knowingly and intelligently waives the right to counsel, courts consistently have discussed the right to self-representation in terms of invoking or asserting it."). In both of those situations, unlike the right to a public trial, the defendant's own actions *necessarily* result in *either* the assertion *or* the waiver of the right; there is simply no potential for "forfeiture." Any invocation of the right to self-representation necessarily requires the waiver of the right to counsel, which must be personal and knowing. See *Faretta v California*, 422 US 806, 835; 95 S Ct 2525; 45 L Ed 2d 562 (1975). Similarly, by choosing to make incriminating statements, a defendant necessarily waives the right against self-incrimination.

[80] *Vaughn*, 291 Mich App at 196.

(1) that the error occurred, (2) that the error was "plain," (3) that the error affected substantial rights, and (4) that the error either resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings.[81]

The first two prongs of the analysis are straightforward. In this case, the circuit court ordered the courtroom closed before voir dire. The Supreme Court of the United States has stated that the " 'party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced . . . .' "[82] Because the circuit court failed to advance that type of interest before closing the courtroom, we conclude that an error occurred.[83] We also conclude that the error was plain, that is, "clear or obvious."[84] It is readily apparent from the record that the circuit court closed the courtroom during voir dire. It is also "well settled" that the Sixth Amendment right to a public trial extends to voir dire.[85]

The third *Carines* prong requires a defendant to show that the error "affected substantial rights."[86] For this prong to be satisfied, *Olano* requires the error to have "affected the outcome of the . . . proceedings."[87] Similarly, this Court has stated that "the proper interpretation of the term 'prejudice' in the context of issue

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[81] *Carines*, 460 Mich at 763, citing *Olano*, 507 US at 731-734, 736-737.

[82] *Presley*, 558 US at 214, quoting *Waller*, 467 US at 48.

[83] Although the court officer, not the circuit court, ordered spectators "to clear the courtroom until after the selection of the new jury," the court officer's order came immediately after the circuit court ordered the jury brought into the courtroom. Accordingly, it is apparent from the record that the court officer's action is attributable to the court.

[84] *Carines*, 460 Mich at 763.

[85] *Presley*, 558 US at 213.

[86] *Carines*, 460 Mich at 765.

[87] *Olano*, 507 US at 734.

preservation for plain error may be equated with the longstanding state precedent of outcome determination."[88] Thus,

> a plain, *unpreserved* error may not be considered by an appellate court for the first time on appeal unless the error could have been decisive of the outcome or unless it falls under the category of cases, yet to be clearly defined, where prejudice is presumed or reversal is automatic.[89]

While the Supreme Court of the United States has specifically reserved judgment on whether an unpreserved structural error automatically affects a defendant's substantial rights,[90] this Court's decision in *People v Duncan* has explained that structural errors "are intrinsically harmful, without regard to their effect on the outcome . . . ."[91] Accordingly, our caselaw suggests that a plain structural error satisfies the third *Carines* prong.

Nevertheless, even if defendant can show that the error satisfied the first three *Carines* requirements, we "must exercise . . . discretion" and only grant defendant a new trial if the error "resulted in the conviction of an actually innocent defendant" or seriously affected the fairness, integrity, or public reputation of judicial proceedings.[92] Although denial of the right to a public trial

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[88] *People v Grant*, 445 Mich 535, 553; 520 NW2d 123 (1994).

[89] *Id.*

[90] See *Puckett*, 556 US at 140, quoting *Arizona v Fulminante*, 499 US 279, 310; 111 S Ct 1246; 113 L Ed 2d 302 (1991) ("This Court has several times declined to resolve whether 'structural' errors—those that affect 'the framework within which the trial proceeds,'—automatically satisfy the third prong of the plain-error test.") (citation omitted).

[91] *Duncan*, 462 Mich at 51.

[92] *Carines*, 460 Mich at 763. Because defendant has not argued that he is actually innocent, we review his claim of error only with regard to whether his conviction seriously affected the fairness, integrity, or public reputation of judicial proceedings.

is a structural error,[93] it is still subject to this requirement.[94] While "any error that is 'structural' is likely to have *an* effect on the fairness, integrity or public reputation of judicial proceedings," the plain-error analysis requires us to "consider whether an error '*seriously*' affected those factors."[95]

The United States Court of Appeals for the Second Circuit has recognized that "it does not follow that every temporary instance of unjustified exclusion of the public—no matter how brief or trivial, and no matter how inconsequential the proceedings that occurred during an unjustified closure—would require that a conviction be overturned."[96] While the Second Circuit's analysis "does not dismiss a defendant's claim on the grounds that the defendant was guilty anyway or that he did not suffer 'prejudice' or 'specific injury,' " it examines "whether the actions of the court and the effect that they had on the conduct of the trial deprived the defendant—whether otherwise innocent or guilty—of the protections conferred by the Sixth Amendment."[97] The goals sought by these protections include (1) ensuring a fair trial, (2) reminding the prosecution and court of their responsibility to the accused and the importance of their functions, (3) encouraging witnesses to come forward, and (4) discouraging perjury.[98]

In reviewing the closure of a courtroom during the first day of jury selection, the Second Circuit determined that the third and fourth protected values were

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[93] *Neder*, 527 US at 8.

[94] *Barrows v United States*, 15 A3d 673 (DC, 2011).

[95] *Id.* at 679-680 (emphasis added).

[96] *Gibbons v Savage*, 555 F3d 112, 120 (CA 2, 2009).

[97] *United States v Gupta*, 650 F3d 863, 867 (CA 2, 2011).

[98] *Peterson v Williams*, 85 F3d 39, 43 (CA 2, 1996), citing *Waller*, 467 US at 46-47.

"not implicated by voir dire because no witnesses testified."[99] The Second Circuit then analyzed the remaining two protected values within the particular circumstances of the case before it and concluded that "limiting presence at the voir dire proceedings to only the attorneys, judge, defendant, and prospective jurors for one afternoon did not subvert these values."[100]

A review of the circuit court transcript during defendant's voir dire shows that both parties engaged in a vigorous voir dire process, that there were no objections to either party's peremptory challenges of potential jurors, and that each party expressed satisfaction with the ultimate jury chosen. Moreover, because "the *venire* is drawn from the public itself," individual veniremembers "remain public witnesses during much of the *voir dire* proceedings, listening to the court's questions and observing the conduct of counsel, until such time as they are chosen for the jury, disqualified, or excused."[101] Thus, "the presence of the *venire* lessens the extent to which [the court's] closure implicates the defendant's public trial right because the *venire*, derived from and representative of the public, guarantees that the *voir dire* proceedings will be subject to a substantial degree of continued public review."[102] Because the closure of the courtroom was limited to a vigorous voir dire process that ultimately yielded a jury that satisfied both parties, we cannot conclude that the closure "seriously

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[99] *Gibbons*, 555 F3d at 121.

[100] *Id.*

[101] *Gupta*, 650 F3d at 870.

[102] *Id.* at 870-871. The concurring justice suggests that this Court's acknowledgment of this fact risks that "a defendant will never be able to satisfy the requirements to overcome forfeiture under the plain-error analysis." *Post* at 683. However, we do not hold that the presence of other veniremembers is *dispositive* to the analysis of the fourth *Carines* prong, only that it is *relevant* to that analysis.

affected the fairness, integrity, or public reputation of judicial proceedings."[103] Defendant is not entitled to a new trial on the basis of his forfeited claim of error.

IV. INEFFECTIVE ASSISTANCE OF COUNSEL

The Sixth Amendment also guarantees a criminal defendant's right "to have the Assistance of Counsel for his defence."[104] The Supreme Court of the United States has recognized that " 'the right to counsel is the right to the effective assistance of counsel.' "[105] The right to the effective assistance of counsel is incorporated to the states by the Due Process Clause of the Fourteenth Amendment.[106]

In *Strickland v Washington*, the Supreme Court of the United States stated that in order to receive a new trial on the basis of ineffective assistance of counsel, a defendant must establish that "counsel's representation fell below an objective standard of reasonableness"[107] and that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[108] Defendant claims that his counsel's failure to object to the court-

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[103] *Carines*, 460 Mich at 774.

[104] Additionally, article 1, § 20 of the 1963 Michigan Constitution guarantees that a criminal defendant "shall have the right . . . to have the assistance of counsel for his or her defense . . . ." "[T]he intention underlying the Michigan Constitution does not afford greater protection than federal precedent with regard to a defendant's right to counsel when it involves a claim of ineffective assistance of counsel." *Pickens*, 446 Mich at 302.

[105] *Strickland*, 466 US at 686, quoting *McMann v Richardson*, 397 US 759, 771 n 14; 90 S Ct 1441; 25 L Ed 2d 763 (1970).

[106] *Powell v Alabama*, 287 US 45; 53 S Ct 55; 77 L Ed 158 (1932).

[107] *Strickland*, 466 US at 688.

[108] *Id.* at 694.

room's closure during voir dire entitles him to a new trial on the basis of ineffective assistance of counsel.

A. DEFICIENT PERFORMANCE PRONG

Defense counsel should be "strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment."[109] The inquiry into whether counsel's performance was reasonable is an objective one and requires the reviewing court to "determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance."[110] This standard requires a reviewing court "to affirmatively entertain the range of possible 'reasons . . . counsel may have had for proceeding as they did.' "[111]

The Court of Appeals panel did just that in reviewing defendant's claim. The panel reasoned that "[d]efendant's trial counsel might have reasonably concluded that proceeding with a jury voir dire that was closed to the public benefitted defendant" because "[r]easonable trial counsel might conclude that the potential jurors will be more forthcoming in their responses when the courtroom is closed, that the proceedings will be less likely to be tainted by outside influences, or might simply find the procedure preferable because it will expedite the proceedings."[112]

The Court of Appeals' conclusion is consistent with the conclusion of the United States Court of Appeals for

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[109] *Id.* at 690.

[110] *Id.*

[111] *Cullen v Pinholster*, 563 US ___, ___; 131 S Ct 1388, 1407; 179 L Ed 2d 557 (2011), quoting *Pinholster v Ayers*, 590 F3d 651, 692 (CA 9, 2009) (Kozinski, C.J., dissenting).

[112] *Vaughn*, 291 Mich App at 197.

the First Circuit that when analyzing an ineffective assistance of counsel claim, "the strategic advantage that [defendant] received from the individual voir dire taking place in private cannot be ignored."[113] Accordingly, we agree with the Court of Appeals' analysis and its conclusion that defendant is not entitled to relief on his ineffective assistance of counsel claim.

B. PREJUDICE PRONG

Even if defendant had shown that counsel's performance was objectively unreasonable, defendant cannot show that he is entitled to relief on the second *Strickland* prong, which requires this Court to determine whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[114]

Defendant claims that a structural error automatically satisfies the second *Strickland* prong. However, *Strickland* and a companion case, *United States v Cronic*, articulated only a narrow class of situations in which prejudice is presumed for ineffective assistance purposes: "when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding"[115] or "when counsel is burdened by an actual conflict of interest."[116] Otherwise, "actual ineffectiveness claims alleging a deficiency in attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice" because "[t]he government is not responsible for, and

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[113] *Horton v Allen*, 370 F3d 75, 82-83 (CA 1, 2004).

[114] *Strickland*, 466 US at 694.

[115] *United States v Cronic*, 466 US 648, 659 n 25; 104 S Ct 2039; 80 L Ed 2d 657 (1984).

[116] *Strickland*, 466 US at 692.

hence not able to prevent, attorney errors that will result in reversal of a conviction or sentence."[117]

Although this Court has not yet ruled on the issue, the United States Court of Appeals for the Eleventh Circuit and the Georgia and Utah Supreme Courts have held that an ineffective assistance of counsel claim premised on a structural public trial right violation still requires a defendant to demonstrate actual prejudice.[118] The Eleventh Circuit explained:

> We cannot dispense with the prejudice requirement for attorney error of this type without defying the Supreme Court's clear holding that except in three limited circumstances, which are not present here, a defendant must show that any error his counsel committed "actually had an adverse effect on the defense." [*Strickland*, 466 US at 693.] That means he must prove a reasonable probability of a different result.[119]

The Eleventh Circuit elaborated on the concept of prejudice in applying that requirement to the case before it, which involved an ineffective assistance of counsel claim premised on the failure to object when the trial judge closed the courtroom for the victim's testimony:

> [Defendant] cannot show that an objection from his counsel would have caused the factfinder to have a reasonable doubt about his guilt. If counsel had objected in a timely fashion and had persuaded the trial judge not to partially close the courtroom, there is no reason to believe that would have changed the victim's testimony in a way which would have created a reasonable doubt in the jury's mind. The victim could just as well have been a more

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[117] *Id*. at 693.

[118] *Purvis v Crosby*, 451 F3d 734, 741 (CA 11, 2006); *Butterfield*, 784 P2d at 157; *Reid v State*, 286 Ga 484, 487; 690 SE2d 177 (2010).

[119] *Purvis*, 451 F3d at 741.

> sympathetic or credible witness if forced to testify publicly. We do not know, and when we do not know the party with the burden loses, and here that party is [defendant].
>
> Against this logic [defendant] argues that an objection by his trial counsel would have preserved the issue for appeal and led to a reversal of his conviction, which would have been a different result from the affirmance that occurred. There are two flaws with this argument. One is its assumption that the trial judge would have overruled an objection if one had been made. There is as much reason to believe that pointing out the error of his ways to the trial judge would have caused him to mend those ways, thereby depriving [defendant] of the issue on appeal. The second and more fundamental flaw in this argument is that it focuses on the outcome of the appeal, not of the trial. The Supreme Court in *Strickland* told us that when the claimed error of counsel occurred at the guilt stage of a trial (instead of on appeal) we are to gauge prejudice against the outcome of the trial: whether there is a reasonable probability of a different result at trial, not on appeal.[120]

However, the United States Courts of Appeals for the First and Eighth Circuits have ruled that a structural error automatically satisfies the *Strickland* prejudice prong.[121] The First Circuit criticized the Eleventh Circuit's reasoning, explaining that its actual prejudice requirement "is in tension with the Supreme Court's pronouncement that prejudice is presumed in cases of structural error not because the risk of prejudice is high, but because it is impossible to determine the extent of the prejudice."[122]

We conclude that the Eleventh Circuit's reasoning and conclusion is more persuasive. Without distinguishing a properly preserved structural error for which

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[120] *Id.* at 738-739, citing *Strickland*, 466 US at 694-695.

[121] *Owens v United States*, 483 F3d 48, 64 n 14 (CA 1, 2007); *McGurk v Stenberg*, 163 F3d 470, 475 (CA 8, 1998).

[122] *Owens*, 483 F3d at 65 n 14.

reversal is required from an error claimed as ineffective assistance of counsel, counsel can harbor error as an appellate parachute by failing to object to the closure of trial, thereby depriving the trial court of the opportunity to correct the error at the time it occurs. Further, because this is not one of the three circumstances in which the Supreme Court of the United States has held that trial counsel's ineffective assistance automatically results in *Strickland* prejudice, we conclude that an ineffective assistance of counsel claim premised on either counsel's waiver of or failure to object to the Sixth Amendment right to a public trial requires a showing of actual prejudice before the defendant is entitled to relief.

In this case, defendant does not claim that the courtroom's closure during voir dire affected the voir dire process and tainted the ultimate jury chosen. To the contrary, defense counsel actively participated in the voir dire process and expressed satisfaction with the composition of the jury and, thus, we must presume that the resulting jury was a fair and neutral fact-finder. Because defendant cannot show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different,"[123] he is not entitled to relief on his ineffective assistance of counsel claim.

V. CONCLUSION

While a criminal defendant has the constitutional right to a public trial, that right is forfeited when no objection is made at the time of the courtroom's closure to members of the public. As a forfeited claim of constitutional error, it can be redressed if the defendant

[123] *Strickland*, 466 US at 694.

shows that the court's exclusion of members of the public during voir dire was "a plain error that affected substantial rights" and that he either "is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings."[124] Because defendant has not made the required showing in this case, he is not entitled to a new trial on his forfeited claim of error. Nor is he entitled to a new trial on the basis of ineffective assistance of counsel because he has not shown that his counsel's performance was objectively unreasonable or that there was a reasonable probability that any error affected the proceeding's outcome. Accordingly, we vacate the Court of Appeals' opinion to the extent it is inconsistent with this opinion, affirm on alternative grounds the judgment of the Court of Appeals, and affirm defendant's convictions.[125]

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

CAVANAGH, J. (*concurring*). I concur in the majority's result only. I agree with the majority's conclusion that a violation of the right to a public trial, including the right to public voir dire, is structural error. *Neder v*

[124] *Carines*, 460 Mich at 774.

[125] Defendant raised several issues in his application for leave to appeal beyond the limited scope of this Court's order granting leave to appeal: that the trial court erred by denying his motion to suppress the statement that he made to police, that the missing lower court record deprived defendant of his right to appeal, and that counsel rendered ineffective assistance by failing to challenge two jurors during voir dire, failing to call two alibi witnesses, and failing to quash the information. The Court of Appeals concluded that these claims of error were without merit, and we deny defendant's application for leave to appeal on these remaining issues because we are not persuaded that the questions presented should be reviewed by this Court.

United States, 527 US 1, 8; 119 S Ct 1827; 144 L Ed 2d 35 (1999); *Waller v Georgia*, 467 US 39, 49-50; 104 S Ct 2210; 81 L Ed 2d 31 (1984); *Presley v Georgia*, 558 US 209, 213; 130 S Ct 721; 175 L Ed 2d 675 (2010).[1] The majority also correctly notes that neither this Court nor the United States Supreme Court has directly considered whether a defendant can waive or forfeit the erroneous denial of the right to public voir dire. Finally, I agree with the majority's conclusion that the right to public voir dire is not subject to waiver by silence and that the Court of Appeals erred by concluding otherwise.

Although I agree with the majority that a structural error occurred in this case, I do not agree with the majority that *Johnson v United States*, 520 US 461; 117 S Ct 1544; 137 L Ed 2d 718 (1997), definitively established that some structural errors may be subject to a forfeiture analysis. *Johnson* applied plain-error review to the petitioner's argument that a structural error had occurred; however, *Johnson* reserved judgment on whether the error at issue was actually structural in nature. *Id.* at 468-469. Moreover, *Neder*, 527 US at 8-10, interpreted *Johnson* as holding that the error was not

[1] Indeed, as the United States Supreme Court explained in *Waller*, 467 US at 49 n 9, "[w]hile the benefits of a public trial are frequently intangible, difficult to prove, or a matter of chance, the Framers plainly thought them nonetheless real." Accordingly, in the context of the right to public voir dire, MCR 8.116(D) establishes very limited circumstances under which a court may close the courtroom. See, also, *Waller*, 467 US at 48 (explaining that in order to close a courtroom, four requirements must be satisfied: (1) the party seeking closure must advance an overriding interest that is likely to be prejudiced by an open courtroom, (2) the closure must be no broader than necessary to protect that interest, (3) the trial court must consider reasonable alternatives to closing the proceeding, and (4) the trial court must make findings adequate to support the closure). In my view, these strict limitations on courtroom closure indicate the importance placed on the right to a public trial, including voir dire, under *Presley*, 558 US at 212-213.

structural. Thus, I disagree with the majority that, by arguing in favor of automatic reversal, defendant in this case seeks an "exception" to the general rules for issue preservation. *Ante* at 655.

Additionally, the majority misapplies this Court's opinion in *People v Duncan*, 462 Mich 47; 610 NW2d 551 (2000), in analyzing whether the structural error in this case requires automatic reversal. I think that *Duncan* must be closely considered at this step of the analysis, particularly *Duncan*'s statement that

> structural errors . . . are intrinsically harmful, without regard to their effect on the outcome, so as to require automatic reversal. Such an error necessarily renders unfair or unreliable the determining of guilt or innocence. . . . [S]tructural errors deprive defendants of basic protections without which a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence. [*Id.* at 51-52 (citations omitted).]

In my view, *Duncan* accurately explains the "intrinsically harmful" nature of most structural errors and, accordingly, whenever a structural error occurs, I believe the potential need for automatic reversal should be given close consideration, even if the error is unpreserved. The majority concedes that *Duncan* held that " '[s]tructural errors . . . are intrinsically harmful,' " but the majority claims that "this statement is consistent with applying our forfeiture rules . . . ." *Ante* at 656 n 42. However, the majority ignores that *Duncan* also explained that intrinsically harmful structural errors "require *automatic reversal*" when such an error "renders unfair or unreliable the determining of guilt or innocence." *Duncan*, 462 Mich at 51 (emphasis added). Similarly, the United States Supreme Court has explained that, although rare, some errors are structural "and thus require[] automatic reversal." *Washington v*

Recuenco, 548 US 212, 218; 126 S Ct 2546; 165 L Ed 2d 466 (2006).[2] Accordingly, because the error at issue in this case is structural, and structural errors are generally subject to automatic reversal, *Neder*, 527 US at 8; *Washington*, 548 US at 218, I believe that there must be an "exception" in order to apply plain-error review in this case.[3]

As the majority explains, denial of the right to public voir dire is a structural error, but the United States Supreme Court has not "squarely considered whether the right [to public voir dire] can be forfeited . . . ." *Ante* at 653. Thus, today we are faced with an issue of first impression in our state and one that has not yet been directly addressed by the United States Supreme Court.

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[2] The majority also criticizes my preference for a general rule of automatic reversal for structural errors with a citation to *New York v Hill*, 528 US 110, 114; 120 S Ct 659; 145 L Ed 2d 560 (2000). As the majority states, *Hill* acknowledged that "certain fundamental rights" require a personal and informed waiver by the defendant, i.e., automatic reversal. *Hill*, 528 US at 114. The majority opinion could be read as arguing that *Hill* stands for the proposition that the denial of the right to counsel and the right to plead not guilty are the *only* errors that require automatic reversal. See *ante* 655-656 n 42. However, as the majority later acknowledges in footnote 44 of its opinion, *Hill* clearly offers the denial of those two rights as *examples* of errors requiring automatic reversal. *Hill*, 528 US at 114 ("For certain fundamental rights, the defendant must personally make an informed waiver. *See, e.g.*, *Johnson v Zerbst*, 304 US 458, 464-465; 58 S Ct 1019; 82 L Ed 1461 (1938) (right to counsel); *Brookhart v Janis*, 384 US 1; 7-8, 86 S Ct 1245; 16 L Ed 2d 314 (1966) (right to plead not guilty).") (emphasis added). Thus, the majority opinion should not be interpreted as limiting the scope of constitutional rights that require automatic reversal to only the rights discussed in *Hill*.

[3] See *United States v Marcus*, 560 US 258, ___; 130 S Ct 2159, 2168; 176 L Ed 2d 1012 (2010) (Stevens, J., dissenting) (explaining that plain-error analysis "requires lower courts to conduct four separate inquiries, each of which requires a distinct form of judgment and several of which have generated significant appellate-court dissensus; *the test may also contain an exception for 'structural errors,'* a category we have never defined clearly") (emphasis added).

Considerable tension exists in the available caselaw regarding whether the denial of the right to a public trial requires automatic reversal. For example, several opinions from the United States Supreme Court appear to indicate that denial of the right to a public trial is structural error requiring automatic reversal. See, e.g., *Washington*, 548 US at 218 (offering "denial of public trial" as an example of "an error [that] is structural, and thus requires automatic reversal"), citing *Waller*, 467 US 39); and *Neder*, 527 US at 8 (same). On the other hand, as the majority explains, several opinions that consider more directly the issue of an unpreserved claim of the denial of the right to public voir dire have applied plain-error review. See, e.g., *Barrows v United States*, 15 A3d 673 (DC, 2011). And in *United States v Agosto-Vega*, 617 F3d 541, 547-548 (CA 1, 2010), the court addressed a preserved claim of the denial of the right to public voir dire and held that a new trial was required. What is particularly notable about *Agosto-Vega* is that the court did not engage in a harmless-error analysis but instead apparently took the view that denial of the right to public voir dire falls into the class of errors that defy harmless-error analysis. *Id.*; see *Arizona v Fulminante*, 499 US 279, 309-310; 111 S Ct 1246; 113 L Ed 2d 302 (1991) (explaining that some errors "defy analysis by 'harmless-error' standards"). *Agosto-Vega*'s approach seems to be supported by *United States v Gonzalez-Lopez*, 548 US 140, 148-149; 126 S Ct 2557; 165 L Ed 2d 409 (2006), in which the United States Supreme Court identified the denial of the right to a public trial as a "structural defect" that "def[ies] analysis by 'harmless-error' standards" because a structural defect affects the "framework within which the trial proceeds" and is "not simply an error in the trial process itself." (Citation and quotation marks omitted.) Accordingly, I find it difficult to square the

notion that the denial of public voir dire defies harmless-error standards and is thus subject to automatic reversal when preserved because the resulting harm is "necessarily unquantifiable and indeterminate," *Sullivan v Louisiana*, 508 US 275, 282; 113 S Ct 2078; 124 L Ed 2d 182 (1993), but the same error is nevertheless subject to plain-error analysis when unpreserved.[4]

Despite this tension in the caselaw, I think that *Duncan* accurately tied the "intrinsically harmful" nature of structural errors to the effect of those errors on the reliability of the trial's determination of guilt or

[4] Indeed, other courts have also struggled with this paradox. See *United States v Floresca*, 38 F3d 706, 712 (CA 4, 1994) (concluding that the error at issue was structural but nevertheless reluctantly applying plain-error review and stating that "[w]e apply [*United States v*] *Olano* [507 US 725; 113 S Ct 1770; 123 L Ed 2d 508 (1993)] although it is by no means clear that we should," and that "[i]t is an open question as to whether the absence of an objection requires further analysis when the alleged error goes to the heart of the entire judicial process"). Thus, while the majority may be correct to rely on implications in the available caselaw regarding the interplay between plain-error and harmless-error analysis, it is nevertheless clear that courts understandably continue to struggle with this unsettled issue.

Another possible way to view the difficult issue presented by unpreserved structural errors may be to conclude that structural errors require automatic reversal because even if the plain-error analysis is applied, all four prongs will *always* be satisfied when the error is structural. See, e.g., *United States v Recio*, 371 F3d 1093, 1103 n 7 (CA 9, 2004) ("[I]t is difficult to imagine a case where structural error will not satisfy [the] fourth requirement [of the plain-error analysis]."); *United States v Rodriguez*, 406 F3d 1261, 1266 (CA 11, 2005) (Carnes, J., concurring) ("Because structural error, where it exists, renders a criminal punishment fundamentally unfair, it would be difficult to justify a conclusion that an error that is structural does not 'seriously affect[] the fairness, integrity or public reputation of judicial proceedings.' ") (citation omitted). But other courts that have applied plain-error analysis to structural errors have concluded that not all structural errors satisfy the fourth prong of the analysis. See, e.g., *United States v Vazquez*, 271 F3d 93, 100 (CA 3, 2001); *United States v David*, 83 F3d 638, 647-648 (CA 4, 1996).

innocence. *Duncan*, 462 Mich at 51-52. As the United States Supreme Court explained in *Washington*, structural errors generally require automatic reversal because a structural error " 'necessarily render[s] a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence.' " *Washington*, 548 US at 218-219, quoting *Neder*, 527 US at 9 (alteration in original). Accordingly, in the context of an unpreserved claim of a violation of the right to public voir dire, if it can be shown that the ultimate determination of guilt remains reliable, I agree with the majority that, under Michigan's current law, the error may be examined for plain error under *People v Carines*, 460 Mich 750; 597 NW2d 130 (1999),[5] because "the remedy should be appropriate to the violation." *Waller*, 467 US at 50.[6]

As for the majority's application of the *Carines* plain-error factors, I agree that the first two prongs—that an error occurred and the error was plain—are clearly established in this case. As for the third prong, which requires a showing that the error "affected

[5] Although I disagree with this Court's adoption of the federal plain-error doctrine for the reasons provided in *People v Grant*, 445 Mich 535, 554-557, 520 NW2d 123 (1994) (LEVIN, J., concurring); and *Carines*, 460 Mich at 775-783 (MARILYN KELLY, J., dissenting), I nonetheless recognize that *Carines* is the law in Michigan, as I have done in previous cases. See *People v Shafier*, 483 Mich 205, 219-224; 768 NW2d 305 (2009).

[6] I agree with the majority that under Michigan's current law, plain-error review is applicable to denial of the right to public voir dire if no objection to the denial was lodged. However, because structural errors are generally subject to automatic reversal, *Neder*, 527 US at 8; *Washington*, 548 US at 218-219, and the caselaw illustrates the uncertainty regarding when structural errors should be subjected to plain-error analysis, the extension of plain-error analysis in this case is limited to only unpreserved structural error that results from the improper denial of the right to public voir dire. Accordingly, the majority's opinion should not be broadly interpreted to extend plain-error review to any other structural errors but instead should be limited to the circumstances of this case.

substantial rights," *Carines*, 460 Mich at 763, I believe that *Duncan* does more than merely "suggest" that plain structural error is prejudicial. Although "this Court and the United States Supreme Court have left open the possibility that there is a category of errors for which the third prong of the plain-error standard is automatically met," *People v Shafier*, 483 Mich 205, 220 n 15; 768 NW2d 305 (2009), denial of the right to a public trial is an error that must be presumed prejudicial because "a requirement that prejudice be shown 'would in most cases deprive [the defendant] of the [public-trial] guarantee, for it would be difficult to envisage a case in which he would have evidence available of specific injury,' " *Waller*, 467 US at 49 n 9, quoting *United States ex rel Bennett v Rundle*, 419 F2d 599, 608 (CA 3, 1969) (alterations in original). Accordingly, "the defendant should not be required to prove specific prejudice in order to obtain relief for a violation of the public-trial guarantee." *Waller*, 467 US at 49.

Although I disagree with the majority's equivocal stance on the third prong of the plain-error test with regard to the denial of the right to public voir dire, my primary quarrel with the majority opinion is with the route it takes to support the conclusion that the error did not seriously affect the fairness, integrity, or public reputation of judicial proceedings. *Carines*, 460 Mich at 763. I do not agree that the presence of the venire is a proper consideration in gauging the final prong of the plain-error analysis. Although the veniremembers are members of the public, if that fact is relevant to the plain-error analysis of the structural error at issue in this case, the right to public voir dire guaranteed by *Presley*, 558 US at 213, loses all meaning. Specifically, veniremembers will *always* be present during voir dire; therefore, under the majority's approach, the prosecution will *always* be able to argue

that the error did not seriously affect the fairness, integrity, or public reputation of judicial proceedings independent of the defendant's innocence. *Carines*, 460 Mich at 763. Moreover,

> [t]he long-established tradition of open voir dire contemplates ensuring that members of the general public, *external to the judicial process*, have the opportunity to observe the proceedings. As the Supreme Court found in *Press–Enterprise* [*Co v Superior Court of California, Riverside Co*, 464 US 501, 506-507; 104 S Ct 819; 78 L Ed 2d 629 (1984)], "beginning in the 16th century, jurors were selected *in* public," meaning that the doors of the "towne house" or other "common place" were open to "so many as will or can come so neare as to heare it." By contrast, a voir dire is neither "public" nor "open" if the only members of the public allowed to attend are those who, having received juror summonses, are required to be there and part of the judicial process itself. Indeed, if the presence of potential jurors were sufficient to "safeguard[]" the values underlying the Sixth Amendment, it would seem that spectators could *always* be excluded. [*United States v Gupta*, 650 F3d 863, 876 (CA 2, 2011) (Parker, J., dissenting) (citation omitted).]

Thus, although the majority correctly rejects the prosecution's argument that the right to public voir dire is subject to waiver, by considering the presence of the venire, the majority's analysis risks essentially adopting the very rule that it purports to reject because a defendant will never be able satisfy the requirements to overcome forfeiture under the plain-error analysis.[7]

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[7] Moreover, the exclusion of a defendant's family has been given special consideration in this area of the law. See, e.g., *Watters v State*, 328 Md 38, 48; 612 A2d 1288 (1992) (stating that excluding a defendant's family deprives the family of the ability "to contribute their knowledge or insight to the jury selection" and prevents the venire from seeing the interested individuals); *United States v Garland*, 364 F2d 487, 489 (CA 2, 1966) (stating that "it [was] improper to exclude any portion of the public, *particularly a member of a defendant's family*" without sufficient

The majority contends that my concerns are merely overwrought hand wringing because, under the majority's approach, the venire's presence is not "dispositive." *Ante* at 668 n 102 (emphasis omitted). However, by considering the venire's presence at all, the majority places a heavy thumb on the delicate scales of justice. Indeed, because the venire will *always* be present during voir dire, the majority's approach will *always* weigh in favor of denying the defendant relief. Given the importance that the Framers placed on the right to a public trial, *Waller*, 467 US at 49 n 9, I would not hamstring a defendant's efforts to vindicate that right by stacking the deck against the defendant before the analysis even begins.

I agree with the majority, however, that concerns regarding the fairness, integrity, and public reputation of the voir dire process under the facts of this particular case are lessened by the fact that the circuit court transcript reveals that "there were no objections to either party's peremptory challenges of potential jurors, and that each party expressed satisfaction with the ultimate jury chosen." *Ante* at 668-669. "The purpose of voir dire is to elicit enough information for development of a rational basis for excluding those who are not impartial from the jury. . . . It is the only mechanism, and the only safeguard a defendant has, for ensuring the right to an impartial jury." *People v Tyburski*, 445 Mich 606, 618; 518 NW2d 441 (1994) (lead opinion by MALLETT, J.). The public's involvement in the voir dire process assists in effectuating the purpose of voir dire, in part, because it allows the public to see that the defendant "is fairly dealt with and not unjustly con-

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justification) (emphasis added). Relying on the venire alone to serve the purpose of public participation in the jury-selection process ignores the unique role of a defendant's family in the courtroom.

demned" via selection of an unbiased jury. *Waller*, 467 US at 46 (citations and quotation marks omitted). Moreover, "the presence of interested spectators may keep [the defendant's] triers keenly alive to a sense of their responsibility and to the importance of their functions . . . ." *Id.* (citations and quotation marks omitted). Although the transcript showing "a vigorous voir dire process," *ante* at 668, does not satisfy these goals as well as the actual presence of observers, it does at least provide some assurance that the voir dire process served its purpose. Accordingly, when weighing the fourth plain-error prong in relation to the improper denial of the right to public voir dire, a court should rely most heavily on evidence indicating whether the purpose of voir dire was satisfied. If relevant evidence is not available, or if the court is left with serious concerns regarding whether the voir dire process served its purpose, the court should not hesitate to conclude that the fairness, integrity, or public reputation of judicial proceedings were seriously affected and that a new trial is required.

MARILYN KELLY and HATHAWAY, JJ., concurred with CAVANAGH, J.

PEOPLE v NUNLEY

Docket No. 144036. Argued April 4, 2012 (Calendar No. 5). Decided July 12, 2012. Certiorari denied, 568 US ___; 133 S Ct 667.

Terry Nunley was charged in the 15th District Court with driving while his license was suspended or revoked (DWLS), second offense, MCL 257.904(1) and (3)(b). The prosecution filed a motion in limine, seeking a ruling that the document certifying that the Secretary of State had mailed defendant notice that his license had been revoked, which is an element of DWLS, would be admissible at trial without the handwritten signature of the employee on the document or producing that employee or another employee of the Secretary of State's office. The district court, Chris Easthope, J., denied the motion, and the prosecution appealed. The Washtenaw Circuit Court, Melinda Morris, J., reversed the district court's ruling that the certificate of mailing was inadmissible because it lacked a handwritten signature, but affirmed its ruling that admitting the certificate without the testimony of its author would violate defendant's constitutional right to be confronted with the witnesses against him. After granting the prosecution's interlocutory application for leave to appeal, the Court of Appeals, DONOFRIO and JANSEN, JJ. (SAAD, P.J., dissenting), affirmed, concluding that the certificate of mailing was testimonial in nature and that admitting it without accompanying witness testimony would violate the Confrontation Clause of the Sixth Amendment. 294 Mich App 274 (2011). The Supreme Court granted the Attorney General's motion to intervene and stay the precedential effect of the Court of Appeals' opinion, 490 Mich 922 (2011), and granted the prosecution leave to appeal, 490 Mich 965 (2011).

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

The certificate of mailing was not testimonial because the circumstances under which it was generated would not lead an objective witness reasonably to believe that the certificate would be available for use at a later trial given that it was generated before the commission of any crime and that its creation was a function of the legislatively authorized administrative role of the

Secretary of State independent from any investigatory or prosecutorial purpose. Thus, it could be admitted into evidence absent accompanying witness testimony without violating the Confrontation Clause.

1. Both the Michigan and United States Constitutions provide that in all criminal prosecutions, the accused has the right to be confronted with the witnesses against him or her. One of the core protections of the Confrontation Clause concerns hearsay evidence that is testimonial in nature. Thus, out-of-court testimonial statements are inadmissible unless the declarant appears at trial or the defendant has had a previous opportunity to cross-examine the declarant.

2. The prosecution in this case moved for the admission of the certificate of mailing without accompanying witness testimony in order to prove the truth of the matter asserted in the certificate: that defendant had been sent notice regarding the revocation of his driver's license by first-class United States mail as provided in MCL 257.212. Thus, the certificate would constitute substantive hearsay to prove the notice element of DWLS. However, the certificate of mailing was not necessarily akin to the types of extrajudicial statements, such as affidavits, depositions, prior testimony, and confessions, that the United States Supreme Court has said are included in the core class of testimonial statements. Rather, the circumstances under which it was generated showed that the certificate of mailing was a business record created primarily for an administrative reason rather than a testimonial affidavit or other record created for a prosecutorial or investigative reason. The certificate was a routine, objective cataloging of an unambiguous factual matter, documenting that the Secretary of State's office had undertaken its statutorily authorized bureaucratic duty to notify defendant that his driver's license had been revoked. Most significantly, the certificate of mailing was created before the commission of any crime that it might later have been used to help prove. Thus, it was not created under circumstances that would lead an objective witness reasonably to believe that it would be available for use at a later trial; at the time the certificate was created, there was no expectation that defendant would violate the law by driving with a revoked driver's license and, therefore, no indication that a later trial would occur. The Court of Appeals erred by concluding otherwise. The certificate of mailing was nontestimonial and could be admitted into evidence absent accompanying witness testimony without violating the Confrontation Clause.

Reversed and remanded to the district court for further proceedings.

Justice HATHAWAY concurred in the result only.

1. CONSTITUTIONAL LAW — EVIDENCE — RIGHT OF CONFRONTATION — TESTIMONIAL STATEMENTS.

Both the Michigan and United States Constitutions provide that in all criminal prosecutions, the accused shall have the right to be confronted with the witnesses against him or her; the admission of an out-of-court testimonial statement violates the defendant's right to confront the witnesses against him or her unless the declarant appears at trial or the defendant has had a previous opportunity to cross-examine the declarant (US Const, Am VI; Const 1963, art 1, § 20).

2. CONSTITUTIONAL LAW — EVIDENCE — RIGHT OF CONFRONTATION — TESTIMONIAL STATEMENTS — NOTICE OF SUSPENSION OR REVOCATION OF DRIVER'S LICENSES — CERTIFICATES OF MAILING.

A certificate of mailing, which is the document certifying that the Secretary of State mailed a person notice that his or her driver's license was suspended or revoked, is not testimonial in nature and may be admitted into evidence absent accompanying witness testimony without violating the Confrontation Clause (US Const, Am VI; Const 1963, art 1, § 20; MCL 257.212, MCL 257.904[1]).

3. CRIMINAL LAW — DRIVING WHILE LICENSE SUSPENDED OR REVOKED — ELEMENTS.

The elements of driving with a suspended or revoked license are (1) that the defendant's license was suspended or revoked, (2) that the defendant was notified of the suspension or revocation as provided in MCL 257.212, and (3) that the defendant operated a motor vehicle on a public highway while his or her license was suspended or revoked (MCL 257.904[1]).

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Brian L. Mackie*, Prosecuting Attorney, and *Mark Kneisel*, Assistant Prosecuting Attorney, for the people.

James E. R. Fifelski for defendant.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Richard A. Bandstra*, Chief Legal Counsel, *B. Eric Restuccia*, Deputy Solicitor General, and *Erik A. Graney*, Assistant Attorney General, for the Attorney General.

Amicus Curiae:

Kym L. Worthy and *Timothy A. Baughman* for the Prosecuting Attorneys Association of Michigan.

ZAHRA, J. The issue in this case is whether a Michigan Department of State (DOS)[1] certificate of mailing is testimonial in nature and thus that its admission, without accompanying witness testimony, violates the Confrontation Clause of the state and federal constitutions. The DOS generated the certificate of mailing to certify that it had mailed a notice of driver suspension to a group of suspended drivers. The prosecution seeks to introduce this certificate to prove the notice element of the charged crime, driving while license revoked or suspended (DWLS), second offense, MCL 257.904(1) and (3)(b).[2] We hold that a DOS certificate of mailing is not testimonial because the circumstances under which it is generated would not lead an objective witness reasonably to believe that the statement would be available for use at a later trial. Instead, the circumstances reflect that the creation of a certificate of mailing, which is necessarily generated *before* the commission of any crime, is a function of the legislatively authorized administrative role of the DOS independent

[1] Although the statutes at issue in this case refer to the Secretary of State, for ease of reference we generally refer to the DOS given that the Michigan Vehicle Code defines "Secretary of State" as including agents and employees of the Secretary of State. MCL 257.58.

[2] MCL 257.904(1) provides:

> A person whose operator's or chauffeur's license or registration certificate has been suspended or revoked and who has been notified as provided in [MCL 257.212] of that suspension or revocation, whose application for license has been denied, or who has never applied for a license, shall not operate a motor vehicle upon a highway or other place open to the general public or generally accessible to motor vehicles, including an area designated for the parking of motor vehicles, within this state.

from any investigatory or prosecutorial purpose. Therefore, the DOS certificate of mailing may be admitted into evidence absent accompanying witness testimony without violating the Confrontation Clause. Accordingly, we reverse the judgment of the Court of Appeals and remand this case to the district court for further proceedings consistent with this opinion.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

On June 11, 2009, the DOS issued an "ORDER OF ACTION" pursuant to MCL 257.303(2) that revoked defendant Terry Nunley's license from June 27, 2009, to at least June 26, 2010, because he had "2 OR MORE SUBSTANCE ABUSE CONVICTIONS IN 7 YEARS." The order included a "WARNING," telling defendant not to drive and an explanation of the right to appeal. The DOS contends that it sent this order to defendant by first-class United States mail on June 22, 2009. The DOS contemporaneously generated a certificate of mailing, which indicated that the DOS had sent defendant the order. The DOS stored the certificate without sending defendant a copy. The certificate of mailing, which includes a list of dozens of names of individuals to whom notice was sent on that particular date, stated:

> I CERTIFY THAT I AM EIGHTEEN YEARS OF AGE OR OLDER AND THAT ON THIS DATE NOTICE OF THE ORIGINAL ORDER OF SUSPENSION OR RESTRICTED LICENSE WAS GIVEN TO EACH OF THE PERSONS NAMED BELOW BY FIRST–CLASS UNITED STATES MAIL AT LANSING, MICHIGAN AS PROVIDED IN SECTION 212 OF MICHIGAN VEHICLE CODE (MCL 257.212).
>
> DATE 6–22–09 [handwritten] OFFICER OR EMPLOYEE F. BUETER [typed]

On September 9, 2009, while defendant's license was still suspended, the police stopped him for failing to properly secure a load on his truck and issued him a citation for DWLS. The prosecution subsequently enhanced defendant's charge to DWLS, second offense, under MCL 257.904(3)(b) because of defendant's driving record. The elements of DWLS require the prosecution to prove (1) that the defendant's license was revoked or suspended, (2) that the defendant was notified of the revocation or suspension as provided in MCL 257.212, and (3) that the defendant operated a motor vehicle on a public highway while his or her license was revoked or suspended.

Before trial, the prosecution moved in limine to admit the certificate of mailing as proof that defendant had received notice that his license had been revoked—even though the certificate did not contain the actual signature of the employee listed on it—without producing the employee listed on the certificate or another DOS employee as a witness. Defendant objected that the admission of the certificate of mailing under those circumstances would deny him his right of confrontation under the Sixth Amendment of the United States Constitution and article 1, § 20 of the Michigan Constitution. The district court denied the prosecution's motion, holding that the nature of the certificate required a signature in order to be sufficient to support notice for a DWLS charge and that to admit the certificate without testimony would violate defendant's right to confront the witnesses against him because there was no other reason to use the document except in litigation.

The prosecution sought leave to appeal in the circuit court, which, in a written opinion, affirmed in part and reversed in part the district court's order. The circuit

court concluded that the district court had erred by ruling that a handwritten signature was required for the certificate to be valid and effective notice under MCL 257.212. The circuit court, however, agreed with the district court that to admit the certificate without testimony would violate defendant's right of confrontation. The circuit court reasoned:

> [T]he [certificate] is not a multipurpose record or one kept by an agency for its own purposes (that are not principally litigation). The statute that mandates the sending of the Certificate of Notice is the statute that defines the criminal offense with which defendant is charged. There has been no showing that the Certificate is used for anything other than proof of the notice element of DWLS. The People effectively admit this when they describe the twofold purpose of the Certificate: "one to state that notice was given to the defendant, and two, to show the defendant's license was suspended." Unlike the "narrowly circumscribed" class of documents such as "a clerk's certificate authenticating an official record—or a copy thereof—for use as evidence," . . . this is not a certificate that the document at issue is an accurate copy of [a] public record . . . .
>
> The legislature apparently intended that the certificate of notice serve as documentary evidence . . . . That the legislature intended it that way does not mean it does not violate the confrontation clause—in fact, as in *Melendez-Diaz* [*v Massachusetts*],[3] that circumstance simply establishes that the declaration is, indeed, testimonial.

The Court of Appeals granted the prosecution's interlocutory application for leave to appeal.[4] In a split, authored decision, the Court of Appeals majority affirmed the lower courts' rulings that the testimonial nature of the certificate meant that its admission would

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[3] *Melendez-Diaz v Massachusetts*, 557 US 305; 129 S Ct 2527; 174 L Ed 2d 314 (2009).

[4] *People v Nunley*, unpublished order of the Court of Appeals, entered March 1, 2011 (Docket No. 302181).

violate the Confrontation Clause if it were admitted without witness testimony.[5] The majority reasoned that "in light of the fact that notification is an element of the offense, certainly the certificate of mailing was made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial."[6] Analogizing the certificate of mailing to the lab analyst's report offered to prove an element of the crime in *Melendez-Diaz*, the majority stated, "Indeed, the certificate of mailing here is being offered to prove an element of the offense: the notification required by the plain language of MCL 257.904(1)."[7] Thus, the certificate was "functionally identical to live, in-court testimony, doing precisely what a witness does on direct examination."[8]

The majority rejected the prosecution's argument that the certificate was merely a clerk's certification of a record, stating that "[t]he critical distinction is that the author of the certificate of mailing, here F. Bueter, is providing more than mere authentication of documents; he is actually attesting to a required element of the charge."[9] The majority also rejected the prosecution's argument that the certificate was not created solely for litigation regardless of whether it could be considered a business record because no statute required maintenance of the certificate and "the [prosecution] concede[d] that one purpose of the certificate of mailing is 'the production of evidence for use at trial . . . .' "[10]

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[5] *People v Nunley*, 294 Mich App 274; 819 NW2d 8 (2011).

[6] *Id*. at 285 (citations and quotation marks omitted).

[7] *Id*.

[8] *Id*. at 294 (citation and quotation marks omitted).

[9] *Id*. at 286-287.

[10] *Id*. at 291 (citation omitted).

Judge SAAD, in dissent, concluded that the certificate is not testimonial because it was created before a crime was even committed and the employee creating the certificate was fulfilling an administrative duty.[11] Judge SAAD believed it was irrelevant that the certificate was used to prove an element of the crime, stating:

> While the majority is certainly correct that the certificate of mailing is an essential piece of evidence in proving defendant's guilt, it does not follow that this renders the certificate testimonial. As noted, the majority's analysis also ignores the context in which the evidence is made. At the time the certificate of mailing was created, no crime had taken place, nor was there an ongoing criminal investigation involving the defendant. Therefore, it was impossible for F. Bueter, or an "objective witness," "reasonably to believe" that the certificate of mailing, at the time of its creation, "would be available for use at a later trial." *Crawford* [*v Washington*, 541 US 36, 52; 124 S Ct 1354; 158 L Ed 2d 177 (2004)] (citation and quotation marks eliminated).
>
> . . . It strains credulity to suggest that the certificate was "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial," because Nunley had not committed a crime, and F. Bueter, when he certified the mailing, had no reason to expect that Nunley would commit a crime. *Crawford*, 541 US at 52. Bueter, or any other state employees who create certificates of mailing, "cannot be considered witnesses" against Nunley "when no prosecution existed at the time of data entry." [*State v*] *Shipley*, 757 NW2d [228, 237 (Iowa, 2008)]. Bueter would likely have suspected that the certificate of mailing was just that: a certificate of notice, certifying a warning to encourage defendant to comply with the law, not a piece of evidence for use in a hypothetical trial. As such, the certificate of mailing was "created under conditions far removed from the inquisitorial investigative function—the primary evil that *Crawford* was designed to avoid." *Id*. at

[11] *Id.* at 298-299 (SAAD, P.J., dissenting).

> 238. Therefore, on the basis of the context in which it was created, the certificate of mailing is nontestimonial.[12]

The prosecution filed an application for leave to appeal in this Court. The Attorney General moved to intervene and for immediate consideration, as well as to stay the effect of the Court of Appeals' opinion and enlarge the record on appeal.

With respect to the motion to enlarge the record, which we ultimately granted, the Attorney General sought to introduce the affidavit of the DOS Driver and Vehicle Records Division Director, Fred Bueter, whose name, "F. Bueter," was printed on the certificate of mailing concerning defendant. In his affidavit, Bueter describes his duties—including ensuring the integrity of motor vehicle records—and facts related to the creation of certificates of mailing. Bueter averred that the DOS sends out numerous types of notices in compliance with MCL 257.212, the vast majority of which are computer generated. According to Bueter, courts across Michigan notify DOS electronically of driving-record activity related to the withdrawal of driving privileges. An internal computer program at DOS receives the information and updates the central driving record of the driver and then generates a notice to the driver. In some instances, the notice is generated and the certificate of mailing is included on the notice itself.[13] A copy is then maintained at the DOS and another copy is mailed to the driver. When

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[12] *Id*. at 302-304.

[13] In the examples Bueter provides, the combined notices and certificates of mailing are sent to drivers who have failed to pay a traffic fine or the assessment of statutory driver responsibility fees, resulting in the suspension of driving privileges. See MCL 257.321a(2) and MCL 257.732a. These types of violations alone cause the DOS to generate approximately 800,000 combined notices and certificates of mailing a year. With regard to mandatory suspensions and revocations, as in the present case, the DOS generates approximately 50,000 notices a year.

mandatory suspension or revocation is involved, as in this case, the process is mostly the same. The difference, however, is that a certificate of mailing is created separately from the notice of suspension or revocation and only the notice (the so-called "Order of Action"), and not the certificate, is sent to the driver. The certificate of mailing is printed once each week and lists hundreds of drivers—defendant's name, for example, is included on the eleventh page of the certificate. A DOS staff member manually fills in the date on the certificate. Bueter himself does not fill in the date, and despite understanding the process of how the notices and certificates are created and shipped, he lacked any personal knowledge regarding any particular notice of license suspension or revocation or regarding any particular certificate of mailing.

We granted the Attorney General's motions for immediate consideration, to intervene, and to stay the precedential effect of the Court of Appeals' opinion.[14] Subsequently, we granted the application for leave to appeal, directing the parties to address

> whether the Court of Appeals erred when it held that the Department of State certificate of mailing is testimonial in nature and thus that its admission, without accompanying witness testimony, would violate the Confrontation Clause. See *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004); *Melendez-Diaz v Massachusetts*, 557 US 305; 129 S Ct 2527; 174 L Ed 2d 314 (2009); and *Bullcoming v New Mexico*, 564 US ___; 131 S Ct 2705; 180 L Ed 2d 610 (2011).[15]

II. STANDARD OF REVIEW

Whether the admission of certificates of mailing would violate a defendant's Sixth Amendment right of

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[14] *People v Nunley*, 490 Mich 922 (2011).

[15] *People v Nunley*, 490 Mich 965 (2011).

confrontation is a question of constitutional law that this Court reviews de novo.[16]

III. ANALYSIS

A. CONFRONTATION CLAUSE JURISPRUDENCE

The Confrontation Clause of the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ."[17] The state of Michigan has at all times "afforded a criminal defendant the right to 'be confronted with the witnesses against him,' [by] adopting this language of the federal Confrontation Clause verbatim in every one of our state constitutions."[18]

The Confrontation Clause is "primarily a functional right" in which the right to confront and cross-examine witnesses is aimed at truth-seeking and promoting reliability in criminal trials.[19] Functioning in this manner, "the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused."[20]

The specific protections the Confrontation Clause provides apply "only to statements used as substantive evidence."[21] In particular, one of the core protections of the Confrontation Clause concerns hearsay evidence

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[16] *People v Jackson*, 483 Mich 271, 277; 769 NW2d 630 (2009).

[17] US Const, Am VI.

[18] *People v Fackelman*, 489 Mich 515, 525; 802 NW2d 552 (2011), citing Const 1839, art 1, § 10; Const 1850, art 6, § 28; Const 1908, art 2, § 19; and Const 1963, art 1, § 20.

[19] *Fackelman*, 489 Mich at 528-529.

[20] *Crawford*, 541 US at 50.

[21] *Fackelman*, 489 Mich at 528.

that is "testimonial" in nature.[22] The United States Supreme Court has held that the introduction of out-of-court testimonial statements violates the Confrontation Clause; thus, out-of-court testimonial statements are inadmissible unless the declarant appears at trial or the defendant has had a previous opportunity to cross-examine the declarant.[23]

Addressing what constitutes a testimonial statement, the United States Supreme Court explained in *Crawford* that "testimony" is a " 'solemn declaration or affirmation made for the purpose of establishing or proving some fact.' An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not."[24] The Court refrained from giving one particular definition of what evidence will constitute a "testimonial statement," but did provide the following guidance:

> Various formulations of this core class of "testimonial" statements exist: "*ex parte* in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially," "extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions," "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial[.]" These formulations all share a common nucleus and then define the [Confrontation] Clause's coverage at various levels of abstraction around it. Regardless of the precise articulation,

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[22] *Crawford*, 541 US at 51.

[23] *Id*. at 53-54.

[24] *Id*. at 51 (citations omitted).

> some statements qualify under any definition—for example, *ex parte* testimony at a preliminary hearing.[25]

In the case at hand, the prosecution moved for the admission of the certificate of mailing without accompanying witness testimony in order to prove the truth of the matter asserted therein: that defendant was sent notice regarding the revocation of his driver's license by first-class United States mail as provided in MCL 257.212. Thus, admitting the certificate of mailing would constitute substantive hearsay intended to prove the notice element of DWLS.[26] Because the certificate of mailing is properly characterized as substantive hearsay, defendant is entitled to the protections of the Confrontation Clause if the certificate of mailing is indeed testimonial. Although the United States Supreme Court has not specifically addressed whether a certificate of mailing like the one at issue here is testimonial, we will review some of its more recent post-*Crawford* decisions addressing this question in other contexts, as well as our own recent decision in *People v Fackelman*.[27]

In *Davis v Washington*, the United States Supreme Court considered whether statements made to law enforcement personnel during a 911 call or at a crime scene are testimonial.[28] The Court recognized that *Crawford* had identified " '[s]tatements taken by police officers in the course of interrogations' " as among the

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[25] *Id.* at 51-52 (citations omitted; first alteration in original).

[26] See MRE 801(c). As a result, even if admitting the certificate of mailing absent accompanying testimony does not violate the Confrontation Clause, the trial court would still need to conclude that it qualifies under a hearsay exception within our rules of evidence for it to be properly admitted. See MRE 802.

[27] *Fackleman*, 489 Mich 515.

[28] *Davis v Washington*, 547 US 813, 817; 126 S Ct 2266; 165 L Ed 2d 224 (2006).

possible formulations of what constitutes a testimonial statement.[29] The Court then addressed in what instances police interrogations are testimonial, holding that

> [s]tatements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.[30]

One of the circumstances the Court examined when making this objective determination in *Davis* was the formality of the statement.[31] Ultimately, the Court ruled that the declarant's statements identifying her assailant during a 911 call were not testimonial.[32] However, in the companion case of *Hammon v Indiana*,[33] the Court ruled that the *Hammon* declarant's statements in response to police questioning at the crime scene were testimonial.[34]

In *Melendez-Diaz*, the United States Supreme Court considered whether "certificates of analysis" were testimonial when they reported the results of a forensic analysis showing that material seized by the police and connected to the defendant was cocaine.[35] The Court

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[29] *Id*. at 822, quoting *Crawford*, 541 US at 52 (alteration in original).

[30] *Davis*, 547 US at 822.

[31] See *id.* at 827, 830.

[32] *Id.* at 829.

[33] *Hammon* was resolved together with *Davis* at 547 US 813; 126 S Ct 2266; 165 L Ed 2d 224 (2006).

[34] *Id.* at 830.

[35] *Melendez-Diaz*, 557 US at 308.

characterized the certificates as "quite plainly affidavits," which fall within the core class of testimonial statements and are defined as " 'declaration[s] of facts written down and sworn to by the declarant before an officer authorized to administer oaths" and "are incontrovertibly a solemn declaration or affirmation made for the purpose of establishing or proving some fact."[36] Given that the fact at issue was whether the substance found in the defendant's possession was, as the prosecution claimed, cocaine, then this was the testimony that the analysts would have been expected to provide if called as witnesses at trial.[37] The certificates were thus "functionally identical to live, in-court testimony, doing 'precisely what a witness does on direct examination.' "[38]

In addition, the Court reasoned that the certificates were "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial," given that "under Massachusetts law the *sole purpose* of the [certificates] was to provide prima facie evidence of the composition, quality, and the net weight of the analyzed substance."[39] Further, "the analysts were aware of the [certificates'] evidentiary purpose, since that purpose—as stated in the relevant state-law provision—was reprinted on the [certificates] themselves."[40]

In *Bullcoming v New Mexico*, the United States Supreme Court considered whether "the Confrontation

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[36] *Id*. at 310 (citations and quotation marks omitted; alteration in original).

[37] *Id*.

[38] *Id.* at 310-311, quoting *Davis*, 547 US at 830.

[39] *Melendez-Diaz*, 557 US at 311 (citations and quotation marks omitted).

[40] *Id*.

Clause permits the prosecution to introduce a forensic laboratory report containing a testimonial certification—made for the purpose of proving a particular fact—through the in-court testimony of a scientist who did not sign the certification or perform or observe the test reported in the certification."[41] The Court rejected the argument that the testimony of a "surrogate" expert was a constitutionally permissible substitute for the testimony of the analyst who had actually conducted the test.[42] The Court also rejected the argument that the report was not testimonial, analogizing it to the certificates of analysis in *Melendez-Diaz* and pointing out that "formalities attending the 'report of blood alcohol analysis' are more than adequate to qualify [the analyst's] assertions as testimonial" and that "[t]he absence of notarization does not remove his certification from Confrontation Clause governance."[43] Further, Justice Ginsburg, joined by Justice Scalia, rejected the argument that this "unbending application of the Confrontation Clause . . . would impose an undue burden on the prosecution," reiterating that the Confrontation Clause " 'may not [be] disregard[ed] at . . . our convenience.' "[44]

Most recently, the United States Supreme Court issued a plurality opinion in *Williams v Illinois* that addressed whether portions of the expert testimony from a forensic specialist violated the defendant's right of confrontation.[45] Specifically, the expert witness testified that a DNA profile produced by an outside labora-

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[41] *Bullcoming*, 564 US at ___; 131 S Ct at 2710.

[42] *Id*. at ___; 131 S Ct at 2710, 2713.

[43] *Id*. at ___; 131 S Ct at 2717.

[44] *Id*. at ___; 131 S Ct at 2717-2718 (citation omitted; alteration in original). Only Justice Scalia joined part IV of Justice Ginsburg's opinion, which otherwise constituted the opinion of the Court.

[45] *Williams v Illinois*, 567 US ___; 132 S Ct 2221; 183 L Ed 2d 89 (2012).

tory using semen from vaginal swabs from the victim matched a DNA profile produced by the state police lab using a sample of the defendant's blood.[46] The defendant argued that any testimony from the expert implicating what had taken place at the outside laboratory violated the Confrontation Clause.[47]

The lead opinion concluded that the expert's testimony concerning the outside laboratory did not run afoul of the Confrontation Clause for two reasons.[48] First, the out-of-court statements were related by the expert only for the purpose of explaining the assumptions on which the expert's opinion relied. They were not offered for the truth of the matter asserted.[49] Second, even if the report that the outside laboratory produced had been admitted into evidence, it was not a testimonial document.[50]

With respect to the second reason, the lead opinion emphasized that the report "was not prepared for the primary purpose of accusing a targeted individual," which distinguished the report from the evidence at issue in *Crawford* and its progeny.[51] Rather, the lead opinion reasoned that, viewed objectively, the primary purpose of the report was to catch the perpetrator who was still at large and that no one at the outside laboratory could have known that the DNA profile would implicate the defendant.[52] Thus, the lead opinion viewed the report as "very different from the sort of extrajudicial statements, such as affidavits, depositions,

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[46] *Id*. at ___; 132 S Ct at 2227 (opinion by Alito, J.).

[47] *Id*. at ___; 132 S Ct at 2227.

[48] *Id*. at ___; 132 S Ct at 2228.

[49] *Id*. at ___; 132 S Ct at 2228.

[50] *Id*. at ___; 132 S Ct at 2228.

[51] *Id*. at ___; 132 S Ct at 2242-2243.

[52] *Id*. at ___; 132 S Ct at 2243-2244.

prior testimony, and confessions, that the Confrontation Clause was originally understood to reach."[53]

In a concurring opinion, Justice Thomas disagreed with the lead opinion's two rationales.[54] He nonetheless agreed that the challenged testimony did not violate the Confrontation Clause because the report "lacked the requisite 'formality and solemnity' to be considered 'testimonial'. . . ."[55] The dissenting opinion expressed agreement with Justice Thomas that the statements were offered for the truth of the matter asserted.[56] The dissent, however, concluded that the out-of-court statements were indeed testimonial under *Melendez-Diaz* and *Bullcoming*, noting that although it is relevant to inquire whether the primary purpose of the statement was to establish "past events potentially relevant to later criminal prosecution," *Crawford* and its progeny do not suggest that "the statement must be meant to accuse a previously identified individual[.]"[57]

Lastly, in *Fackelman*, we considered whether evidence from a psychiatrist's report violated the defendant's right of confrontation.[58] This Court concluded that the evidence from the report fell within the core class of testimonial statements that are subject to the Confrontation Clause.[59] This Court reasoned that the report memorialized the "defendant's medical history and the events that led to his admittance to the hospital, provided the all-important diagnosis, and outlined a

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[53] *Id*. at ___; 132 S Ct at 2228.

[54] *Id*. at ___; 132 S Ct at 2255 (Thomas, J., concurring).

[55] *Id*. at ___; 132 S Ct at 2255 (citation and quotation marks omitted).

[56] *Id*. at ___; 132 S Ct at 2265, 2269-2270 (Kagan, J., dissenting); *id*. at ___; 132 S Ct at 2256 (Thomas, J., concurring).

[57] *Id*. at ___; 132 S Ct at 2265-2267, 2273-2274 (Kagan, J., dissenting).

[58] *Fackelman*, 489 Mich at 518-519.

[59] *Id*. at 532.

plan for treatment."[60] Thus, this report constituted the psychiatrist's testimony regarding the defendant's mental illness.[61] Further, this Court opined that the statements in the report were "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial," given that

> (1) defendant's admittance to the hospital was arranged by lawyers, (2) defendant was arrested en route to the hospital, (3) the report noted that the Monroe County Sheriff requested notification before defendant's discharge, (4) defendant referred to a trial and to a gun in his responses related in the report, and, perhaps most significantly, (5) at its very beginning and ending, in which its overall context is most clearly identified, the report expressly focused on defendant's alleged crime and the charges pending against him.[62]

Accordingly, this Court concluded that the admission into evidence of the psychiatrist's diagnosis—an out-of-court, testimonial statement offered for its truth—violated the defendant's constitutional right to be confronted with the witnesses against him.[63]

B. APPLICATION

The Court of Appeals majority relied largely on *Melendez-Diaz* to conclude that the certificate of mailing was testimonial in nature. In so doing, the majority stated that the "sole purpose of the preparation of the certificate of mailing was to provide proof of notice as required by MCL 257.212 . . . ."[64] And the majority

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[60] *Id*.

[61] *Id*.

[62] *Id*. at 532-533.

[63] *Id*. at 534.

[64] *Nunley*, 294 Mich App at 289.

reasoned that "in light of the fact that notification is an element of the offense, certainly the certificate of mailing was " ' "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." ' "[65] We disagree.

To begin, we do not believe that the certificate of mailing here is necessarily akin to the types of extrajudicial statements—such as affidavits, depositions, prior testimony, and confessions—that *Crawford* included in the core class of testimonial statements.[66] The certificate of mailing memorializes that the DOS on a particular date sent the "Order of Action" to defendant by first-class United States mail, notifying him that his driver's license had been revoked. Thus, like an affidavit, it certifies a fact in question.[67] However, this fact alone does not render the certificate a formal affidavit that is necessarily testimonial for purposes of the Confrontation Clause.

Instead, we believe that the circumstances under which the certificate was generated show that it is a nontestimonial business record created primarily for an administrative reason rather than a testimonial affidavit or other record created for a prosecutorial or investigative reason. As set forth earlier in this opinion, under *Crawford* and its progeny, courts must consider the circumstances under which the evidence in question came about to determine whether it is testimonial.[68]

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[65] *Nunley*, 294 Mich App at 285, quoting *Melendez-Diaz*, 557 US at 311, quoting *Crawford*, 541 US at 52.

[66] See *Crawford*, 541 US at 51-52.

[67] See *Melendez-Diaz*, 557 US at 310.

[68] *Id*. at 324. We note that how one characterizes the certificate is not dispositive. Even if we characterized the certificate of mailing as an affidavit, it would not render it de facto testimonial.

The certificate here is a routine, objective cataloging of an unambiguous factual matter, documenting that the DOS has undertaken its statutorily authorized bureaucratic responsibilities. Thus, the certificate is created for an administrative business reason and kept in the regular course of the DOS's operations in a way that is properly within the bureaucratic purview of a governmental agency. Our analysis of the nature and purpose of the certificate, as informed by the circumstances under which it was created, leads us to the conclusion that it is nontestimonial for the purposes of the Confrontation Clause.

Perhaps most significant to this analysis is the fact that the DOS certificates of mailing are necessarily created *before* the commission of any crime that they may later be used to help prove. This is because receipt of notice is an element of the crime of DWLS, and the certificate of mailing is created contemporaneously with the notice itself. Accordingly, a person, even one whose license has been suspended, cannot legally commit the crime of DWLS before he or she receives notice. Given this significant distinguishing fact and the relevant statutes, we conclude that the certificates of mailing are a result of the legislatively authorized administrative function of the DOS, which is independent of any investigatory or prosecutorial purpose.

Instead, just as all statements made in response to police interrogations are not de facto testimonial, see *Davis*, 547 US at 822, not all documents akin to affidavits are de facto testimonial, see, e.g., *Williams*, 567 US at ___; 132 S Ct at 2242-2244 (opinion by Alito, J.); *id*. at ___; 132 S Ct at 2255 (Thomas, J., concurring) (a majority of the Court concluding that a lab technician's report producing a person's DNA profile was not testimonial given the circumstances in which the report was created and its lack of formality). Further, even if the certificate constitutes a business record, when such a document is "prepared specifically for use at . . . trial," it is generally testimonial and subject to confrontation. *Melendez-Diaz*, 557 US at 324.

Specifically, MCL 257.212 states:

> If the secretary of state is authorized or required to give notice under this act or other law regulating the operation of a vehicle, unless a different method of giving notice is otherwise expressly prescribed, notice shall be given either by personal delivery to the person to be notified or by first-class United States mail . . . .

MCL 257.904(1), in turn, generally recognizes that the DOS will provide service of notice to persons who have had their driver's licenses suspended or revoked. Further, it is without question that the DOS has the authority to notify drivers when their licenses are suspended or revoked as inherent within its duties to administer and regulate this state's driver's licenses. Because of defendant's two alcohol related convictions,[69] the DOS was therefore "authorized," meaning "empower[ed]" and "give[n] a right or authority,"[70] to send defendant notice that his driver's license had been revoked.

Once the DOS sent defendant the required notice regarding the revocation of his license, MCL 257.212 mandated that the notice be given in the manner previously described, i.e., through personal delivery or by first-class United States mail. MCL 257.212 further provides that the giving of notice by mail is "complete upon the expiration of 5 days after mailing the notice." The statute further provides that "[p]roof of the giving of notice in either manner may be made by the certificate of a person 18 years of age or older, naming the person to whom notice was given and specifying the

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[69] MCL 257.303(2)(c) provides that the Secretary of State "shall revoke" the license of a driver who has two alcohol-related driving convictions within seven years and shall not issue a new license for at least one year under MCL 257.303(4).

[70] Black's Law Dictionary (6th ed).

time, place, and manner of the giving of notice."[71] Thus, the primary purpose of a certificate of mailing, at the time that it is created, is to establish "proof of the giving of notice" in accordance with the DOS's statutorily authorized bureaucratic responsibilities.

Accordingly, because the certificate of mailing was necessarily generated before the charged crime could be committed, it was not *made under circumstances* that would lead an objective witness reasonably to believe that it would be available for use at a later trial. At the time the certificate was created, there was no expectation that defendant would violate the law by driving with a revoked driver's license and therefore no indication that a later trial would even occur. Thus, the Court of Appeals majority wrongly assumed that "the certificate of mailing is testimonial because it *will* be used for the purpose of proving or establishing some fact at trial."[72] Instead, as Judge SAAD noted in his dissent, it does not follow that simply because a statement relates to an element of the crime it must be testimonial.[73]

Unlike *Crawford* or its progeny, the evidence at issue in this case was not prepared as a result of a criminal investigation or created after the commission of the crime. Rather, the DOS generates certificates of mailing contemporaneously with the notices that are mailed to drivers whose licenses have been suspended or revoked. Again, under no circumstances could the drivers whose licenses have been suspended or revoked be charged with DWLS before having received the notice of the suspension or revocation. In our view, the distinction

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[71] MCL 257.212.

[72] *Nunley*, 294 Mich App at 291 (emphasis added).

[73] *Id*. at 298 (SAAD, P.J., dissenting).

makes "all the difference in the world"[74] because the certificate was not and could not have been created in anticipation of a prosecution because no crime had yet occurred. Because "[c]riminal activity, by its deviant nature, is normally unforeseeable,"[75] and persons "may reasonably proceed upon the assumption that others will obey the criminal law,"[76] we cannot assume that the certificate of mailing in regard to defendant or any other person would be used at a later trial. In other words, the certificates of mailing may be comfortably classified as business records "created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial[.]"[77] Accordingly, we conclude that the context and circumstances of the creation of the certificate of mailing reflect that it is nontestimonial.

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[74] *Melendez-Diaz*, 557 US at 322.

[75] *Papadimas v Mykonos Lounge*, 176 Mich App 40, 46-47; 439 NW2d 280 (1989), citing Prosser & Keaton, Torts (5th ed), § 33, p 201.

[76] Prosser & Keaton, Torts (5th ed), § 33, p 201.

[77] *Melendez-Diaz*, 557 US at 324. We note that our analysis is consistent with the reasoning of both the lead opinion and the dissenting opinion from the United States Supreme Court's recent plurality decision in *Williams*. Consistently with the reasoning of the lead opinion, *Williams*, 567 US at ___; 132 S Ct at 2242-2244, the primary purpose of the certificate of mailing was not to accuse a targeted individual of engaging in criminal conduct. Instead, because the certificate is necessarily generated before the commission of any crime, there is no one to accuse of criminal conduct. Further, consistently with the reasoning of the dissenting opinion, *id*. at ___; 132 S Ct at 2273-2274 (Kagan, J., dissenting), the primary purpose of the certificate of mailing was not to produce evidence for a later criminal prosecution. Although the dissenting opinion differed with the lead opinion in its view that "it makes not a whit of difference whether, at the time of the [creation of the evidence], the police already have a suspect," *id*. at ___; 132 S Ct at 2274, the circumstances here would not lead an objective witness to reasonably believe that the certificate of mailing would be available for use at a later trial because no crime had been committed at the time the certificate was generated and no investigatory procedure had begun.

C. ADDITIONAL SUPPORTING AUTHORITY

Caselaw from the other two states that have reviewed this precise question provides additional support for our conclusion that the certification of mailing at issue is not testimonial. In *State v Murphy*, the Maine Supreme Judicial Court considered a certificate-notice system, seemingly identical to the one our DOS uses, in which notice was also a necessary element of the charge of operating while the person's license was suspended or revoked under the laws of Maine.[78] Examining *Crawford* and *Melendez-Diaz*, the court stated that "[r]ead expansively, *Melendez-Diaz* might be construed as requiring us to conclude that [the certificate] is testimonial . . . , [but] we are not persuaded to embrace that construction."[79] The court set forth several reasons for its holding. First, the court stated that the facts in *Melendez-Diaz* did not involve the type of certificate at issue in *Murphy* and, thus, *Melendez-Diaz* did not control the outcome.[80] Second, the court reasoned that unlike the certificates of analysis in *Melendez-Diaz*, which "substituted for live, in-court expert testimony prepared in an effort to secure the defendant's criminal conviction," the certificates at issue in *Murphy* did "not involve expert analysis or opinion."[81] Instead, the certificates merely reported neutral information from the Maine Secretary of State, who was charged with the custody of that information.[82] Moreover, the certificates did not "contain 'testimony' of the Secretary of State's personal knowledge that the required notice of suspension was mailed; rather, the certificate attests to his or

[78] *State v Murphy*, 2010 ME 28, ¶¶ 1-5; 991 A2d 35, 35-37 (Me, 2010).

[79] *Id*. at ¶ 19; 991 A2d at 41-42.

[80] *Id*. at ¶ 20; 991 A2d at 42.

[81] *Id*. at ¶ 21; 991 A2d at 42.

[82] *Id*.

her knowledge of what routinely-maintained public records indicate."[83] Third, the court stated that "neither the certificate nor the records to which it refers are primarily maintained and employed for purposes of criminal prosecution. Identical certificates are routinely prepared for nonprosecutorial purposes, such as administrative motor vehicle proceedings and insurance-related inquiries."[84] Lastly, unlike the certificates of analysis in *Melendez-Diaz*, "[b]ecause neutral, bureaucratic information from routinely maintained public records is not obtained by use of specialized methodology, there is little, if any, practical benefit to applying the crucible of cross-examination against those who maintain the information."[85]

The Massachusetts Supreme Judicial Court also ruled on this issue in *Commonwealth v Parenteau*.[86] In *Parenteau*, the request by the police or the prosecution for the certificates attesting to the mailing of the notice at issue occurred *after* defendant had committed the crime.[87] On those facts, the court held that "the certificate was created exclusively for trial so the Commonwealth could prove a fact necessary to convict him" and thus it was testimonial.[88] The court, however, stated that like the notice itself, if the certificate had been created at the time that the notice was sent, it would have been a business record and thus nontestimonial, reasoning:

> [T]here is no evidence of the existence of a contemporaneous business record showing that the notice was mailed

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[83] *Id*.

[84] *Id*. at ¶ 22; 991 A2d at 42.

[85] *Id*. at ¶ 24; 991 A2d at 43.

[86] *Commonwealth v Parenteau*, 460 Mass 1; 948 NE2d 883 (2011).

[87] *Id*. at 8.

[88] *Id*. at 5.

> on that date. If such a record had been created at the time the notice was mailed and preserved by the registry as part of the administration of its regular business affairs, then it would have been admissible at trial. That would have been the correct procedure for the admission of a business record from the registry. . . . [However, the actual certificate used here] was not created as part of the administration of the registry's regular business affairs, but for the purpose of establishing an essential fact at trial. Accordingly, the registry certificate did not constitute a nontestimonial business record.[89]

Both *Murphy* and *Parenteau* provide support for our conclusion that the certificate of mailing here is not testimonial. Significant in both cases were the circumstances under which the certificates were created. The timing of the certificates' creation, who requested that creation or how they were generated, and the information therein all informed the decisions in those cases. In *Murphy*, the circumstances showed that the creation of the certificate was for purposes other than prosecution, while in *Parenteau*, the creation of the certificate was made at the request of law enforcement after the crime had been committed. In the instant case, the certificate of mailing was necessarily created before the crime was committed as part of the legislatively permitted administrative function of the DOS and was akin to the neutral records largely maintained as a part of a bureaucratic purpose in *Murphy*. Thus, the certificate of mailing here is like the hypothetical business record contemplated in *Parenteau*, but the opposite of the actual certificate at issue in *Parenteau*, which "was not created as part of the administration of the registry's regular business affairs, but for the purpose of establishing an essential fact at trial."[90]

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[89] *Id*. at 10.

[90] *Id*.

Moreover, analogous federal cases addressing illegal reentry into the United States provide additional support for our conclusion that the certificate of mailing is not testimonial. Federal law prohibits the reentry of an alien after the alien has been previously deported.[91] To prove an essential element of this crime, the prosecution will introduce into evidence a warrant of deportation. In this document, an immigration official attests that he or she witnessed the defendant's previous deportation. Subsequently, if the defendant is found within the United States and is prosecuted for illegal reentry, federal courts have consistently ruled that the warrant is admissible without accompanying testimony to prove that the defendant had been deported.[92] Concluding that a warrant of deportation is not testimonial, the United States Court of Appeals for the Eleventh Circuit stated:

> We are persuaded that a warrant of deportation does not implicate adversarial concerns in the same way or to the same degree as testimonial evidence. A warrant of deportation is recorded routinely and not in preparation for a criminal trial. It records facts about where, when, and how a deportee left the country. Because a warrant of deportation does not raise the concerns regarding testimonial evidence stated in *Crawford*, we conclude that a warrant of deportation is non-testimonial and therefore is not subject to confrontation.[93]

This conclusion is representative of the manner in which the United States Courts of Appeals for other circuits have reasoned.

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[91] See 8 USC 1326.

[92] See *United States v Cantellano*, 430 F3d 1142 (CA 11, 2005); *United States v Torres-Villalobos*, 487 F3d 607 (CA 8, 2007); *United States v Bahena-Cardenas*, 411 F3d 1067, 1074-1075 (CA 9, 2005); *United States v Valdez-Maltos*, 443 F3d 910, 911 (CA 5, 2006); *United States v Garcia*, 452 F3d 36 (CA 1, 2006).

[93] *Cantellano*, 430 F3d at 1145.

We find this analogous line of federal decisions persuasive. Like the certificate of mailing certifies that defendant had been sent notice of the suspension of his license, the warrant of deportation is a warrant certifying that the defendant had been deported. In both instances, these documents were recorded routinely *before* any criminal activity took place. And neither implicates "adversarial concerns in the same way or to the same degree as testimonial evidence," because they are "recorded routinely and not in preparation for a criminal trial."[94] Moreover, just as the warrants of deportation are created under "circumstances objectively indicating that their primary purpose is to maintain records concerning the movements of aliens and to ensure compliance with orders of deportation, not to prove facts for use in future criminal prosecutions,"[95] the certificates of mailing are created under circumstances objectively indicating a purpose to ensure the maintenance of records indicating that the DOS has carried out its authorized function of notifying persons convicted of certain driving offenses that their driver's licenses have been suspended.

IV. CONCLUSION

Because we conclude that the certificate of mailing at issue is not testimonial, its admission into evidence without accompanying testimony will not violate the Confrontation Clause. Accordingly, we reverse the judgment of the Court of Appeals and remand this case to the district court for further proceedings consistent with this opinion.

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[94] *Id*.

[95] *Torres-Villalobos*, 487 F3d at 613.

YOUNG, C.J., and CAVANAGH, MARILYN KELLY, MARKMAN, and MARY BETH KELLY, JJ., concurred with ZAHRA, J.

HATHAWAY, J., concurred in the result only.

ORDERS IN CASES

ORDERS ENTERED IN CASES BEFORE THE SUPREME COURT

Summary Disposition March 5, 2012:

PEOPLE v KILPATRICK, No. 143861; Court of Appeals No. 304991. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted.

PEOPLE v BURGHARDT, No. 144425; Court of Appeals No. 306649. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted.

Leave to Appeal Denied March 5, 2012:

PEOPLE v WAYNE WILLIAMS, No. 143288; Court of Appeals No. 296527.

PEOPLE v HAGER, No. 143306; Court of Appeals No. 299373.

LASECKI v LAKE LEANN PROPERTY OWNERS ASSOCIATION, No. 143366; Court of Appeals No. 293723.

PEOPLE v POWELL, No. 143414; Court of Appeals No. 299764.

PEOPLE v MCNEES, No. 143435; Court of Appeals No. 304252.

PEOPLE v BIRD, No. 143438; Court of Appeals No. 302888.

TAYLOR CITY COUNCIL v LAMARAND, No. 143444; Court of Appeals No. 297052.

PEOPLE v CHARLES KING, No. 143447; Court of Appeals No. 303438.

PEOPLE v ESCOTT, No. 143458; Court of Appeals No. 297206.

PEOPLE v MYATT, No. 143516; Court of Appeals No. 302832.

PEOPLE v MORA, No. 143522; Court of Appeals No. 303594.

PEOPLE v RAMOS, No. 143541; Court of Appeals No. 303088.

MARTIN v NILES HOUSING COMMISSION, No. 143560; Court of Appeals No. 300037.

PEOPLE v WARREN, No. 143561; Court of Appeals No. 303680.

PEOPLE v JIMMIE GORDON, No. 143585; Court of Appeals No. 300247.

PEOPLE v MCDONALD, No. 143600; reported below: 293 Mich App 292.

PEOPLE v JAVORRIS JACKSON, No. 143604; Court of Appeals No. 296236.

PODZIKOWSKI v ALBERT TOWNSHIP, No. 143666; Court of Appeals No. 296083.

PEOPLE v GETTER, No. 143674; Court of Appeals No. 300329.

PEOPLE v ANTHONY EVANS, No. 143703; Court of Appeals No. 302617.

EDWARDS v DEPARTMENT OF CORRECTIONS, No. 143704; Court of Appeals No. 303964.

PEOPLE v DAVID HUDSON, No. 143723; Court of Appeals No. 301529.

PEOPLE v PETZ, No. 143753; Court of Appeals No. 295199.

PEOPLE v VEZIROVIC, No. 143793; Court of Appeals No. 300760.

PEOPLE v MINOR, No. 143794; Court of Appeals No. 304678.

HARRIS v STATE FARM MUTUAL AUTOMOBILE INSURANCE CO, No. 143803; Court of Appeals No. 301654.

PEOPLE v WILLIS, No. 143806; Court of Appeals No. 302417.

PEOPLE v OVEGIAN, No. 143814; Court of Appeals No. 303510.

PEOPLE v BAISDEN, No. 143816; Court of Appeals No. 300979.

PEOPLE v RIOS, No. 143819; Court of Appeals No. 302103.

PEOPLE v ALGER GARDNER, No. 143820; Court of Appeals No. 305413.

PEOPLE v PATRICK LEWIS, No. 143821; Court of Appeals No. 303836.

PEOPLE v TOWLE, No. 143822; Court of Appeals No. 304843.

PEOPLE v BOUGHNER, No. 143823; Court of Appeals No. 302309.

PEOPLE v GRIMA, No. 143833; Court of Appeals No. 301886.

PEOPLE v MURDOCK, No. 143846; Court of Appeals No. 304480.

SMITH v MORRISON MANAGEMENT SPECIALISTS, INC, No. 143850; Court of Appeals No. 301021.

PEOPLE v HARPER, No. 143869; Court of Appeals No. 305326.

PEOPLE v LADOUCEUR, No. 143876; Court of Appeals No. 304946.

GMAC MORTGAGE, LLC v DEWAN, No. 143882; Court of Appeals No. 305080.

PEOPLE v WHEELER, No. 143891; Court of Appeals No. 304279.

PEOPLE v ZORA, No. 143905; Court of Appeals No. 296508.

ZIGMOND CHIROPRACTIC, PC v AUTO CLUB INSURANCE ASSOCIATION, No. 143906; Court of Appeals No. 295574.

PEOPLE v WINBURN, No. 143914; Court of Appeals No. 303223.

MARKMAN, J., did not participate for the reasons set forth in his December 7, 2011 statement in this case, 490 Mich 928.

GALLAGHER-MCCARTHY v MCCARTHY, No. 143915; Court of Appeals No. 301687.

In re MCCORMICK ESTATE, No. 143918; Court of Appeals No. 296547.

PEOPLE v MICHAEL GREEN, No. 143927; Court of Appeals No. 305079.

PEOPLE v FAULKNER, No. 143928; Court of Appeals No. 297000.

PEOPLE v YOUNG, No. 143931; Court of Appeals No. 305428.

MCCARTHY v SOSNICK, Nos. 143934 through 143939; Court of Appeals Nos. 293482, 294385, 295784, 293483, 294383, and 295782. We further conclude that the application for leave to appeal is frivolous and vexatious. MCR 7.316(D). Plaintiff Patrick McCarthy is ordered to pay the clerk of this Court $500 within 28 days of the date of this order. We direct the clerk of this Court not to accept any further filings from Mr. McCarthy in any noncriminal matter until he has made the payment required by this order.

PEOPLE v PENNINGTON, No. 143940; Court of Appeals No. 304868.

PEOPLE v MILLER, No. 143953; Court of Appeals No. 305441.

PEOPLE v KEITH BROWN, No. 143958; Court of Appeals No. 304933.

PEOPLE v SENTRAY WILLIAMS, No. 143960; Court of Appeals No. 305181.

PEOPLE v KARON MORRIS, No. 143962; Court of Appeals No. 298087.

PEOPLE v STUBBS, No. 143963; Court of Appeals No. 305366.

PEOPLE v CARRIER, No. 143966; Court of Appeals No. 305630.

PEOPLE v BURNETTE, No. 143968; Court of Appeals No. 297136.

PEOPLE v PARIS CAGE, No. 143969; Court of Appeals No. 298381.

LEASE CORPORATION OF AMERICA v EZ THREE COMPANY, LLC, No. 143974; Court of Appeals No. 297704.

PEOPLE v GRADY HUDSON, No. 143977; Court of Appeals No. 305815.

NEFF v DEPARTMENT OF CORRECTIONS, No. 143978; Court of Appeals No. 303422.

PEOPLE v SPAULDING, No. 143979; Court of Appeals No. 298743.

PEOPLE v PHILLIPS, Nos. 143980 and 143981; Court of Appeals Nos. 296261 and 296262.

PEOPLE v SCOTT WHITE, No. 143991; Court of Appeals No. 298593.

PEOPLE v WHEATON, No. 144000; Court of Appeals No. 306115.

PEOPLE v LOPEZ, No. 144001; Court of Appeals No. 297835.

PEOPLE v GIBSON, No. 144004; Court of Appeals No. 299125.

PEOPLE v FORTINO GONZALEZ, Nos. 144005 and 144006; Court of Appeals Nos. 298709 and 298710.

HENNING v HENNING, No. 144007; Court of Appeals No. 302452.

PEOPLE v FORT, No. 144010; Court of Appeals No. 298378.

PEOPLE v FRAZIER, No. 144015; Court of Appeals No. 305372.

PEOPLE v WALLACE, No. 144016; Court of Appeals No. 305192.

PEOPLE v GEETER, No. 144021; Court of Appeals No. 292850.

PEOPLE v MCQUARTER, No. 144022; Court of Appeals No. 305713.

PEOPLE v LOUKAS, No. 144023; Court of Appeals No. 305320.

PEOPLE v ROBERT WILLIAMS, Nos. 144024 and 144056; reported below: 294 Mich App 461.

PEOPLE v RICHARD, No. 144025; Court of Appeals No. 298417.

PEOPLE v MUNIZ, No. 144031; Court of Appeals No. 305720.

PEOPLE v CHARO, No. 144033; Court of Appeals No. 305832.

PEOPLE v GROTTO, No. 144039; Court of Appeals No. 305746.

PEOPLE v BERNARD MOORE, No. 144043; Court of Appeals No. 298400.

PEOPLE v SHEA, No. 144044; Court of Appeals No. 305412.

PEOPLE v TERRY WILLIAMS, No. 144045; Court of Appeals No. 297588.

PEOPLE v JOHN MARTIN, No. 144046; Court of Appeals No. 305522.

PEOPLE v BILLY LEWIS, No. 144049; Court of Appeals No. 297078.

PEOPLE v BLAIR, No. 144050; Court of Appeals No. 298377.

PEOPLE v ODENBAUGH, No. 144051; Court of Appeals No. 305430.

PEOPLE v RING, No. 144054; Court of Appeals No. 298074.

DJELAJ v RGIS INVENTORY SPECIALISTS, Nos. 144057 and 144058; Court of Appeals Nos. 292090 and 292091.

VAN ANTWERP ESTATE v GROSSE POINTE VILLAGE GRILL, INC, No. 144059; Court of Appeals No. 296920.

PEOPLE v DOCKERY, No. 144066; Court of Appeals No. 305544.

PEOPLE v WILLIE HARRIS, No. 144075; Court of Appeals No. 298340.

BILLETER v GENERAL MOTORS CORPORATION, No. 144082; Court of Appeals No. 303978.

PEOPLE v BAKER, No. 144090; Court of Appeals No. 305581.

RINGO v STATE EMPLOYEES' RETIREMENT SYSTEM, No. 144194; Court of Appeals No. 305634.

FEDERAL NATIONAL MORTGAGE ASSOCIATION v MATTHEWS, No. 144338; Court of Appeals No. 301086.

GROESBECK v HENRY FORD HEALTH SYSTEM, No. 144510; Court of Appeals No. 307069.

Reconsideration Denied March 5, 2012:

WHITESELL INTERNATIONAL CORPORATION v WHITAKER, Nos. 142934 and 143169; Court of Appeals No. 287569. Leave to appeal denied at 490 Mich 911.

TROYER POTATO PRODUCTS, INC v OAKLEY, No. 143450; Court of Appeals No. 292666. Leave to appeal denied at 490 Mich 894.

CITY OF ALBION v CLK PROPERTIES, LLC, No. 143617; Court of Appeals No. 298069. Leave to appeal denied at 490 Mich 914.

CONVIS TOWNSHIP v COLLARD, No. 143651; Court of Appeals No. 300659. Leave to appeal denied at 490 Mich 914.

Leave to Appeal Denied March 7, 2012:

In re MANUEL MOROUN, No. 144600; reported below: 295 Mich App 312.

Leave to Appeal Denied March 9, 2012:

PEOPLE v RICHARDS, No. 142234; Court of Appeals No. 293285. Leave to appeal having been granted and the briefs and oral arguments of the parties having been considered by the Court, we vacate our order of May 18, 2011. The application for leave to appeal the October 19, 2010, judgment of the Court of Appeals is denied.

YOUNG, C.J. (*concurring*). In 2008, this Court decided to institute a pilot project to test the efficacy of several proposed changes to court rules pertaining to jurors. The project began in late 2008 and ended December 31, 2010. On June 29, 2011, this Court issued an administrative order instituting many of the proposed jury reforms by amending MCR 2.512, 2.513, 2.514, 2.515, 2.516, and 6.414.[1] The rules went into effect on September 1, 2011, and the Court said it would review the efficacy of the changes in 2014.

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[1] 489 Mich clxxvi-cxcvi. Proposed MCR 2.513(K) allowed predeliberation discussions in criminal trials, see 482 Mich lxxxix, xcvii, while the newly enacted MCR 2.513(K) allows trial judges to permit jurors to discuss a case during midtrial recesses in civil cases only.

While the pilot project was ongoing, defendant was charged with carjacking and felony-firearm. Defendant admitted that he stole the victim's car, but he claimed that contrary to the victim's testimony, he never brandished a pistol. The trial judge announced to the jury during preliminary instructions that he was one of seven circuit judges who had been chosen to participate in a pilot program to test proposed changes to the way jury trials are conducted. The judge explained that contrary to past practices, the jurors would be permitted to discuss the evidence among themselves during the trial, as long as all the jurors were present in the jury room. He also explained that it was important for them to keep discussions tentative until they had heard all of the evidence, the court's instructions, and the attorneys' arguments. The jurors were also given notebooks with some of the instructions. Defense counsel objected to allowing the jurors to engage in predeliberation discussions. The jury ultimately convicted defendant as charged.

Defendant appealed as of right, claiming that the jurors' predeliberation discussions violated his due process right to trial by an impartial jury. The Court of Appeals rejected defendant's claim and affirmed his convictions in an unpublished opinion per curiam.[2] The Court of Appeals held that the jurors' predeliberation discussions did not violate defendant's right to a fair trial because the trial court's order was consistent with Administrative Order 2008-2 and because none of the potential problems with allowing jurors to engage in predeliberation discussions were implicated.

We granted defendant's application for leave to appeal and directed the parties to address "whether the circuit judge's instruction to the jury permitting jurors to discuss the evidence among themselves in the jury room during trial recesses violated the defendant's right to an impartial jury and a fair trial."[3]

Criminal defendants have a right to an impartial jury[4] and to a fair trial,[5] but there is no explicit constitutional right prohibiting jurors from discussing the case among themselves before the matter is submitted to them for decision. In this case, defendant claims a due process violation. In resolving a due process challenge, we must consider whether a particular procedure—such as the procedure forbidding jurors from undertaking predeliberation discussions—is fundamentally necessary to

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[2] *People v Richards*, unpublished opinion per curiam of the Court of Appeals, issued October 19, 2010 (Docket No. 293285).

[3] *People v Richards*, 489 Mich 924 (2011).

[4] The Sixth Amendment provides, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ." US Const, Am VI.

[5] The Fourteenth Amendment provides,"[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ." US Const, Am XIV, § 1.

ensure a fair trial.[6] Since "[h]istorical practice is probative of whether a procedural rule can be characterized as fundamental, "[7] it is appropriate to consider the history of juries in English and American jurisprudence. The earliest English juries conducted their own investigations and asked questions at will during trial.[8] Over time, juries became less and less active.[9] By the eighteenth century, "the jury model available to the colonies was one based on almost total jury passivity."[10] Most, if not all, of the colonies had prohibitions on predeliberation discussions in place when the federal Constitution was ratified.[11] Thus, the historical practice in the United States since the time of ratification has been to prohibit predeliberation discussions.

While consideration of an historical practice is a relevant inquiry, a practice is not constitutionally required merely because it has traditionally been used in American courts. In *Williams v Florida*, the Supreme Court of the United States upheld Florida's use of 6-person juries, notwithstanding the common law tradition of 12-person juries.[12] In doing so, it established a framework to determine whether a particular aspect of a jury trial "has been immutably codified into our Constitution."[13] The Court concluded that the Framers did not "equate the constitutional and common-law characteristics of the jury."[14] Rather, a court must examine "the function that the particular feature performs and its relation to the purposes of the jury trial"[15] to determine whether that feature is "an indispensible component of the Sixth Amendment."[16]

To this end, the Court stated that the "essential feature of a jury obviously lies in the interposition between the accused and his accuser of the commonsense judgment of a group of laymen, and in the community participation and shared responsibility that results from that group's determination of guilt or innocence."[17] Thus, in *Williams*, the Court

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[6] *Duncan v Louisiana*, 391 US 145, 148-49 (1968).

[7] *Medina v California*, 505 US 437, 446 (1992).

[8] Dann, *"Learning lessons" and "speaking rights": Creating educated and democratic juries*, 68 Ind L J 1229, 1232 (1993).

[9] *Id*. at 1232-1235.

[10] *Id*. at 1235.

[11] *Id*. at 1235-1236.

[12] *Williams v Florida*, 399 US 78, 103 (1970). While the issue in *Williams* was not identical to the issue presented in the instant case, the Court's analysis is helpful because the *Williams* Court was faced with the task of evaluating the constitutionality of a longstanding jury tradition that did not have explicit textual support in the Constitution.

[13] *Id*. at 90.

[14] *Id*. at 99.

[15] *Id*. at 99-100.

[16] *Id*. at 100.

[17] *Id*.

concluded that "the 12-man requirement cannot be regarded as an indispensable component of the Sixth Amendment."[18]

Applying the framework required by *Williams* leads me to conclude that allowing jurors to engage in predeliberation discussions neither violates the basic purposes of a jury nor prevents members of the community from using their common sense to decide a defendant's guilt by discussing among themselves the evidence as it is produced during a trial. In fact, there is evidence that predeliberation discussions enhance a jury's ability to reach a fairer and just result.[19]

Those who oppose a rule allowing predeliberation discussions typically raise five arguments in support of their claim that predeliberation discussions are unconstitutional. All are based on intuition about human behavior and have no real support in studies of jury behavior. First, they argue that "since the prosecution's evidence is presented first, any initial opinions formed by jurors are likely to be unfavorable to the defendant, and there is a tendency for a juror to pay greater attention to evidence that confirms his initial opinion."[20] Even if this unsupported assertion were true, it would have no bearing on the issue presented because jurors can rely on earlier-presented evidence more than later-presented evidence even when predeliberation discussions are not allowed. The prosecution traditionally presents its evidence first. This is an inevitable aspect of our system as the prosecution bears the burden of proving every element beyond a reasonable doubt and the defendant does not have a duty to present any evidence. There is also some contrary evidence that during predeliberation discussions jurors may be alerted to problems with their initial impressions and pay closer attention to potential flaws or strong arguments in opposition to their initial impressions.[21] Thus, the fact that the prosecution presents its evidence first does not create impartial juries or render trials unfair.

The second asserted problem with allowing predeliberation discussions is that "jurors might form premature conclusions without having heard the final arguments of both sides" or the court's final instructions

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[18] *Id*.

[19] Anderson, *Let jurors talk: Authorizing predeliberation discussion of the evidence during trial*, 174 Mil L R 92, 104, 109, 111, 113, 115, and 118 (2002). During Michigan's recent pilot program, 91 percent of jurors who responded indicated that predeliberation discussions helped them understand and recall evidence and that it helped them reach a correct verdict. Most of the participating judges who responded reported that they thought the practice increased fairness, efficiency, and understanding.

[20] *Commonwealth v Kerpan*, 508 Pa 418, 422 (1985).

[21] In one study, jurors who were allowed to engage in predeliberation discussions "were no more likely to favor the testimony presented at the beginning of the trial . . . than they were to favor what they heard immediately at the end of trial before deliberations . . . ." Anderson, 174 Mil L R at 117-118; see also *id*. at 115.

on the law they are to apply to the facts of the case.[22] Again, individual jurors can just as easily reach premature conclusions in cases in which predeliberation discussions are prohibited. Jurors can also reach premature conclusions that favor a defendant just as easily as they can reach premature conclusions about a defendant's guilt.[23] Moreover, to reduce the effects of not having the final instructions on the law, the jurors in the instant case were given binders with some of the pertinent instructions at the beginning of the trial.

Third, opponents of predeliberation discussions argue that predeliberation discussions create partiality and render the trial unfair because "once a juror declares himself before his fellow jurors he is likely to stand by his opinion even if contradicted by subsequent evidence."[24] Again, this position is not based on anything more than a supposition about human behavior. Even if this were a valid assumption, the trial judge here gave repeated, emphatic, and clear instructions to the jurors to keep an open mind during predeliberation discussions. I believe that we should presume that the jurors followed those instructions just as we presume that they follow other instructions.[25] If jurors are told that predeliberation discussions are tentative, then a juror's personal embarrassment of retreating from an earlier stated opinion is significantly curbed. Interestingly, contrary to the assumption that jurors might become fixed in an early impression of the case, studies suggest that jurors allowed to engage in predeliberation discussions change their mind just as often as those who do not engage in predeliberation discussions.[26]

A fourth argument in opposition to predeliberation discussions is that "the defendant is entitled to have his case considered by the jury as a whole, not by separate groups or cliques that might be formed within the jury prior to the conclusion of the case."[27] Again, when, as in this case, the trial judge gives repeated, emphatic, and clear instructions that the jury may only discuss the case when all jurors are present and participating, we should presume that the jurors followed that instruction.[28] Admittedly, there is some evidence that jurors allowed to engage in predeliberation discussions have disobeyed instructions to only engage in discussions when all jurors were present.[29] However, jurors who are willing to disobey the instruction to not engage in predeliberation

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[22] *Kerpan*, 508 Pa at 422-423.

[23] When reviewing the constitutionality of 6-person juries in *Williams*, the Supreme Court of the United States relied on studies to conclude that the advantage of having a slightly smaller jury "might just as easily belong to the State" as to the defendant. *Williams*, 399 US at 101.

[24] *Kerpan*, 508 Pa at 422.

[25] *People v Graves*, 458 Mich 476, 486 (1998).

[26] Anderson, 174 Mil L R at 115.

[27] *Kerpan*, 508 Pa at 422.

[28] *People v Abraham*, 256 Mich App 265, 279 (2003).

[29] Anderson, 174 Mil L R at 117.

discussions without all the jurors present are just as likely to disobey a judge's instruction not to engage in predeliberation discussions at all. The fact that some juries may discuss the case without all members present also does not necessarily deprive defendants of the right to a fair trial or make juries impartial because it is the type of error that could benefit the defendant just as easily as it could benefit the prosecution.

The final argument against allowing predeliberation discussions is that such a practice allows alternate jurors to exert undue influence on the 12 people actually charged with reaching a verdict. As with the other criticisms, there is no claim or evidence that the practice leads to a prejudiced or biased jury or that it somehow makes the trial fundamentally unfair. Allowing alternate jurors to participate in predeliberation discussions does not benefit one side more than the other and thus does not render the jury partial. Since this argument fails to demonstrate how allowing predeliberation discussions undercuts the basic purpose of a jury, it is unpersuasive.

Because I see no real evidence that generally allowing the jurors to engage in predeliberation discussions will render a defendant's trial unfair or render the jurors partial, and defendant here does no more than recite the unsupported assertions that predeliberation discussions are a bad idea, I concur in this Court's order denying defendant's application for leave to appeal the Court of Appeals' decision.

Our decision to deny defendant's application for leave to appeal the Court of Appeals' decision does not ignore or overrule precedent. Justice HATHAWAY claims in her dissenting statement that our decision fails to adhere to "precedent" set forth in *People v Hunter*.[30] However, this Court's discussion of predeliberation juror discussions in *Hunter* was clearly nonbinding obiter dictum. "Obiter dicta are not binding precedent. Instead, they are statements that are unnecessary to determine the case at hand and, thus, lack the force of an adjudication."[31] In *Hunter*, this Court held that the circuit court's instruction to the jury regarding self-defense was erroneous and "sufficiently prejudicial in our view to require reversal and remand . . . ."[32] After so holding, this Court "deem[ed] it appropriate to comment on 1 other aspect of this case," specifically, the circuit court's instruction to the jury at the beginning of the trial allowing the jurors to discuss the evidence among themselves throughout the course of the trial.[33] Because this Court had previously held that the self-defense instruction was sufficiently prejudicial to require reversal of the defendant's conviction, any "comment"[34] on the instruction allowing jurors to discuss the evidence throughout trial was obiter dictum and not "nationally accepted precedent" as Justice HATHAWAY claims. We are not bound to adhere to statements in *Hunter* suggesting "juries should be directed by the court [to not engage in

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[30] *People v Hunter*, 370 Mich 262 (1963).

[31] *People v Peltola*, 489 Mich 174, 190 n 32 (2011) (quotation marks and citation omitted).

[32] *Hunter*, 370 Mich at 269.

[33] *Id*.

[34] *Id*.

discussions about the evidence] until ready to deliberate upon their verdict at the conclusion of the trial."[35] Accordingly, *Hunter* does not control the outcome of this case, and for the reasons previously set forth, allowing jurors to engage in predeliberation discussions in this case did not violate defendant's right to due process of law.

MARILYN KELLY, J. (*dissenting*). I believe that allowing the jurors to discuss the evidence before deliberations began violated defendant's Sixth Amendment right to a fair trial and an impartial jury. For that reason I respectfully dissent.

This is a criminal matter. Defendant was jury convicted of carjacking and felony-firearm. When delivering preliminary instructions to the jury, the circuit court judge announced that his court was part of a pilot project to test proposed changes in the way jury trials were conducted.[1] The judge explained that, contrary to past practices, the jurors would be permitted to discuss the evidence among themselves when in the jury room with all jurors present. He further instructed them that it was important to remember that any discussion was tentative until they had heard all the evidence, court instructions, and attorneys' arguments.

The rule against allowing jurors to discuss the evidence before deliberation is deeply rooted in our jurisprudence. And as with many traditions, the rule has a purpose. It serves to ensure that an accused receives a fair trial with an impartial jury. Twenty-six states and the federal court system have statutes or court rules that explicitly bar predeliberation jury discussions in criminal cases or do so by caselaw.[2]

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[35] *Id.*

[1] Administrative Order Number 2008-2 authorized certain Michigan judges to participate in a pilot project to study the effects of proposed jury reforms. See 482 Mich lxxxix. Those reforms included proposed changes to MCR 2.513(K), which pertains to jury deliberation. The pilot version, which was not adopted for use in criminal jury trials, see 489 Mich clxxvi-cxcvi, provided that judges may inform jurors that they may discuss evidence among themselves during trial recesses, 482 Mich at xcvii. I opposed this inclusion then, 482 Mich at cix, as I do now.

[2] Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Florida, Idaho, Illinois, Iowa, Kansas, Maryland, Massachusetts, Michigan, Missouri, Montana, Nebraska, North Dakota, Oklahoma, Oregon, Pennsylvania, South Carolina, Texas, Utah, Wisconsin, Wyoming. Alas R Crim P 27(c)(1); Ariz R Civ P 39(f) (permitting discussion in civil cases but allowing court to prohibit it for good cause); Ark Code Ann 16-64-117 and 16-89-118; Cal Civ Proc Code 611; *People v Flockhart*, __ P3d ___; 2009 WL 4981910 (Colo App, 2009), cert gtd ___ P3d __; 2011 WL 597016 (Colo, 2011); *State v Washington*, 182 Conn 419, 429 (1980); Fla Stat 918.06; Idaho R Civ P 47(n); *State v McLeskey*, 138 Idaho 691, 697 (2003); Illinois Sup Ct R 436(b)(3); Iowa Ct R 1.927(1) and 2.19(5)(d); Kan Stat Ann 60-248; Kan Crim Pattern JI 3d 101.02; *Jones-Harris v State*, 179 Md App 72, 88 (2008); *Kelly v*

As was pointed out in *Winebrenner v United States*,[3] allowing jurors to discuss the evidence during the presentation of a criminal case is inherently risky given the foibles of human nature. Jurors may draw conclusions without hearing all the evidence and without all needed instructions from the court.[4] The result is that the burden of proof is improperly shifted to the accused.

In our system, a person accused of a crime is innocent until proved guilty.[5] The burden remains on the prosecution to prove beyond a reasonable doubt that the accused is guilty, and the accused need not present evidence of his or her innocence. If jurors have decided the case for the prosecution before the accused has had the opportunity to present evidence, the burden has effectively shifted to the accused to change the jurors' minds. In my opinion, this violates the accused person's constitutional rights. No instruction to the jurors to correct the violation, however artfully contrived, can overcome this obstacle.

I believe that the instructions given to the jury could not overcome the Constitutional violation that occurred in this case. For that reason, I do not find compelling the prosecution's and the concurrence's reliance on the article by Anderson, *Let jurors talk: Authorizing pre-deliberation discussion of the evidence during trial*.[6]

First, Anderson recommends changes to the procedures used in federal military trials. In his summary, he states:

> From a military law standpoint, no constitutional, statutory, regulatory, or case-made rules are an impediment to authorizing pre-deliberation discussions among jurors. In addition, because the Sixth Amendment right to a trial by jury does not apply to the military, the precedential value of *Winebrenner* and its progeny to courts-martial practice is, arguably, nil.[7]

Earlier in the article, Anderson dismisses the concerns in *Winebrenner* by stating that cautionary instructions can overcome any rights violations.[8]

Foxboro Realty Assoc, LLC, 454 Mass 306, 313 n 17 (2009); MCR 2.513(K); Mo Rev Stat 494.495; Mont Code Ann 25-7-402 and 46-16-501; Neb Rev Stat 25-1110; ND R Ct 6.11; Okla Stat tit 12, § 581; Okla Stat tit 22, § 854; Or R Civ P 58(C); *Commonwealth v Kerpan*, 508 Pa 418, 422-423 (1985); *State v McGuire*, 272 SC 547, 551-552 (1979); Tex R Civ P 284; Utah R Crim P 17(k); Utah R Civ P 47(*l*); Wis Stat 805.13(2)(b) and 972.01; Wyo Stat Ann 1-11-208 and 7-11-206(c); see also *United States v Jadlowe*, 628 F3d 1, 16-17 (CA 1, 2010).

[3] *Winebrenner v United States*, 147 F2d 322, 327-329 (CA 8, 1945).

[4] *Id*. at 328; see also *People v Hunter*, 370 Mich 262 (1963).

[5] *Coffin v United States*, 156 US 432, 453, 458-459 (1895).

[6] 174 Mil L R 92 (2002).

[7] *Id*. at 121.

[8] *Id*.

However, the fact that he then states that the Sixth Amendment does not apply to the military courts illustrates that the answer is not so clear for nonmilitary courts.

Second, Anderson discusses the jury reform projects in Arizona, California, Washington, D.C., and Colorado.[9] While it is correct that the Arizona reviewing committee did recommend that predeliberation discussions be allowed in both civil and criminal cases, the Arizona Supreme Court declined to adopt the change for criminal cases.[10] The court expressed " 'concerns about a division among the federal courts of appeals on the question whether permitting [predeliberation] juror discussions deprives the defendant of the Sixth Amendment right to an impartial jury.' "[11] In addition, California and Colorado made modifications only to their civil jury procedures.[12] Washington, D.C., made no formal rule changes at all.[13] Despite any assertion to the contrary, to date there is no case precedent or formal or informal rule in the Washington, D.C., courts that permits predeliberation discussions.

For these reasons, I believe that instructions that allow predeliberation jury discussions in criminal cases are erroneous and the error cannot be harmless beyond a reasonable doubt. I would reverse the judgment of the Court of Appeals and remand the case for a new trial.

HATHAWAY, J. (*dissenting*). I fully share Justice MARILYN KELLY's concerns that allowing the jurors to discuss the evidence before deliberations violated defendant's Sixth Amendment right to a fair trial and an impartial jury. I write separately to express my consternation at this Court's failure to adhere to the constitutionally based and nationally

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[9] *Id*. at 104-112 (2002).

[10] See *id*. at 106.

As a result of the controversy over allowing predeliberation discussions in civil trials, the Arizona judiciary authorized an experiment to evaluate the changes discussed in Diamond, et al., *Juror discussions during civil trials: Studying an Arizona innovation*, 45 Ariz L R 1 (2003). Fifty civil trials and predeliberation jury discussions and deliberations were videotaped. The study found some benefits to the discussions, such as that they "facilitate understanding and enable jurors to correct impressions of the evidence when it is presented." *Id*. at 48. But other findings were negative. For example, "data also showed that the jurors often violated the admonition to discuss the case only when all of them were present in the jury room," *id*. at 33, and "it is all but impossible to determine a satisfactory answer to . . . whether the expression of early verdict preferences in a case causes the jury to arrive at a particular verdict," *id*. at 58-59. To date Arizona does not allow predeliberation discussions in criminal trials.

[11] Anderson, 174 Mil L R at 106, quoting Dann & Logan, *Jury reform: The Arizona experience*, 79 Judicature 280, 283 (1996).

[12] See *id*. at 108, 112.

[13] See *id*. at 110.

accepted precedent set forth in *People v Hunter*,[1] which has protected due process rights in criminal jury trials for over 50 years. In *Hunter*, this Court unanimously held that predeliberation discussions among jurors violate the constitutionally afforded due process right to a fair trial.[2] The justices agreed that it is "clear beyond any doubt that jurors should not be encouraged to discuss evidence they have heard and seen during the course of trial until all of the evidence has been introduced, the arguments to the jury made, and the jury charged by the court . . . ."[3] In so holding, *Hunter* recognized that "[t]here is no right more sacred than the right to a fair trial. There is no wrong more grievous than the negation of that right. An unfair trial adds a deadly pang to the bitterness of defeat."[4]

By allowing the Court of Appeals' opinion to stand, this Court has rendered *Hunter* meaningless without expressly overruling it. This indirect overruling of *Hunter* casts aside firmly established caselaw without even a forthright acknowledgement that the Court is abandoning precedent, let alone offering reasons for doing so.[5] While the justices of this Court may have debated the proper approach to stare decisis in the past,[6] it should cause considerable pause that precedent is now dealt with in such a cursory manner.

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[1] *People v Hunter*, 370 Mich 262 (1963).

[2] The concurring statement characterizes the holding in *Hunter* as dictum, and thus not binding on this Court. I disagree. Courts of this state have followed *Hunter* and treated it as binding precedent for more than 50 years. As stated by the Court of Appeals in this case:

> Defendant correctly observes that the trial court's instruction allowing the jurors to discuss the evidence during recesses is contrary to longstanding precedent. See *People v Hunter*, 370 Mich 262, 269-270; 121 NW2d 442 (1963), and *People v Blondia*, 69 Mich App 554, 557-558; 245 NW2d 130 (1976). However, the trial court was expressly authorized by Supreme Court Administrative Order No. 2008-2 to instruct the jurors in the manner that it did. [*People v Richards*, unpublished opinion per curiam of the Court of Appeals, issued October 19, 2010 (Docket No. 293285), 2.]

[3] *Hunter*, 370 Mich at 269.

[4] *Id*. at 272 (quotation marks and citations omitted).

[5] When defendant's case was tried, the trial court was participating in a pilot project authorized pursuant to Supreme Court Administrative Order No. 2008-2. The pilot project was implemented on August 5, 2008, which was before I became a member of this Court. The project ran until December 31, 2010. Among the procedures authorized by the pilot were interim deliberations in all cases, including criminal matters. Defendant objected to the use of interim jury discussions and argued that *Hunter* precluded such discussions. On appeal, the Court of Appeals acknowledged that *Hunter* was binding precedent but stated that this Court, through AO 2008-2, allowed *Hunter* to be disregarded for purposes of the pilot project. Unfortunately, this Court failed to offer any acknowledgment of, or explanation for, disregarding *Hunter* in the order authorizing the project.

[6] See *Univ of Mich Regents v Titan Ins Co*, 487 Mich 289 (2010).

Furthermore, in light of today's terse order, it is unclear whether this Court has abandoned the constitutional rights recognized in *Hunter* for all future cases, or whether the constitutional rights of accused defendants were only abandoned for purposes of the pilot project.[7] The lower courts and litigants are simply left to speculate because today's order provides no guidance. In either event, it is troubling that this issue is only now being formally addressed by this Court rather than having been properly addressed at the beginning of the pilot project. Given the significance of the rights involved, this Court should have, at a minimum, formally addressed this issue before authorizing this pilot project, or the project should have been limited to cases in which both parties consented to the procedures.

Further, the concurring statement relies on the results of this Court's pilot project that tested these so-called "jury reforms." However, I am not persuaded that those results in any way diminish the constitutional concerns shared by the overwhelming majority of jurisdictions that have addressed this issue. Almost all jurisdictions in the country either expressly forbid or have not adopted this procedure[8] because of the clear constitutional concerns involved. Most importantly, as acknowledged in the concurring statement, the prohibition of predeliberation discussions among jurors has been part of the historical criminal jury trial system in the United States since the ratification of the Constitution. This procedure has been embodied in our judicial system and considered a component of a fair trial since the 1700s. Changing such a historically established procedure should at a minimum carry a heavy burden of demonstrating why the established procedure is wrong, and why the new procedure will serve to significantly enhance the criminal justice system. The majority's order today instead stands mute in its rationale.

The concurring statement claims "there is evidence that predeliberation discussions enhance a jury's ability to reach a fairer and just result," citing the statistic from our pilot project that "91 percent of jurors who responded indicated that predeliberation discussions helped them understand and recall evidence and that it helped them reach a correct verdict." But this statistic, and the reliance on it, overlooks several important factors. First, our pilot project failed to demonstrate any *objective* evidence that interim jury deliberations will result in any substantial improvement in the jury trial system. The data from this

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[7] It remains unclear how many defendants were subject to this project. This Court received surveys concerning approximately 100 cases conducted as part of the project. These surveys were submitted by some, but not all of the courts that participated in the pilot project. But regardless of the number of defendants subjected to this pilot project, it is inappropriate to abandon constitutional rights merely to test a procedure.

[8] Twenty-six states and the federal court system have statutes or court rules that explicitly bar predeliberation jury discussions in criminal cases. Only two states, Indiana and Maryland, specifically authorize predeliberation discussions in criminal cases. The balance of the states do not provide for the use of the procedure in criminal cases.

Court's pilot project was compiled from a mere 30 jury trials.[9] Data from 30 trials is simply inadequate to produce anything more than anecdotal observations.

But regardless of the number of jurors' votes tallied, our pilot project failed to use control groups or employ independent monitoring techniques (such as videotaping jury sessions) to objectively evaluate the efficacy of the procedures. Among the out-of-state studies reviewed by this Court, only one study, conducted in Arizona, used objectively verifiable monitoring to determine the actual impact of juror interim deliberations.[10] Significantly, Arizona specifically declined to include criminal matters in the project because of the same constitutional concerns that Justice MARILYN KELLY and I have expressed. Even when tested in the civil trials, the Arizona study concluded that the overall impact of interim discussions was only "modest" and contained shortcomings.[11] Thus, where objective testing has been implemented, it has not demonstrated any substantial improvement in the jury system, let alone alleviated the due process concerns at stake in criminal trials.

The fact that a juror feels something is helpful in reaching a verdict cannot outweigh the constitutional rights implicated. For example, if a pilot project allowed jurors to talk to family and friends about evidence during trial, and the vast majority of jurors in the project concluded that consulting with family and friends was helpful in coming to the correct decision, would that mean that courts could jettison the obvious constitutional concerns raised by such out-of-court consultations? Certainly, speaking with trusted family members or friends to help form conclusions and opinions is, by human nature, a helpful and desirable way to decide matters; it is what people do everyday and are comfortable with. But it does not logically follow that, because a majority of jurors would find it helpful or desirable, the procedure is workable or desirable for the criminal justice system or that it would afford a fair trial. Similarly, simply because the vast majority of jurors might find conducting research on the Internet throughout the trial helpful in reaching the "correct" verdict,[12] it does not logically follow that the trial would be fair or that

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[9] While the pilot project collected surveys concerning approximately 100 cases, only 30 cases were reviewed by this Court. The majority of the surveys collected were from criminal trials.

[10] The 2002 Arizona study used a control group by dividing juries into "discuss" and "no discuss" groups and the jurors were videotaped so that objective monitoring could be employed. See Shari S. Diamond and Neil Vidmar, *Juror Discussions During Civil Trials* <http://www.law.northwestern.edu/faculty/fulltime/diamond/papers/arizona_civil_discussions.pdf> (accessed June 2, 2011).

[11] *Id.*

[12] Our pilot project asked jurors if interim deliberations assisted them in reaching the "correct verdict." I question the use of the phrase "correct verdict" because it requires a comparative analysis. But what would the juror be comparing the "correct" verdict to? What would an "incorrect" verdict be? The phrase presupposes that verdicts reached without using the procedure are somehow "incorrect," which is a supposition without support.

due process concerns would be eliminated. The issue is not whether a procedure is deemed helpful to jurors, but rather whether this historic change in the manner in which trials are conducted significantly improves the jury trial system, as demonstrated by objective and verifiable evidence, while maintaining the integrity and the fundamental fairness of the trial process.

Finally, I find no merit in the concurring statement's suggestion that because "there is no explicit constitutional right prohibiting jurors from discussing the case among themselves before the matter is submitted to them for decision," no constitutional right is at stake. There are a multitude of historical jury trial procedures impacting fundamental fairness in trials that are not expressly addressed in the Constitution. Following such logic, virtually all safeguards of fairness in trials, such as not allowing jurors to conduct research or to discuss evidence with those not on the jury, could be cast aside in favor of juror preference.

In sum, precluding predeliberation discussions among jurors has been an accepted part of our criminal jury system since the time of the ratification of our Constitution. Moreover, the established procedure is supported by thoughtful and well-accepted reasons, and there is no objective evidence that there will be any substantial improvement in the criminal justice trial system by abandoning it. Accordingly, I dissent.

PEOPLE v BUTIRUS, No. 142320; Court of Appeals No. 298964.

MARKMAN, J. (*concurring*). I concur in the Court's order denying leave to appeal. In 1998, defendant, a noncitizen, pleaded no contest to fourth-degree criminal sexual conduct. Subsequently, the United States Supreme Court held that a criminal defense attorney must "advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences." *Padilla v Kentucky*, 559 US 356; 130 S Ct 1473, 1483; 176 L Ed 2d 284 (2010). Later, in May 2010, defendant filed a motion for relief from judgment, alleging that his trial counsel had provided ineffective assistance of counsel by failing to advise him of the immigration consequences of his no-contest plea. The trial court denied this motion, and the Court of Appeals denied leave to appeal. In order to obtain relief, defendant must establish that he was actually prejudiced by his counsel's failure to advise him concerning the risk of adverse immigration consequences. MCR 6.508(D)(3)(b); *Padilla*, 130 S Ct at 1483. Even assuming that *Padilla* applies retroactively to this case, as the trial court explained, "defendant has not proffered any evidence (i.e., an affidavit) establishing that his trial counsel failed to discuss the immigration ramifications of a guilty plea." Defendant also failed to present any evidence that he was actually prejudiced by such a failure. Defendant has since filed an affidavit with this Court in which he avers that his attorney failed to advise him of the immigration consequences of his plea and that he would not have pleaded no contest had he known that he would be deported. He also avers that he has been ordered deported to Iraq, but because of the war in that country, the Department of Homeland Security has placed him under an order of supervision until it is safe to physically deport him. However, even assuming that this affidavit would be a sufficient offer of proof, it was never submitted to the

trial court. Therefore, I cannot conclude that the trial court erred by denying defendant's motion for relief from judgment.

PEOPLE v CHAN, Nos. 142382 and 142384; Court of Appeals Nos. 301149 and 301150.

MARKMAN, J. (*concurring*). I concur in the order denying leave to appeal. In 2008, defendant, a noncitizen, pleaded guilty of breaking and entering and possession of an explosive device with malicious intent. Subsequently, the United States Supreme Court held that a criminal defense attorney must "advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences." *Padilla v Kentucky*, 559 US 356; 130 S Ct 1473, 1483; 176 L Ed 2d 284 (2010). Later, in June 2010, defendant filed a motion for relief from judgment, alleging that his trial counsel had provided ineffective assistance of counsel by failing to advise him of the immigration consequences of his guilty plea. The trial court denied this motion, and the Court of Appeals denied leave to appeal. In order to obtain relief, defendant must establish that he was actually prejudiced by his counsel's failure to advise him about the risk of adverse immigration consequences. MCR 6.508(D)(3)(b); *Padilla*, 130 S Ct at 1483. Even assuming that *Padilla* applies retroactively to this case, defendant has failed to present any evidence that he was actually prejudiced by his trial counsel's failure to advise him concerning the risk of adverse immigration consequences. Although defendant filed an affidavit with the trial court, he failed to include in the affidavit any averment that he would not have pleaded guilty but for the lack of advice about possible deportation. In addition, there is no evidence in the record concerning why the Department of Homeland Security is investigating defendant for possible deportation. Therefore, I cannot conclude that the trial court erred by denying defendant's motion for relief from judgment.

SCHNORR v TMR AMUSEMENTS, INC, No. 143700; Court of Appeals No. 296827.

In re BOURGEOIS-MARTIN, No. 144601; Court of Appeals No. 305452.

PEOPLE v SCHWARZLOSE, No. 144652; Court of Appeals No. 308516.

Reconsideration Denied March 9, 2012:

PEOPLE v SMOOT, No. 141457; Court of Appeals No. 289540. Leave to appeal denied at 490 Mich 882.

In re KIVEL, No. 144322; Court of Appeals No. 304194. Leave to appeal denied at 490 Mich 999.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal Entered March 14, 2012:

HOUSTON v GOVERNOR, Nos. 144686, 144691, and 144768; reported below: 295 Mich App 588. The application for leave to appeal before

decision by the Court of Appeals (Docket No. 144686) is denied as moot. The application for leave to appeal before consideration by the Court of Appeals (Docket No. 144691) is treated as an application for leave to appeal the March 7, 2012, judgment of the Court of Appeals. The applications for leave to appeal the March 7, 2012, judgment of the Court of Appeals (Docket Nos. 144691 and 144768) are considered. We direct the clerk to schedule oral argument on Wednesday, March 21, 2012, at 9:30 a.m. on whether to grant the applications or take other action. MCR 7.302(H)(1).

Leave to Appeal Denied March 16, 2012:

In re BAKER, No. 144460; Court of Appeals No. 304519.

In re STURDIVANT, No. 144591; Court of Appeals No. 304905.

In re HART, No. 144695; Court of Appeals No. 305417.

In re MATTHEW MOROUN, No. 144735; Court of Appeals No. 308392.

Reconsideration Denied March 16, 2012:

In re SAH, No. 144178; Court of Appeals No. 302809. Leave to appeal denied at 490 Mich 999.

Summary Disposition March 21, 2012:

ALEXANDER v CASSIDY, No. 143812; Court of Appeals No. 301860. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate the order of the Court of Appeals and we remand this case to the Court of Appeals for plenary consideration. The court shall address the defendants' claims of immunity under both state and federal law, employing the standards appropriate to those claims. We do not retain jurisdiction.

MORGAN v GENERAL MOTORS, LLC, No. 143949; Court of Appeals No. 298278. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals, and we reinstate the decision of the Workers' Compensation Appellate Commission (WCAC). Contrary to the determination of the Court of Appeals, the WCAC did not err as a matter of law in finding that the plaintiff could not recover benefits on the basis of an injury date that he did not allege in his application. The plaintiff alleged only one injury date, in 2005. The WCAC found as fact, and the record supports, that the defendant could not possibly have known it was being called upon to defend a date that was in 1999. The WCAC correctly applied the law to the facts it found in this case.

PEOPLE v MARQUIS NELSON, No. 143996; Court of Appeals No. 296932. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals with respect to guidelines

scoring of offense variable 1, MCL 777.31, and offense variable 13, MCL 777.43, for the reasons stated in the Court of Appeals dissenting opinion, and we remand this case to the Calhoun Circuit Court for resentencing. The circuit court shall apply the preponderance of the evidence standard to its scoring decisions, and any review by the Court of Appeals shall be for clear error. *People v Osantowski*, 481 Mich 103 (2008). In all other respects, leave to appeal is denied.

PEOPLE V ERIC HILL, No. 144131; Court of Appeals No. 301564. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted.

MARILYN KELLY, J., would deny leave to appeal.

Leave to Appeal Granted March 21, 2012:

PRICE V HIGH POINTE OIL COMPANY, INC, No. 143831; reported below: 294 Mich App 42.

Leave to Appeal Denied March 21, 2012:

PEOPLE V DONNIS JACKSON, No. 143180; Court of Appeals No. 302779.

MARILYN KELLY, J., would remand this case to the Court of Appeals for consideration as on leave granted.

PEOPLE V TAYLOR, No. 143901; Court of Appeals No. 298183.

CAVANAGH, J., would grant leave to appeal.

Rehearing Denied March 21, 2012:

In re JUSTIN, No. 142076. Reported at 490 Mich 394. The motion for rehearing is considered, and it is denied. The Judicial Tenure Commission's bill of costs is considered, and the respondent, James M. Justin, is ordered to pay costs of $7, 657.86 to the commission.

Reconsideration Denied March 21, 2012:

LAMEAU V CITY OF ROYAL OAK, Nos. 141559 and 141560; reported below: 289 Mich App 153. Summary disposition at 490 Mich 949.

CAVANAGH and HATHAWAY, JJ., would grant reconsideration and would deny leave to appeal.

MARILYN KELLY, J., would grant reconsideration for the reasons set forth in her dissenting statement in this case, 490 Mich 949, 949-958 (2011).

JILEK V STOCKSON, No. 141727; reported below: 289 Mich App 291. Summary disposition at 490 Mich 961

MARKMAN, J. (*concurring*). Plaintiff here moves for reconsideration of this medical malpractice case. He professes confusion about our order, while also professing that our order will "create enormous confusion for lawyers and judges handling [medical malpractice] cases." I concur in our

denial of plaintiff's motion because, in my judgment, this Court has correctly decided both issues presented.

First, we reviewed de novo the appropriate standard of care. We held that "the appropriate standard of care was 'family practice' because the defendant-physician is board-certified solely in family medicine" and that "the trial court properly allowed the jury to consider that standard of care in light of the facilities available[,] . . . an urgent care center . . . ." *Jilek v Stockson*, 490 Mich 961 (2011). This conclusion was the result of the following application of the law:

(1) As we stated in *Locke v Pachtman*, 446 Mich 216, 222 (1994):

> Proof of a medical malpractice claim requires the demonstration of the following four factors: (1) the applicable standard of care, (2) breach of that standard of care by the defendant, (3) injury, and (4) proximate causation between the alleged breach and the injury. MCL 600.2912a . . . .

(2) As our citation in *Locke* indicates, MCL 600.2912a establishes the basis for determining the applicable "standard of care" in medical malpractice cases. It provides, in relevant part:

> (1) . . . [I]n an action alleging malpractice, the plaintiff has the burden of proving that in light of the state of the art existing at the time of the alleged malpractice:
>
> * * *
>
> (b) The defendant, if a specialist, failed to provide the recognized standard of practice or care within that specialty as reasonably applied in light of the facilities available in the community or other facilities reasonably available under the circumstances, and as a proximate result of the defendant failing to provide that standard, the plaintiff suffered an injury.

(3) In *Woodard v Custer*, 476 Mich 545, 561 (2006), we then defined a "specialist" as " 'a physician whose practice is limited to a particular branch of medicine or surgery, especially one who, by virtue of advanced training, is certified by a specialty board as being qualified to so limit his practice.' " (Citation omitted.)

(4) Defendant here is board-certified in family medicine. Thus, she is properly characterized as a "specialist" in family medicine.

(5) Therefore, pursuant to MCL 600.2912a(1)(b), the applicable standard of care is "that specialty as reasonably applied in light of the facilities available . . . ."

(6) In this case, "that specialty" was family medicine, and the "facilities available" consisted of an urgent care center. Accordingly, "the appropriate standard of care was 'family practice' because the defendant-physician is board-certified solely in family medicine" and "the trial court properly allowed the jury to consider that standard of care in light of the facilities available [to] . . . an urgent care center . . . ." *Jilek*, 490 Mich at 961.

(7) Contrary to the holding of the Court of Appeals, and as I believe is clear from *Woodard*, the "one-most-relevant-specialty" test is only applicable if the defendant has more than one specialty. *Woodard*, 476 Mich at 590 (MARKMAN, J., concurring). Here, defendant has only one specialty, family medicine. Pursuant to MCL 600.2912a(1)(b), *that* specialty determines defendant's standard of care. Thus, although defendant was practicing family medicine at the time of the alleged malpractice, this is irrelevant because defendant has only one specialty, and the "one-most-relevant-specialty" test is inapplicable. To the extent that *Reeves v Carson City Hosp (On Remand)*, 274 Mich App 622 (2007), and *Gonzalez v St John Hosp & Med Ctr (On Reconsideration)*, 275 Mich App 290 (2007), are inconsistent with this conclusion, they were, in my judgment, necessarily overruled by this Court's previous order.

Second, we reviewed for abuse of discretion whether the trial court properly excluded evidence of the urgent care center's internal policies. We adopted the Court of Appeals dissent's analysis, which provided two independent bases for its conclusion that the trial court did not abuse its discretion in this regard:

(1) Pursuant to MCR 2.613(A), "[a]n error in the admission or exclusion of evidence . . . is not ground for granting a new trial [or] for setting aside a verdict . . . unless refusal to take this action appears to the court inconsistent with substantial justice." As the Court of Appeals dissent explained, the "majority [made] no attempt to explain how the errors it discerns from this record resulted in a jury verdict that was 'inconsistent with substantial justice.' " *Jilek v Stockson*, 289 Mich App 291, 317 (2010) (BANDSTRA, J., dissenting). For the reasons provided in our order and in Judge BANDSTRA's dissent, I do not believe that the admission of the exhibits would have made any significant difference at trial. Therefore, I cannot conclude that the result was "inconsistent with substantial justice."

(2) *Gallagher v Detroit-Macomb Hosp*, 171 Mich App 761, 765-766 (1988); *Buczkowski v McKay*, 441 Mich 96, 99 n 1 (1992); and *Zdrojewski v Murphy*, 254 Mich App 50, 62 (2002), all indicate that it is contrary to public policy to impose "a legal duty on a [defendant] on the basis of its internal policies . . . ." *Buczkowski*, 441 Mich at 99 n 1. Each of these cases was decided after the adoption of the Michigan Rules of Evidence, and thus their holdings were not preempted by the rules. In my judgment, the admission of the exhibits would have been contrary to established law, and thus I do not find that the trial court abused its discretion in excluding them.

CAVANAGH, J. (*dissenting*). I would grant reconsideration for the reasons stated in my dissenting statement in this case. I also agree with plaintiff that the majority order muddles the law and is inconsistent with *Woodard v Custer*, 476 Mich 545 (2006).

MARILYN KELLY and HATHAWAY, JJ., would grant reconsideration.

Orders Denying Motions for Disqualification Entered March 21, 2012:

PARISE v DETROIT ENTERTAINMENT, LLC, No. 144072; reported below: 295 Mich App 25. The motion for full-Court review of the motion to disqualify Chief Justice YOUNG and Justice MARY BETH KELLY is consid-

ered, and it is granted. Upon full-Court consideration of the plaintiff's motion, we deny the motion for the reason that no justice is persuaded that there is any ground for the disqualification of Chief Justice YOUNG or Justice MARY BETH KELLY.

YOUNG, C.J. I deny plaintiff's renewed motion seeking my disqualification. I deny plaintiff's additional claim regarding the alleged donations made to Candice Miller for Congress, followed by Candice Miller for Congress' alleged donations to the Michigan Republican Party, followed by the alleged donation by the Michigan Republican Party to my Supreme Court campaign in 2010. Even if true, this new allegation is one degree of separation *further* than the subject matter of the previous motion for disqualification. Accordingly, it too is insufficient to give rise to an appearance of impropriety. Moreover, plaintiff's allegations regarding professional and consulting relationships, even if true, are too attenuated to give rise to an appearance of impropriety. Plaintiff still does not claim that I am actually biased for or against either party in this matter. Because I am not biased for or against either party in this matter, I deny plaintiff's motion seeking my disqualification.

I do not participate in the order or the full Court's decision on the motion for disqualification of another justice, pursuant to MCR 2.003(D)(3)(b), for the reasons stated in my November 25, 2009, dissent from the rule's promulgation[1] and in my March 31, 2010, statement of nonparticipation in a similar motion in *Pellegrino v Ampco Sys Parking*.[2] I believe that rule to have serious constitutional flaws.

LAWRENCE V BOARD OF LAW EXAMINERS, No. 144191. The motion for full-Court review of the motion to disqualify Justice MARKMAN is considered, and it is granted. Upon full-Court consideration of the plaintiff's motion, we deny the motion for the reason that no justice is persuaded that there is any ground for the disqualification of Justice MARKMAN.

YOUNG, C.J. (*not participating*). I do not participate in the order or the full Court's decision on the motion for disqualification of another justice, pursuant to MCR 2.003(D)(3)(b), for the reasons stated in my November 25, 2009, dissent from the rule's promulgation[1] and in my March 31, 2010, statement of nonparticipation in a similar motion in *Pellegrino v Ampco Sys Parking*.[2] I believe that rule to have serious constitutional flaws.

ZAHRA, J., did not participate for the reasons set forth in his previous statement in this case, 490 Mich 935 (2011).

Order Granting Leave to Appeal as Cross-Appellant Entered March 23, 2012:

VELEZ V TUMA, No. 138952; reported below: 283 Mich App 396. Leave to appeal granted at 489 Mich 956. On the Court's own motion, the plaintiff's application for leave to appeal as cross-appellant is

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[1] See 485 Mich cxxx, clxvii-clxxxv (YOUNG, J., dissenting).

[2] 485 Mich 1134, 1155-1165 (2010) (YOUNG, J., not participating).

[1] See 485 Mich cxxx, clxvii-clxxxv (YOUNG, J., dissenting).

[2] 485 Mich 1134, 1155-1165 (2010) (YOUNG, J., not participating).

reconsidered, and it is granted. The parties are invited to file supplemental briefs limited to the issue raised in that cross-application and whether *Markley v Oak Health Care Investors of Coldwater, Inc*, 255 Mich App 245, 250 (2003), correctly decided that the common law setoff rule applies in medical malpractice actions where joint and several liability is imposed. The plaintiff's brief shall be filed no later than April 13, 2012, and the defendant's brief shall be filed no later than May 4, 2012.

Leave to Appeal Granted March 23, 2012:

ADMIRE v AUTO-OWNERS INSURANCE COMPANY, No. 142842; Court of Appeals No. 289080. On March 7, 2012, the Court heard oral argument on the application for leave to appeal the February 15, 2011, judgment of the Court of Appeals. On order of the Court, the motion to strike portions of the plaintiff's briefs and exhibits is denied. The application is again considered, and it is granted. The parties shall include among the issues to be briefed (1) whether MCL 500.3107(1)(a) allows the plaintiff to recover the full cost of handicap-accessible transportation or whether the plaintiff's recovery is offset to the extent that the handicap-accessible transportation replaces the plaintiff's other transportation costs; (2) if the plaintiff's recovery is offset, what procedure a factfinder must undertake in calculating the amount of the plaintiff's recovery and what evidence is relevant to that calculation; (3) whether there is any basis in MCL 500.3107(1)(a) to treat transportation costs differently from other household expenses, such as food or housing, that every person incurs whether injured or not; and (4) whether the principles and standards articulated in *Griffith v State Farm Mut Auto Ins Co*, 472 Mich 521 (2005), are sufficient to resolve this dispute. We invite the continued participation of all amici curiae who have previously appeared in this case. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

LYON CHARTER TOWNSHIP v MCDONALD'S USA, LLC, No. 143342; reported below: 292 Mich App 660.

DEBANO-GRIFFIN v LAKE COUNTY, No. 143841; Court of Appeals No. 282921. The parties shall include among the issues to be briefed (1) whether the plaintiff established a causal connection between her protected activity and the adverse employment action under the Whistleblowers' Protection Act (MCL 15.362) and, if so, (2) whether a whistleblower may challenge an adverse employment decision, which is claimed to be a matter of business judgment that was based on a fiscal or budgetary reason, as a mere pretext over the defendants' assertion that the separation of powers principle prevents the judiciary from examining the budgetary decisions of a legislative body. See *Dubey v Stroh Brewery Co*, 185 Mich App 561, 565-566 (1990).

ZAHRA, J., did not participate because he was on the Court of Appeals panel that issued the October 15, 2009, and December 16, 2010, opinions per curiam in this case.

Oral Granting Oral Argument in Case Pending on Application for Leave to Appeal Entered March 23, 2012:

AUTOMOBILE CLUB INSURANCE ASSOCIATION v STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, No. 143808; Court of Appeals No. 294324. The parties shall submit supplemental briefs within 42 days of the date of this order addressing whether legal residence and domicile of the insured minor were conclusively established in Tennessee pursuant to the judgment of divorce entered by the Wayne Circuit Court, as amended, or whether the minor had the capacity to acquire a different legal residence or domicile of choice. See, e.g., *Vanguard Ins Co v Racine*, 224 Mich App 229, 233 (1997); MCR 3.211(C)(1) and (3); 8 Mich Civ Jur, Domicile § 7; Restatement Conflict of Laws, 2d, §§ 15 and 22(1), comments a and d. The parties should not submit mere restatements of their application papers.

Leave to Appeal Denied March 23, 2012:

ATTORNEY GENERAL v CIVIL SERVICE COMMISSION, No. 144184; Court of Appeals No. 306685.

MARKMAN, J. (*dissenting*). I would grant the Attorney General's motion to bypass the Court of Appeals. In my judgment, this dispute, concerning the constitutionality of the Civil Service Commission's authorization of expanded health-care benefits for certain public employees, as with the recent dispute concerning the constitutionality of the emergency financial managers act, *In re Executive Message*, 490 Mich 999 (2012), presents questions of Michigan constitutional law that warrant the expedited consideration of the highest court of this state. Individuals and communities that are immediately affected, as well as the citizenry generally, whose constitution is at issue, are entitled to dispositive resolutions of these disputes in a reasonably facilitated manner. I would have treated each of these disputes as priority matters for our consideration. I respectfully dissent.

Order Entered March 23, 2012:

In re JAMES, No. 143942. On order of the Court, the petition to extend time constraints is considered, and it is granted in part. We order that the Judicial Tenure Commission's recommendation of action, if any, be submitted to this Court by June 15, 2012. See MCR 9.207(F) and 9.219(A). No further extensions will be granted.

MARKMAN, J. (*dissenting*). For the reasons set forth in my previous dissent, *In re James*, 490 Mich 936, 939 (2011), I believe this Court clearly possesses the authority to suspend a judge without salary during an interim suspension, and I would have done so in this case and placed respondent's salary in escrow pending final resolution of the disciplinary proceedings of the Judicial Tenure Commission (JTC).

Respondent, the chief judge of the 22d District Court in Inkster, is alleged to have misappropriated approximately $131,000 in public funds, including funds intended for the restitution of the victims of crime in

Inkster. If she is not ultimately vindicated, continuing to pay her salary during her suspension will (a) diminish the likelihood that misappropriated funds will ever be recovered on behalf of the people of Inkster, (b) diminish the likelihood that adequate restitution will ever be afforded the victims of crime in Inkster for whom such funds were intended, and (c) diminish public regard for the integrity and effectiveness of the self-disciplinary processes of this judiciary.

Although under regular circumstances I would have no objection to allowing the JTC to extend the duration of its investigation beyond this Court's previously established timetable, to do so while respondent continues to be suspended with pay merely exacerbates what I view as the problem with such a suspension—continuing to compensate a judge with public funds during an indefinite suspension *predicated upon* allegations of past misappropriation of public funds. Instead, as I have indicated, I would exercise our authority to hold respondent's salary in escrow until the allegations against her are resolved. Under the Court's new timetable, respondent will have been on administrative leave and interim suspension for a minimum of 16 months with salary by the time this matter is finally resolved. I respectfully, but strongly, dissent from the adoption of the extended timetable.

Summary Disposition March 26, 2012:

ANGEL v A1 SOUTH LLC/GRAND RAPIDS GRIFFINS/WAUSAU UNDERWRITERS INSURANCE COMPANY, No. 144147; Court of Appeals No. 295015. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate the judgment of the Court of Appeals and we remand this case to the Court of Appeals for reconsideration in light of *Findley v DaimlerChrysler Corp*, 490 Mich 928 (2011).

HATHAWAY, J., would grant leave to appeal.

PEOPLE v SCAFONE, No. 144480; Court of Appeals No. 298072. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate the judgment of the Court of Appeals and we remand this case to the Court of Appeals for reconsideration in light of the newly discovered October 3, 2008 transcript of the defendant's waiver of his right to a jury trial. If the court determines that the defendant validly waived his right to a jury trial, then it should address the defendant's claim of ineffective assistance of counsel. We do not retain jurisdiction.

HOUSTON v GOVERNOR, Nos. 144691 and 144768; reported below: 295 Mich App 588. On March 21, 2012, the Court heard oral arguments on the applications for leave to appeal the March 7, 2012, judgment of the Court of Appeals. On order of the Court, the applications are again considered. MCR 7.302(H)(1). In lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals. Public Act 280 of 2011, amending the County Apportionment Act is not a "local" act in violation of Const 1963, art 4, § 29.

Plaintiffs make much of the alleged political motivations behind the Act, calling it a "political favor" to the Oakland County Executive and

citing numerous supportive editorial comments. As with any redistricting of political maps, the parties here vie to create maps that benefit their own interests, and a dispute with partisan implications has not surprisingly arisen. Notwithstanding this reality, "[t]he validity of legislation can never be made to depend on the motives which have secured its adoption, whether these be public or personal, honest or corrupt." Cooley, Constitutional Law, p 154. See also *Mich United Conservation Clubs v Secretary of State (After Remand)*, 464 Mich 359, 367 (2001) (CORRIGAN, C.J., concurring) (stating that even if the motive of a legislative body could be discerned as opposed to the motives of individual legislators, "This Court has repeatedly held that courts must not be concerned with the alleged motives of a legislative body in enacting a law, but only with the end result—the actual language of the legislation"). This Court's authority does not extend to considering whether legislation "represents wise or unwise, prudent or imprudent, public policy." *In re Request for Advisory Opinion Regarding Constitutionality of 2011 PA 38*, 490 Mich 295, 302 (2011). Rather, it is our responsibility only to say whether 2011 PA 280 is in violation of Const 1963, art 4, § 29, and there is nothing that is relevant in this regard that can be drawn from the political or partisan motivations of the parties. In short, there is nothing that plaintiffs have identified within the Constitution that prevents a political or partisan legislative body from acting in a political or partisan fashion. Moreover, this Court possesses no special capacity, and there are no legal standards, by which to assess the political propriety of actions undertaken by the legislative branch. Instead, it is the responsibility of the democratic, and representative, processes of government to check what the people may view as political or partisan excess by their Legislature. And it is the responsibility of this Court only to compare the law with the Constitution to ensure that the former does not transgress the limits of the latter. For the reasons that follow, we are persuaded that 2011 PA 280 does not breach Const 1963, art 4, § 29.

In reaching our decision, this Court, as it is always, is engaged in applying the equal rule of law to the best of its ability. That there may be some partisan advantage to one side or another in this decision is simply a function of the fact that there is no *conceivable* decision that could have been reached in which one side or the other could not have asserted that partisan advantage accrued to the other. We believe that a fair review of the decisions of this Court in which some partisan advantage was at issue would make clear that our decisions have been marked by a commitment to a faithful reading of the law. See, e.g., *In re Request for Advisory Opinion*, 490 Mich 295; *Scott v Dir of Elections*, 490 Mich 897 (2011); *Attorney General v Clarke*, 489 Mich 61 (2011).

2011 PA 280 makes three relevant changes in the County Apportionment Act, MCL 46.401 *et seq*.: first, following the next federal census, it limits the number of commissioner districts any county may apportion based upon its population; second, it reassigns apportionment duties to the Board of Commissioners in counties that exceed 1 million residents and that have adopted an optional unified form of county government; and third, in what we will describe as the "transitional" provision of the Act, § 1(2), amending MCL 46.401(2), it requires any county not in

compliance with the Act to reapportion within 30 days of the law's effective date. This latter change nullifies Oakland County's 25-commissioner district plan drawn under preamendment apportionment rules, and establishes in its place a 21-commissioner district plan to be drawn by the Board. As a practical matter, because Oakland County is the only county that will not be in compliance with the law on its effective date, only Oakland County will have to reapportion during the transitional period.

It is a well-established rule that a "statute is presumed to be constitutional unless its unconstitutionality is clearly apparent." *McDougall v Schanz*, 461 Mich 15, 23 (1999). Further, any "attempt to segregate any portion or exclude any portion [of a statute] from consideration is almost certain to distort the legislative intent." *Robinson v City of Lansing*, 486 Mich 1, 16 (2010). Rather, when interpreting a statute, its words "should not be construed in the void, but should be read together to harmonize the meaning, giving effect to the Act as a whole." *Gen Motors Corp v Erves*, 399 Mich 241, 255 (1976).

Const 1963, art 4, § 29 provides that the Legislature "shall pass no local or special act where a general act can be made applicable," unless approved by a two-thirds vote of the Legislature and by a "majority of the electors voting thereon in the district affected." Whether 2011 PA 280 constitutes a local act must be determined in accordance with the principles set forth in the preceding paragraph. Indeed, the fact that Const 1963, art 4, § 29 refers to the "act" underscores the necessity of viewing the transitional provision, or any other statutory provision, within the larger context of the act itself.

In *City of Dearborn v Wayne Co Bd of Supervisors*, 275 Mich 151, 155-156, 157 (1936), this Court established a two-part test for determining whether an act is general or local. First, the limiting criteria of the act must be reasonably related to the overall purpose of the statute. Second, the act must be sufficiently open-ended so that localities may be brought within the scope of its provisions as such localities over time meet the required criteria. "The probability or improbability of other [localities] reaching the statutory [criteria] . . . is not the test of a general law." "It must be assumed" that other localities may come to meet the criteria. *Id*. at 157.

2011 PA 280 satisfies the *Dearborn* test. First, the limiting criteria are reasonably related to the overall purpose of the Act. Here, the overall purpose is to limit the number of districts a county may apportion, and the population criteria set forth in the Act seem a reasonable means of achieving that purpose. Second, the Act is open-ended. It provides various population ranges and places corresponding limits on the number of districts for every county within those ranges. As a county's population increases above or below a given range, the number of districts that may be apportioned by that county will increase or decrease respectively.

That the transitional provision, requiring compliance with the Act within 30 days by counties whose apportionment does not currently satisfy the requirements of 2011 PA 280, practically applies only to Oakland County frustrates neither of the elements of *Dearborn*. As explained above, the transitional provision must be read and harmonized with the act as a whole. In that context, the transactional provision

directs how the act will operate until the next census triggers a new reapportionment, just as a nearly identical transitional provision accomplished the same when the county apportionment act was initially enacted in 1966. 1966 PA 261. A similar transitional provision was also upheld by this Court in *Chamski v Cowan*, 288 Mich 238, 257 (1939).

Here, the transitional provision neither disengages the limiting criteria from the overall purpose of the Act, nor undermines the conclusion that the Act broadly governs all of the counties within the state. Rather, § 1(2) merely facilitates the transition between a legal environment of disparate apportionment practices within the counties and a legal environment of uniform practices. Absent a transitional period during which some counties must necessarily be treated differently from others, it would be impossible for the Legislature to make general, uniform changes to public policy pertaining to local government. That is, to bring counties that are out of compliance with the Legislature's preferred public policy into compliance, and to establish uniform policy, those counties out of compliance must be treated differently during the transition or else uniformity can never be achieved. The transitional provision here accomplishes just such a purpose by ensuring that Oakland County will not be the only county that operates outside of the apportionment limits of the Act until the next census.

In assessing whether a law is constitutional under Const 1963, art 4, § 29, we must view the law's impact *as a whole*, and not merely at a single instant in time—herein, according to plaintiffs, at the instant at which the law becomes effective and the transitional provision is momentarily triggered. A typical regulatory law may pertain to local governments in a wide variety of ways, in terms of substantive and temporal and procedural obligations, and it cannot be that we can isolate a single section or subparagraph or clause from that law and conclude that the law is "local" if viewed in a discrete fashion it affects individual local governments in a disparate fashion. Imagine, for example, that the Legislature determined to limit the number of distilleries (or any other facility), and enacted a law limiting any county with a population under 100,000 to one distillery, and requiring compliance within 180 days. At the time, Alpena alone among counties under 100,000 had more than one distillery. During the 180-day transitional period, Alpena would obviously be treated differently from every other county, and would alone be required to close one of its distilleries in order to conform to the law. Such a transitional provision would not fairly be characterized as an unconstitutional local act under Const 1963, art 4, § 29. That is, if an outlying local government cannot be required to comply with a general law for the very reason that they are at present an outlier, efforts to render public policies more uniform by the Legislature will perpetually, and wrongly, be frustrated on the grounds of "unconstitutionality." Perhaps in a particular instance, the achievement of such uniformity might be unwise or imprudent, but it would not be unconstitutional for that reason. It seems perfectly in accord with the Constitution that a transitional provision might be set forth within a statute so that the law might proceed in an orderly fashion from one set of rules to a different set of rules—from one regulatory order to another—and that such transitional provision be allowed, if only

temporarily, to treat covered entities in a distinctive fashion in order to achieve the uniform public policy sought by the Legislature. This not only does not frustrate the general effect of legislation, but may actually be necessary to achieve such a general effect. See *Chamski*, 288 Mich at 258 (stating that transitional provisions "promote speedy action on the part of counties having the required population").

2011 PA 280 establishes apportionment limits for every county within the state. Indeed, as conceded by plaintiff at oral argument, if the Legislature "had imposed this very same Act" *before* Oakland County had reapportioned following the last census, it would not constitute a local act. Thus, it seems beyond dispute that the Act's *overall* effect is general. That an otherwise general act requires some transition period in order to fully achieve its objectives does not by itself transform such act into a "local" act. The transitional provision is a necessary component of the Legislature's intention to give general and *uniform* effect to 2011 PA 280. While the Legislature was under no obligation to give such uniform effect to the statute, there is also nothing within the Constitution that either prohibits the Legislature from effecting this end or that compels the conclusion that a general act is thereby transformed into a local act.

The Court of Appeals held to the contrary that, although 2011 PA 280 was generally constitutional, the transitional provision was not because "Oakland County alone would be required to reduce the number of members on its county board of commissioners and undertake a second reapportionment of its county board of commissioners within 30 days after the effective date of the act." *Houston v Governor*, 295 Mich App 588, 595 (2012). However, it erred by isolating the transitional provision, and analyzing it independent of the larger Act. Just as *Robinson* forewarned, this separation of the transitional provision from the rest of the Act "distort[ed] the legislative intent" and led the Court of the Appeals astray.

The Court of Appeals also relied on our decision in *Michigan v Wayne Co Clerk*, 466 Mich 640 (2002). In *Wayne Co Clerk*, the relevant act ostensibly required any city with a population of 750,000 or more *and* a city council composed of nine at-large members to place a specific proposal on its August 6, 2002 ballot. Because Detroit was the only city that could satisfy those criteria by the date certain, we held that the act constituted "local" legislation.

Wayne Co Clerk is clearly distinguishable from the case at hand because there the date certain and the population criterion rendered the entire act closed-ended. No locality other than Detroit could ever have been brought within the operation of the act. Here, by contrast, the overall purpose of the Act is to limit the number of districts each county may apportion—an indisputably general purpose. That Oakland County may be the only county immediately out of compliance with the Act, and therefore immediately affected by the transitional provision, does not frustrate the Act's general applicability because every county remains potentially subject in the future to the limitations established by 2011 PA 280.

For these reasons, we believe that the Court of Appeals erred by finding that the transitional provision in 2011 PA 280 constituted a "local" act in violation of Const 1963, art 4, § 29. With regard to plaintiffs' additional arguments that 2011 PA 280 violates Const 1963, art 9, § 29, and abridges the right of an elector to challenge any apportionment plan submitted under § 1(2), we adopt the reasoning of the Court of Appeals partial concurrence and partial dissent.

MARILYN KELLY, J. (*dissenting*). I respectfully dissent because the Court of Appeals made the correct ruling in this politically charged case. MCL 46.401(2) is unconstitutional and should be severed from the County Apportionment Act.

SECTION 1(2) APPLIES ONLY TO OAKLAND COUNTY

The law and its application to the facts of this case are straightforward and simple. Last year, the Legislature enacted 2011 PA 280,[1] which amended the County Apportionment Act, for the stated purpose of reducing the size and cost of local government. The most significant change, found in MCL 46.401(1) and MCL 46.402, reduces the maximum number of commissioners any county may have from 35 to 21.[2] The number of commissioners per county is determined by that county's population.

MCL 46.401(2) sets a 30-day window from the effective date of the amended act for counties to get into compliance.[3] The pivotal difference

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[1] MCL 46.401 *et seq*.

[2] MCL 46.401(1), as amended by 2011 PA 280, states that "each county shall apportion the county into not less than 5 nor more than 21 county commissioner districts . . . ." MCL 46.402, as amended by 2011 PA 280, provides:

County Population	Number of Commissioners
Under 5,001	Not more than 7
5,001 to 10,000	Not more than 10
10,001 to 50,000	Not more than 15
~~50,001 to 600,000~~over 50,000	~~Not more than~~ 21
~~600,001 to 1,000,000~~	~~17 to 35~~
~~Over 1,000,000~~	~~25 to 35~~

[3] MCL 46.401(2), as amended by 2011 PA 280, states:

> If a county is not in compliance with section 2 on the effective date of the amendatory act that added this subsection, the county apportionment commission of that county shall, within 30 days of the effective date of the amendatory act that added this subsection, apportion the county in compliance with section 2. For subsequent apportionments in a county that is apportioned under this subsection, the county apportionment commission of that county shall comply with the provisions of subsection (1).

between MCL 46.401(1) and MCL 46.401(2) is this: Subsection (1) will affect every county that exceeds a population of 50, 000 for the life of the act. But subsection (2) will affect only those counties whose population exceeds 600, 000 and that have more than 21 commissioners on March 28, 2012.[4] It is undisputed that Oakland County is the only county that will be affected by the amended compliance provision in MCL 46.401(2). This flaw renders the subsection unconstitutional.

SECTION 1(2) IS UNCONSTITUTIONAL

The Michigan Constitution prohibits the Michigan Legislature from passing local or special acts unless they obtain a specified number of votes, which did not occur in this case.[5] This Court determined long ago that a legislative enactment that is limited to a specific geographical region constitutes a local or special act.[6] The fact that it contains a limitation, like a population threshold, does not necessarily render it a local act.[7] It will be deemed a local act if (1) it is not open-ended and (2)

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[4] The practical impact of subsection (2) is that the act affects only those counties with a population of over 600,000 that have more than 21 commissioners. The prior population threshold for a maximum of 21 commissioners was 50,001 to 600,000. Therefore, any county under this threshold will not be immediately affected. There are only 4 counties in Michigan with populations over 600,000: Wayne, Macomb, Kent and Oakland. Wayne and Macomb Counties are charter counties, which are not governed by this act. See MCL 45.501 to 45.521. Kent County has a population of 602,000, but because it already has only 21 commissioners, it is unaffected by the changes to MCL 46.401.

[5] Const 1963, art 4, § 29 provides:

> The legislature shall pass no local or special act in any case where a general act can be made applicable, and whether a general act can be made applicable shall be a judicial question. No local or special act shall take effect until approved by two-thirds of the members elected to and serving in each house and by a majority of the electors voting thereon in the district affected. Any act repealing local or special acts shall require only a majority of the members elected to and serving in each house and shall not require submission to the electors of such district.

It is undisputed that the voting requirements for the Legislature to pass a local act were not present in this case.

[6] *Advisory Opinion on Constitutionality of 1975 PA 301*, 400 Mich 270, 287 (1977).

[7] See *Michigan v Wayne Co Clerk*, 466 Mich 640 (2002); *City of Dearborn v Wayne Co Bd of Supervisors*, 275 Mich 151 (1936); *Lucas v Bd of Rd Comm'rs*, 131 Mich App 642, 652 (1984).

its population thresholds do not bear a reasonable relationship to its purpose.[8]

The Court declared a challenged statute unconstitutional in *Michigan v Wayne Co Clerk*[9] because it was not open-ended. We stated that "population-based statutes have been upheld against claims that they constitute local acts where it is possible that other municipalities or counties can qualify for inclusion if their populations change," but that "where the statute cannot apply to other units of government, that is fatal to its status as a general act."[10] The same flaw presented in the statute in *Wayne Co Clerk* exists here. MCL 46.401(2) cannot and will never apply to any unit of government aside from Oakland County.

This is because no other county could possibly be subject to its compliance provision by March 28, 2012. That is the effective date of the amended County Apportionment Act. It is a date certain, and it will never occur again. The only county in the state that will have a population of over 600,000 and more than 21 commissioners on March 28, 2012, is Oakland County. As the Court of Appeals majority aptly stated, "It is implicit in the *Wayne County Clerk* holding that when a statute can affect only one municipality within a specific time frame, *practically* impossible scenarios should not remove the statute from being considered an unconstitutional local act."[11]

The majority relies on *Chamski v Cowan*[12] for the proposition that a transitional provision may be necessary to achieve a general effect. But the transitional provision in *Chamski* did not apply to only one county for all time. Moreover, *Wayne Co Clerk*, not *Chamski*, is the only case on point. Like Oakland County in the present context, in *Wayne Co Clerk* only Detroit was affected by the act's criteria on the date certain. For that reason, the act was deemed unconstitutional.

SECTION 1(2) MUST BE SERVED TO ALLOW THE ACT TO SURVIVE CONSTITUTIONAL SCRUTINY

Because the remainder of the County Apportionment Act can stand on its own without the 30-day compliance provision, the Court of Appeals properly severed MCL 46.401(2).[13] The majority would have us hold that where part of a statute is unconstitutional, it need not be removed if the balance of the statute is constitutional. This is simply not accurate. Rather, "[t]he constitutionality of a law that is complete in itself, without certain provisions that may be omitted, will remain constitutional if such

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[8] *City of Dearborn*, 275 Mich at 155-156.

[9] *Wayne Co Clerk*, 466 Mich 640.

[10] *Id*. at 642-643.

[11] *Houston v Governor*, 295 Mich App 588, 595-596 (2012).

[12] *Chamski v Cowan*, 288 Mich 238 (1939).

[13] *Houston*, 295 Mich App at 597-598.

objectionable parts are omitted."[14] Just as the Court of Appeals held, this section can be severed and the balance of the act will stand.

CONCLUSION

Unlike so many cases that come before this Court, this one is easily resolved and does not fall in the category of a "close call." The Michigan Legislature has enacted a statute that requires reapportionment of certain county boards of commissioners. By its terms, a portion of this statute can apply to only one county, Oakland County, on the date it mandates reapportionment. Under Michigan law, such a statute is deemed a local act. And local acts are unconstitutional.

The part of the statute that renders it a local act is the section that requires reapportionment of county boards of commissioners on the effective date of the act, March 28, 2012. The flawed section has that effect because only Oakland County falls under the act on that date. On later dates, other counties could feasibly fall under the statute.

The mistake the majority makes is that it reads the constitutionally flawed section along with the rest of the statute, viewing the statute's impact "as a whole." But the whole, however read, cannot cure the constitutional flaw of one of its parts. The question that must be resolved is not whether the whole can cure the defective section. It cannot. The question is whether the whole is fatally infected by the unconstitutionality of the section.

If it is possible to sever the constitutionally flawed section of a statute while the remainder of the statute could function, the court should sever the flawed section. That is what the Court of Appeals did in this case. This Court should affirm its decision.

CAVANAGH, J., joined the statement of MARILYN KELLY, J.

HATHAWAY, J. (*dissenting*). I agree with Justice MARILYN KELLY that the Court of Appeals reached the correct decision in this politically charged case. I would affirm the Court of Appeals' decision that 2011 PA 280, § 1(2), amending MCL 46.401(2), is an unconstitutional local act.

Leave to Appeal Denied March 26, 2012:

In re APPLICATION OF MICHIGAN CONSOLIDATED GAS COMPANY, Nos. 143661 and 143662; reported below: 293 Mich App 360.

STURRIS v DEPARTMENT OF TREASURY, No. 143005; reported below: 292 Mich App 639.

CROWN ENTERPRISES, INC v CITY OF ROMULUS, No. 143236; Court of Appeals No. 286525.

PEOPLE v MAYES, No. 143258; Court of Appeals No. 296271.

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[14] *People v McMurchy*, 249 Mich 147, 159; 228 NW 723, 727-28 (1930); see also MCL 8.5.

CITY OF RIVERVIEW v STATE OF MICHIGAN, No. 143273; reported below: 292 Mich App 516.

LAGOS ESTATE v DAVIS, No. 143404; Court of Appeals No. 296837.
HATHAWAY, J., would grant leave to appeal.

KARMOL v ENCOMPASS PROPERTY AND CASUALTY COMPANY, No. 143679; reported below: 293 Mich App 382.

SEATON v WAYNE COUNTY CLERK, No. 143686; Court of Appeals No. 297502.

GOLDFADEN v CLEVELAND, No. 143752; Court of Appeals No. 297416.

PEOPLE v PHILLIP MITCHELL, No. 143769; Court of Appeals No. 302275.

PEOPLE v FRESCURA, No. 143776; Court of Appeals No. 301409.

PEOPLE v PHILLIP MITCHELL, No. 143792; Court of Appeals No. 301657.

PEOPLE v VALDEZ GLENN, No. 143818; Court of Appeals No. 300623.

PEOPLE v MURDAY, Nos. 143842, 143843, and 143844; Court of Appeals Nos. 304888, 304889, and 304890.

PEOPLE v WALK, No. 143857; Court of Appeals No. 300722.

PEOPLE v JOHNNY RILEY, No. 143858; Court of Appeals No. 301387.

PEOPLE v HAWTHORNE, No. 143859; Court of Appeals No. 303303.

PEOPLE v HENRY, No. 143860; Court of Appeals No. 300874.
HATHAWAY, J., not participating. Justice HATHAWAY recuses herself and will not participate in this case as she was the presiding trial court judge. See MCR 2.003(B).

PEOPLE v STOKES, No. 143862; Court of Appeals No. 302863.

PEOPLE v BEACH, No. 143864; Court of Appeals No. 303801.

PEOPLE v SEALEY, No. 143888; Court of Appeals No. 301997.

PEOPLE v TYRONE WIGGINS, No. 143897; Court of Appeals No. 303516.

PEOPLE v MADDEN, No. 143898; Court of Appeals No. 305252.

PEOPLE v ALTMAN, No. 143908; Court of Appeals No. 303448.

PEOPLE v CARMONA, No. 143910; Court of Appeals No. 304056.

PEOPLE v DOZIER, No. 143920; Court of Appeals No. 303169.

PEOPLE v RANGE, No. 143921; Court of Appeals No. 302276.

PEOPLE v SALTER, No. 143922; Court of Appeals No. 300754.

PEOPLE v RICKY GORDON, No. 143926; Court of Appeals No. 305266.

PEOPLE v BERCAICHE, No. 143944; Court of Appeals No. 301634.

PEOPLE v FELTON WOODS, No. 143946; Court of Appeals No. 305078.

PEOPLE v DAVIDSON, No. 143947; Court of Appeals No. 300589.

PEOPLE v MARLON WALKER, No. 143948; Court of Appeals No. 305667.

BERGER v KATZ, Nos. 143950 and 143951; Court of Appeals Nos. 291663 and 293880.

MILES v PAROLE BOARD, No. 143957; Court of Appeals No. 303983.

PEOPLE v ANTONIO COLEMAN, No. 143959; Court of Appeals No. 300462.

PEOPLE v GREGORY WALKER, No. 143961; Court of Appeals No. 302208.

PEOPLE v HERNANDEZ, No. 143964; Court of Appeals No. 304464.

EBERLINE v NATIONAL CITY MORTGAGE, INC, No. 143965; Court of Appeals No. 292022.

PEOPLE v CARLOS GONZALEZ, No. 143967; Court of Appeals No. 303508.

PEOPLE v GRAHAM, No. 143994; Court of Appeals No. 297830.

NATIONWIDE MUTUAL FIRE INSURANCE COMPANY v PARKER'S PROPANE GAS COMPANY, Nos. 144011 and 144029; Court of Appeals No. 299068.

PEOPLE v GARCIA, No. 144017; Court of Appeals No. 299497.

PEOPLE v WILLIE EDWARDS, No. 144027; Court of Appeals No. 299263.

PEOPLE v KENQUA SMITH, No. 144028; Court of Appeals No. 304923.

PEOPLE v PIGEE, No. 144030; Court of Appeals No. 301667.

PEOPLE v LESOSKI, No. 144032; Court of Appeals No. 305877.

PEOPLE v BRINSON, No. 144034; Court of Appeals No. 305712.

JONES v PERRY, No. 144037; Court of Appeals No. 305672.

PEOPLE v WYATT, No. 144062; Court of Appeals No. 305327.

PEOPLE v EUASHKA, No. 144069; Court of Appeals No. 298236.

PEOPLE v TIMOTHY PRINCE, No. 144077; Court of Appeals No. 296922.

PEOPLE v CHRISTOPHER WILLIAMS, No. 144078; Court of Appeals No. 298937.

PEOPLE v WEIDNER, No. 144080; Court of Appeals No. 298435.

PEOPLE v ESPINOZA, No. 144081; Court of Appeals No. 297574.

PEOPLE v TATE, No. 144085; Court of Appeals No. 298675.

PEOPLE v RONALD HILL, No. 144091; Court of Appeals No. 305469.

PEOPLE v FLOYD, No. 144092; Court of Appeals No. 297393.

PEOPLE v PETERSON, No. 144097; Court of Appeals No. 305795.

PEOPLE v RODRIGUEZ-ARANGO, No. 144099; Court of Appeals No. 297065.

PEOPLE v JAMES STEVENS, No. 144100; Court of Appeals No. 305886.

PEOPLE v OWENS, No. 144101; Court of Appeals No. 306142.

ARGUE v SHERRY, No. 144106; Court of Appeals No. 305779.

PEOPLE v RODNEY MASON, No. 144110; Court of Appeals No. 304869.

PEOPLE v MUNGAR, No. 144111; Court of Appeals No. 295146.

HATHAWAY, J., not participating. Justice HATHAWAY recuses herself and will not participate in this case as she was the presiding trial court judge before this case was reassigned after her election to this Court. See MCR 2.003(B).

PEOPLE v COLLIN, No. 144116; Court of Appeals No. 305772.

PEOPLE v RIEPEN, No. 144121; Court of Appeals No. 297316.

ALJAZI v STATE FARM INSURANCE, No. 144125; Court of Appeals No. 301038.

PEOPLE v TIMMONS, No. 144127; Court of Appeals No. 297670.

PEOPLE v PASCALE, No. 144130; Court of Appeals No. 299016.

NOLLABALLI v ACHANTA, No. 144133; Court of Appeals No. 298042.

PENFIELD TOWNSHIP v COLLARD, No. 144137; Court of Appeals No. 301146.

BRUCE v DYNAMIC RESOURCES, LLC, No. 144148; Court of Appeals No. 301969.

BURCH v EAS, No. 144149; Court of Appeals No. 303775.

SUEDEAL v CIENA HEALTH CARE MANAGEMENT, INC, No. 144157; Court of Appeals No. 300144.

FANNIE MAE v YOPP, No. 144167; Court of Appeals No. 305684.

GRIEVANCE ADMINISTRATOR v PEMBERTON, No. 144173.

PEOPLE v RAHIM SMITH, No. 144187; Court of Appeals No. 305342.

PEOPLE v KEATON, No. 144189; Court of Appeals No. 299175.

PEOPLE v STEELE, No. 144195; Court of Appeals No. 304460.

PEOPLE v JUAREZ, No. 144197; Court of Appeals No. 305901.

NUGENT v ST ONGE, No. 144202; Court of Appeals No. 299255.

PEOPLE v HAVENAAR, No. 144205; Court of Appeals No. 305942.

PEOPLE v ANTHONY COLEMAN, No. 144210; Court of Appeals No. 299517.

PEOPLE v ADAMS, No. 144217; Court of Appeals No. 305921.

PEOPLE v HANK JONES, No. 144219; Court of Appeals No. 29932.

PEOPLE v HARRY JOHNSON, No. 144221; Court of Appeals No. 299784.

HURON COUNTY PROSECUTOR v PAQUETTE, No. 144347; Court of Appeals No. 301140.

Reconsideration Denied March 26, 2012:

PEOPLE v SHERMAN, No. 142967; Court of Appeals No. 302104. Leave to appeal denied at 490 Mich 967.

PEOPLE v DANIELS, No. 143357; Court of Appeals No. 299186. Leave to appeal denied at 490 Mich 969.

PEOPLE v VANWAGONER, No. 143531; Court of Appeals No. 298695. Leave to appeal denied at 490 Mich 912.

PEOPLE v CLINTON, No. 143698; Court of Appeals No. 300902. Leave to appeal denied at 490 Mich 1002.

DITTMER v DEPARTMENT OF CORRECTIONS, No. 143720; Court of Appeals No. 298997. Leave to appeal denied at 490 Mich 1002.

In re VICKERSON ESTATE, No. 143724; Court of Appeals No. 294178. Leave to appeal denied at 490 Mich 972.

PEOPLE v JIMMIE JONES, No. 143791; Court of Appeals No. 305101. Leave to appeal denied at 490 Mich 1002.

LALONDE v JPMORGAN CHASE BANK NA, No. 143852; Court of Appeals No. 295238. Leave to appeal denied at 490 Mich 974.

Superintending Control Denied March 26, 2012:

KHAN v ATTORNEY GRIEVANCE COMMISSION, No. 144164.

FRENCH v ATTORNEY GRIEVANCE COMMISSION, No. 144223.

Summary Disposition March 28, 2012:

CARLSON v CITY OF WARREN, Nos. 143121 and 143122; Court of Appeals Nos. 299577 and 299587. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration, as on leave granted, of the issue raised in Court of Appeals Docket No. 299577, whether any of the class members' claims are barred by the three-year period of limitations set forth in MCL 600.5805(10); and the issue raised in Court of Appeals Docket No. 299587, whether the

defendant has a due process right to defend against the plaintiffs' individual claims of causation and damages in this class action and/or whether there are due process implications to the process of statistical "extrapolation" to be drawn from the testimony of the plaintiffs' expert witnesses. In all other respects, leave to appeal is denied.

CAVANAGH, J., did not participate due to a familial relationship with counsel of record.

SCION, INC v MARTINEZ, No. 143347; Court of Appeals No. 295178. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals and reinstate the Macomb Circuit Court's September 18, 2009, opinion and order. The Court of Appeals erred in vacating the trial court's decision that granted the motion to intervene filed by Gonzalez Contracting Services, Inc., and Industrial Design Innovations, Inc., and invalidated the plaintiff's writ of garnishment. The Court of Appeals erred in holding that the motion to intervene was untimely, where timeliness was not raised by any party below, and where the motion was consistent with intervention by right under MCR 2.209(A), and with the court rules governing garnishment after judgment, see MCR 3.101(L)(2) and (M)(1). The Court of Appeals also erred in holding that the plaintiff's writ of garnishment, which was sought and issued in violation of MCR 2.614(A)(1), had priority over the perfected security interest of intervenor Industrial Design Innovations, Inc. Accordingly, we reinstate the Macomb Circuit Court's decision that granted the motion to intervene, invalidated the plaintiff's writ, and released the escrowed funds to intervenor Industrial Design Innovations, Inc.

PEOPLE v COOLEY, No. 143634; Court of Appeals No. 304071. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted.

RIVER INVESTMENTS LCP, LLC v WATSON BROTHERS COMPANY, No. 143851; Court of Appeals No. 298253. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals and we remand this case to the St. Clair Circuit Court for further proceedings not inconsistent with this order. The Court of Appeals erred by concluding that the plaintiff's action for breach of implied warranty in this case is subject to the statute of repose, MCL 600.5839, because the claim does not allege an "injury to property . . . arising out of the defective and unsafe condition of an improvement to real property."

PEOPLE v ALTON SANDERS, No. 144118; Court of Appeals No. 298507. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate that part of the Court of Appeals' judgment finding evidence of a traffic violation for failing to signal a lane change, and we remand this case to the Monroe Circuit Court for further findings of fact relative to whether the failure to signal a lane change independently justified the traffic stop. Where the trial court failed to make factual findings that are important to the resolution of the legal issue, the Court of Appeals should have remanded the case to the trial court to make those findings instead of making factual determinations based on the lack of

contrary findings by the trial court. In all other respects, leave to appeal is denied. We do not retain jurisdiction.

Leave to Appeal Granted March 28, 2012:

STATE OF MICHIGAN v MCQUEEN, No. 143824; reported below: 293 Mich App 664. The parties shall include among the issues to be briefed whether the Michigan Medical Marihuana Act, MCL 333.26421 *et seq*., permits patient-to-patient sales of marijuana.

The Attorney General and the Michigan Association of Compassion Centers are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

Leave to Appeal Denied March 28, 2012:

PEOPLE v SAYLOR, No. 143117; Court of Appeals No. 302633.

PEOPLE v SHAWN HENDERSON, No. 143191; Court of Appeals No. 302684.

HENDERSON v HENDERSON, No. 143749; Court of Appeals No. 295765.

ADKINS v DICK, Nos. 143903 and 143904; Court of Appeals Nos. 297820 and 298945.

PEOPLE v MCCLOUD, No. 143995; Court of Appeals No. 298504.

Summary Disposition March 30, 2012:

MCCLENDON v APOSTOLU, No. 144160; Court of Appeals No. 305984. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we reverse the order of the Wayne Circuit Court granting the plaintiff's motion to reinstate the complaint, because the delay in filing the motion, in excess of 3½ years, was unjustified. We remand this case to that court for entry of an order granting the defendants' motion to dismiss.

MARILYN KELLY and HATHAWAY, JJ., would deny leave to appeal.

Leave to Appeal Granted March 30, 2012:

PEOPLE v KADEEM WHITE, No. 144387; reported below: 294 Mich App 622.

Order Granting Oral Argument Granted in Case Pending on Application for Leave to Appeal Entered March 30, 2012:

PEOPLE v VAUGHN MITCHELL, No. 144239; Court of Appeals No. 293284.

Leave to Appeal Denied March 30, 2012:

UNEMPLOYMENT INSURANCE AGENCY v GERSTENSCHLAGER, No. 143837; Court of Appeals No. 304928.

Summary Disposition April 4, 2012:

MANSOUR v AZ AUTOMOTIVE CORPORATION, No. 144153; Court of Appeals No. 292241. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals and reinstate the decision of the Workers' Compensation Appellate Commission (WCAC). A true majority decision of the WCAC is not required in order to have a proper decision for appellate review. *Findley v DaimlerChrysler Corp*, 490 Mich 928 (2011).

MARILYN KELLY, J., would deny leave to appeal for the reasons set forth in Justice CAVANAGH's dissenting statement in *Findley*, 490 Mich 928, 928-929 (2011).

Leave to Appeal Granted April 4, 2012:

HALL v STARK REAGAN, PC, No. 143909; reported below: 294 Mich App 88. The parties shall include among the issues to be briefed (1) whether the parties' shareholder agreement arbitration clause encompasses claims arising under the Civil Rights Act (CRA), MCL 37.2101 *et seq*., and (2) whether the plaintiffs, as mutual equal shareholders of the law firm, have a legally cognizable claim against the defendants under the CRA.

We further order that this case be argued and submitted to the Court together with the case of *Hall v Stark Reagan, PC* (Docket No. 143911), at such future session of the Court as both cases are ready for submission.

HALL v STARK REAGAN, PC, No. 143911; reported below: 294 Mich App 88. The parties shall include among the issues to be briefed (1) whether the parties' shareholder agreement arbitration clause encompasses claims arising under the Civil Rights Act (CRA), MCL 37.2101 *et seq*., (2) whether the plaintiffs, as mutual equal shareholders of the law firm, have a legally cognizable claim against the defendants under the CRA, and (3) whether the appellants are properly named defendants in this case.

We further order that this case be argued and submitted to the Court together with the case of *Hall v Stark Reagan, PC* (Docket No. 143909), at such future session of the Court as both cases are ready for submission.

Leave to Appeal Denied April 4, 2012:

PEOPLE v FLEMING, No. 143583; Court of Appeals No. 299994.

JOURNEY v BEECHER COMMUNITY SCHOOL DISTRICT, No. 143626; Court of Appeals No. 298263.

MCCARTHY V SCOFIELD, No. 143785; Court of Appeals No. 300921. On the Court's own motion, we order plaintiff Patrick McCarthy to pay $500 to the Clerk of this Court within 28 days of the date of this order, pursuant to MCR 7.316(D). In Docket Nos. 141439 and 141340 and 141442 and 141443, by orders of September 9, 2010, the plaintiff was ordered to pay $250 "based on the plaintiff's inflammatory and unsubstantiated accusations regarding the conduct of the defendants and the Court of Appeals." In this application for leave to appeal, the plaintiff persists in making inflammatory and unsubstantiated accusations against those involved in this litigation. We therefore again impose sanctions. We direct the Clerk of this Court not to accept any further filings from Mr. McCarthy in any noncriminal matter until he has made the payment required by this order.

PEOPLE V OETTING, No. 143887; Court of Appeals No. 305518.

PEOPLE V NOONAN, No. 143892; Court of Appeals No. 305035.

LITZENBERG V GUIFFRE, No. 143971; Court of Appeals No. 299217.

CAVANAGH, MARILYN KELLY, and HATHAWAY, JJ., would grant leave to appeal.

PEOPLE V DANTE GAINES, No. 143973; Court of Appeals No. 305344.

DAVIS V QUICKWAY SERVICES, No. 143988; Court of Appeals No. 302018.

MARILYN KELLY and HATHAWAY, JJ., would grant leave to appeal.

PEOPLE V GERALD PRINCE, No. 143992; Court of Appeals No. 305949.

In re MP, No. 144052; Court of Appeals No. 296331.

PEOPLE V GUTIERREZ, No. 144093; Court of Appeals No. 295169.

Summary Disposition April 6, 2012:

JOHNSON V HURLEY MEDICAL GROUP, No. 141793; Court of Appeals No. 287587. On March 8, 2012, the Court heard oral argument on the application for leave to appeal the August 12, 2010, judgment of the Court of Appeals. On order of the Court, the application is again considered. MCR 7.302(H)(1). In lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals and we reinstate the Genesee Circuit Court's order granting summary disposition to the defendants. In 2000, the plaintiff filed a notice of intent (NOI) that failed to state the manner in which it was alleged that the breach of the standard of practice or care was the proximate cause of the injury claimed in the notice, as required by MCL 600.2912b(4)(e). Because the NOI failed to contain all the information required under MCL 600.2912b(4), it did not toll the statute of limitations. *Boodt v Borgess Med Ctr*, 481 Mich 558, 562-563 (2008); *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 59, 64 (2002). The Court of Appeals erred in concluding that under MCL 600.2301 and *Bush v Shabahang*, 484 Mich 156 (2009), the plaintiff could amend her NOI retroactive to when it was filed. By its own terms, *Bush*

applies only to cases affected by the 2004 amendment of MCL 600.5856. *Id*. at 170, 185. See also *Ligons v Crittenton Hosp*, 490 Mich 61, 87 (2011) (declining "to apply the rationale of *Bush* beyond its limited statutory focus," i.e., the 2004 amendment of MCL 600.5856). The NOI here was filed before the effective date of the 2004 amendment and thus does not fall within the holding of *Bush*. Further, because the plaintiff failed to file an NOI that complied with all the content requirements of MCL 600.2912b(4), no action could be commenced, *Boodt*, 481 Mich at 562-563, and MCL 600.2301 applies only to pending actions. *Id.* at 563 n 4; *Driver v Naini*, 490 Mich 239, 254, 264 (2011) (explaining that MCL 600.2301 is inapplicable where no action or proceeding is pending, and that no action is pending if it could not be commenced).

YOUNG, C.J. (*concurring*). I fully concur in the Court's order. I conclude that even if *Bush v Shabahang*, 484 Mich 156 (2009), applied in this case, the decision of the panel of the Court of Appeals should be reversed because a statute of limitations defense is a substantial right of a party. *DeCosta v Gossage*, 486 Mich 116, 138 (2010) (MARKMAN, J., dissenting), citing *Gladych v New Family Homes, Inc*, 468 Mich 594, 600 (2003).

CAVANAGH, MARILYN KELLY, and HATHAWAY, JJ., would deny leave to appeal.

Leave to Appeal Denied April 6, 2012:

ATTORNEY GENERAL v BLUE CROSS BLUE SHIELD OF MICHIGAN, Nos. 142670 and 142671; reported below: 291 Mich App 64. Leave to appeal having been granted and the briefs and oral arguments of the parties having been considered by the Court, we vacate our order of July 13, 2011. The application for leave to appeal the December 7, 2010, judgment of the Court of Appeals is denied, because we are no longer persuaded that the question presented should be reviewed by this Court.

MARILYN KELLY, J. (*dissenting*). I agree with Justice MARKMAN that the Court of Appeals erred by affirming the trial court's decision. However, I reach my conclusion using a different legal analysis.

I would reverse both the Court of Appeals and the trial court's decisions and find Blue Cross Blue Shield of Michigan (BCBSM) in violation of MCL 550.1207(1)(o). That section allows BCBSM to have ownership and other interests in "domestic, foreign, or alien insurers" as long as the criteria it lists are met.[1] The critical limitation is in MCL 550.1207(1)(o)(*iv*). This allows BCBSM to have an interest in domestic, foreign, or alien insurers if the interest "will not result in [BSBSM] owning or controlling part or all of the insurer . . . and the insurer being acquired is only authorized to sell disability insurance . . . ."[2]

There is no dispute among the parties or in the lower court opinions that BCBSM could not have directly acquired the three foreign insurers. At issue is whether it could lawfully acquire the insurers indirectly. I believe it could not. I base that conclusion on MCL 550.1207(1)(o)(*iii*), which states that "[a]s used in this subparagraph and subparagraph (*iv*), 'control' means that term as defined [in MCL 500.115] of the insurance

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[1] MCL 550.1207(1)(o)(*i*) to (*iv*).

[2] MCL 550.1207(1)(o)(*iv*).

code . . . ." I rely also on MCL 500.115(b)(*i*), which defines "control" as "possession, direct or *indirect*, of the power to direct or cause the direction of the management and policies of a person . . . . Control is presumed to exist if any person . . . directly or *indirectly*, owns . . . 10% or more of the voting securities of any other person . . . ." (Emphasis added.) Under MCL 500.114, "person" includes an insurer.

It is uncontested that through its 100 percent ownership of the Accident Fund, BCBSM indirectly owns more than 10 percent of the voting securities of the three foreign insurers. The BCBSM organization chart shows that BCBSM owns 100 percent of the voting securities of the Accident Fund, which owns 100% of the voting securities of the three foreign insurers. BCBSM's 2009 and 2010 consolidated financial statements list the three foreign insurers as "purchased" subsidiaries. Given that BCBSM indirectly owns 100 percent of the foreign insurers, it must be presumed that it controls them.

The trial court reasoned that nothing in MCL 550.1207(1)(o) barred BCBSM's subsidiaries from purchasing insurance companies. This simply defies reason. That is exactly what MCL 550.1207(1)(o) does by including "indirect" ownership in the definition of "control." In the context of corporations, a subsidiary is, by definition, a corporation "in which a parent corporation has a controlling share."[3] Since BCBSM has not just a "controlling share," but 100 percent ownership of the Accident Fund, it indirectly controls the foreign insurers. The trial court itself stated that BCBSM "does not directly own, and did not directly acquire or purchase, the insurance companies. If anything, [BCBSM] only *indirectly* owns, and only *indirectly* purchased or acquired, the companies."[4] This is simply not allowed under MCL 550.1207(1)(o).

To put the nail in the coffin, MCL 550.1207(1)(o)(*iv*) also limits the insurance companies BCBSM is allowed to have an interest in to insurers "only authorized to sell disability insurance." The three foreign insurers acquired are workers' compensation insurers. This is not a form of disability insurance; it is a form of casualty insurance.[5]

BCBSM violated the restrictions in MCL 550.1207(1)(o) and should be required to divest itself of its interest in the three foreign insurers. For that reason, I respectfully dissent.

MARKMAN, J. (*dissenting*). The facts of this case are as straightforward as the statutory interpretation that follows. In 1939, Blue Cross/Blue Shield of Michigan (BCBSM), a nonprofit "health care corporation," was established by the Michigan Legislature for the purpose of providing broad health care protection to the people of Michigan. As a "health care corporation," BCBSM is generally prohibited from acquiring any interest in "domestic, foreign, or alien insurers . . . ." MCL 550.1207(1)(o). However, in 1993, the Legislature amended the Nonprofit Health Care Corporation Reform Act ("Act"), MCL 550.1101 *et seq*., and permitted

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[3] Black's Law Dictionary (8th ed), p 368.

[4] *Attorney General v Blue Cross Blue Shield of Mich*, order of the Ingham Circuit Court granting defendant's motion for reconsideration, entered January 13, 2009 (Case No. 08-917-CZ) (emphasis added).

[5] MCL 500.624(1)(b).

BCBSM to form a "domestic stock insurance company" for the purpose of "acquiring, owning, and operating the state accident fund," a for-profit workers' compensation carrier. MCL 550.1207(1)(x). Pursuant to the Act, BCBSM formed the Accident Fund as a "domestic stock insurance company," which then acquired the state accident fund. Then, in 2005, the Accident Fund entered into a series of transactions that resulted in the acquisition of 100 percent of the common shares of three foreign workers' compensation insurers. In the present litigation, the Attorney General challenges the validity of these acquisitions. The lower courts held that the Attorney General failed to state a claim upon which relief could be granted, and the majority here denies leave to appeal. Because, in my judgment, the Accident Fund as a wholly owned subsidiary of BCBSM lacked the authority to engage in these transactions, I respectfully dissent.

(1) MCL 550.1207(1)(o) generally prohibits BCBSM, as a "health care corporation," from acquiring an interest in "domestic, foreign, or alien insurers."

(2) However, the Act provides that, notwithstanding the general prohibition in subsection (1)(o) against BCBSM acquiring an interest in "domestic, foreign, or alien insurers," BCBSM may "establish, own, and operate a domestic stock insurance company only for the purpose of acquiring, owning, and operating the state accident fund pursuant to chapter 51 of the insurance code of 1956, 1956 PA 218, MCL 500.5100 to 500.5114 . . . ." MCL 550.1207(1)(x).

(3) The Accident Fund, as the "domestic stock insurance company" established by BCBSM under subsection (1)(x), derives its authority from, and is governed by, this provision, a point acknowledged by BCBSM in its brief on appeal. See Appellee's Brief at 28 n 28 (noting that, in contrast to other provisions of MCL 550.1207(1) that do not apply to the Accident Fund, MCL 550.1207(1)(x) "substantively and markedly" limits its activities).

(4) Subsection (1)(x), by using the modifier "*only*," confines the permissible business activities of the Accident Fund when it is "own[ed] and operate[d]" by BCBSM to "acquiring, owning, and operating the state accident fund pursuant to chapter 51 of the insurance code of 1956 . . . ."

(5) The transactions at issue are not authorized by subsection (1)(x) because the Accident Fund's acquisition of foreign insurance companies constitutes an act falling outside the "acquiring, owning, [or] operating the state accident fund." Rather, it is an act that expands the scope of its business activities beyond subsection (1)(x).

(6) Further, no other provision in chapter 51 of the Insurance Code provides authority for the Accident Fund to acquire additional insurers. Thus, the transactions were beyond the Fund's authority.

(7) Subparagraph (*i*) of subsection (1)(x) permits the Accident Fund to transact specified types of insurance "directly or indirectly." The Court of Appeals infers from this language that the Fund was permitted to acquire the foreign insurance companies. However, to accept this inference would be in contravention of established principles of interpretation. Subsection (1)(x) limits the permissible scope of the Fund's activities to

"acquiring, owning, and operating the state accident fund pursuant to chapter 51 of the insurance code . . . ." By immediately thereafter using the phrase "so long as all of the following are met," subsection (1)(x) then places *additional* limitations on the Fund's operations through six subparagraphs.[1] Rather, however, than reading these additional limitations *in the context* of the overarching limitation found in subsection (1)(x), the Court of Appeals instead reads the additional limitations *out of context* by disregarding the primary limitation itself. The failure to give full effect to this sentence renders it altogether nugatory. And because "[c]ourts must give effect to every word, phrase, and clause in a statute and avoid an interpretation that would render any part of the statute surplusage or nugatory," *State Farm Fire & Cas Co v Old Republic Ins Co*, 466 Mich 142, 146 (2002), the Court of Appeals' interpretation is in error.

(8) Nor does MCL 500.1305(1), which provides authority for a "domestic insurer" to "acquire 1 or more subsidiaries," provide authority for the Accident Fund to engage in the acquisition of the three foreign insurance companies. The Fund, as a legislatively authorized entity, is not an ordinary "domestic stock insurance company." The enabling provision that authorized the Fund's formation defined the scope of its business activities. That is, under MCL 550.1207(1)(x), the Fund may *only* "acquir[e], own[], and operat[e] the state accident fund pursuant to chapter 51 of the insurance code of 1956, 1956 PA 218, MCL 500.5100 to 500.5114 . . . ." MCL 500.1305(1), which provides authority for an ordinary domestic insurer to acquire subsidiaries, is found in chapter 13 of the Insurance Code, not in chapter 51.

(9) Accordingly, because MCL 500.1305(1) is not found in *chapter 51* of the Insurance Code, it does not govern the Fund's operation of the state accident fund. In short, § 1305(1) does not provide authority for the Fund to "acquire 1 or more subsidiaries," nor does any other provision of law that has been identified.

In conclusion, because the Accident Fund as a wholly owned subsidiary of BCBSM, in my judgment, lacked the authority to engage in the acquisition of the three foreign insurance companies, the trial court's determination that the Attorney General failed to state a claim upon which relief could be granted, and the Court of Appeals' affirmance, are both in error. Accordingly, I dissent from the majority's denial of leave to appeal and would instead reverse the judgment and remand this matter to the trial court for further proceedings.

NATIONAL WILDLIFE FEDERATION v DEPARTMENT OF ENVIRONMENTAL QUALITY, No. 143771; Court of Appeals No. 301993.

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[1] That the Legislature specifically intended subsection (1)(x) to govern and confine the permissible scope of *the Accident Fund's* business activities as a wholly owned subsidiary of BCBSM is further evidenced by these subparagraphs. For example, subparagraph (*i*) limits "the insurer" to transacting only specified types of insurance such as worker's compensation insurance.

MARILYN KELLY and HATHAWAY, JJ., would grant leave to appeal because petitioner raises jurisprudentially significant issues that this Court should examine.

FEDERAL NATIONAL MORTGAGE ASSOCIATION v JORDAN, No. 144373; Court of Appeals No. 306830.

FEDERAL HOME LOAN MORTGAGE CORPORATION v LAUB, No. 144833; Court of Appeals No. 309101.

Summary Disposition April 13, 2012:

HANNA v MERLOS, No. 142914; Court of Appeals No. 289513. On April 5, 2012, the Court heard oral argument on the application for leave to appeal the March 3, 2011, judgment of the Court of Appeals. On order of the Court, the application is again considered. MCR 7.302(H)(1). In lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals, and we remand this case to the Wayne Circuit Court for entry of an order granting summary disposition to the defendant. The plaintiff failed to "file with the complaint an affidavit of merit" as required by MCL 600.2912d(1). See *Scarsella v Pollack*, 461 Mich 547, 549 (2000), and *Ligons v Crittenton Hosp*, 490 Mich 61, 84, 85 (2011).

CAVANAGH, MARILYN KELLY, and HATHAWAY, JJ., would deny leave to appeal.

PALETTA v OAKLAND COUNTY ROAD COMMISSION, No. 143663; Court of Appeals No. 298238. On April 5, 2012, the Court heard oral argument on the application for leave to appeal the July 21, 2011, judgment of the Court of Appeals. On order of the Court, the application is again considered. MCR 7.302(H)(1). In lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals. The accumulation of gravel on the paved roadway was not actionable under the highway exception to the governmental tort liability act (MCL 691.1402) because an accumulation of gravel, whether natural or otherwise, does not implicate the defendant's duty to maintain the highway in "reasonable repair." MCL 691.1402(1); *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 160 (2000); *Buckner Estate v City of Lansing*, 480 Mich 1243 (2008). We remand this case to the Oakland Circuit Court for entry of an order of summary disposition in favor of the Oakland County Road Commission.

CAVANAGH, MARILYN KELLY, and HATHAWAY, JJ., would deny leave to appeal.

Leave to Appeal Denied April 13, 2012:

TRADER v COMERICA BANK, No. 143811; reported below: 293 Mich App 210.

MARKMAN, J. (*dissenting*). I would grant leave to appeal to determine whether in applying the statute of limitations to the certificates of deposit at issue, the Court of Appeals should have separately considered plaintiff's claims for the principal and the interest accrued under the certificates.

Leave to Appeal Before Decision by the Court of Appeals Denied April 13, 2012:

SMITH v DEPARTMENT OF HUMAN SERVICES DIRECTOR, No. 144913; Court of Appeals No. 309447. The application for leave to appeal before decision by the Court of Appeals is considered, and it is denied, because the Court is not persuaded that the question presented should be reviewed by this Court before consideration by the Court of Appeals.

The Court of Appeals is directed to decide this case on an expedited basis, considering whether (1) the circuit court erred in concluding that defendant may not implement limits on the duration of welfare benefits as part of its authority to establish eligibility criteria for family independence program recipients under MCL 400.57a(3) and/or MCL 400.57b(1)(f) and, if so, (2) whether plaintiffs are entitled to summary disposition on the alternative ground that defendant failed to comply with the requirements of the Administrative Procedures Act, MCL 24.201 *et seq*. The motion for stay is denied. The motion for leave to file a brief amicus curiae is denied as moot.

MARILYN KELLY, J. (*concurring*). I concur with the decision to deny defendant's application to bypass the Court of Appeals as well as its motion for a stay. I write separately to reflect on the dissent of my colleague.

The grant of a bypass, which he advocates, would entirely deprive the Court of Appeals of its authority to decide the matter. It would also deviate from the normal appellate course that our court rules require.

The grant of a stay, which my colleague also advocates, would not necessarily save the state any costs at all. It would only be if the Court of Appeals were to reverse the decision of the trial court that costs might be unnecessarily incurred. And, of course, I have considered how likely that result is when deciding not to grant a stay. Moreover, the Court has directed the Court of Appeals to act expeditiously, which is all we could ask of ourselves.

MARKMAN, J. (*dissenting*). I would grant either defendant's motion to bypass the Court of Appeals or its motion for a stay. As a result of the Court's failure to take either of these actions, this case is not afforded the most expeditious and final review possible, and the state will incur significant costs in the interim period. It is a matter of considerable consequence for our constitutional system of separated powers when a trial court enjoins the executive authority from undertaking an action, in this case forbidding the executive from terminating the eligibility of certain recipients of welfare benefits. Such a case raises a question "of considerable delicacy, as it requires one of the co-ordinate branches of the government to pass its judgment on the acts of another, and the presumption is that the executive department has the same desire to keep within constitutional limits as either of the other two." *Dullam v Willson*, 53 Mich 392, 397 (1884). Indeed, it is precisely the purpose of MCR 7.302(B)(4)(b) to expedite the resolution of cases such as this in which an appeal has been taken from a ruling that an "action of the legislative or executive branch of state government is invalid[.]" As

the concurrence is well aware, this court rule allows us to "deviate from the normal appellate course" in exactly these circumstances. The need for such expedited review is underscored in this case by the financial implications for the state, as the injunction now in place will cost the state an estimated $7 million per month, in addition to the transitional costs that defendant asserts will be incurred as the result of having to comply with the injunction. I respectfully dissent.

Statement Regarding Decision on Motion for Disqualification Entered April 13, 2012:

LAWRENCE v CITY OF TROY, No. 144845; Court of Appeals No. 300478.

ZAHRA, J. In this Freedom of Information Act (FOIA) case, plaintiff has moved for my disqualification. I previously recused myself from plaintiff's original action brought under MCR 7.304, in which plaintiff asked this Court to implement superintending control power over the Board of Law Examiners' 2010 decision denying plaintiff's application for admission to the State Bar of Michigan. *Lawrence v Bd of Law Examiners*, 490 Mich 935 (2011). The basis of my recusal was that I was a member of the Board of Law Examiners and had participated in the decision-making process that was the subject of plaintiff's superintending control complaint. Plaintiff now seeks my recusal, alleging that the instant action was cited in plaintiff's action seeking superintending control. That plaintiff elected to mention his FOIA action in his complaint for superintending control does not form a basis for my recusal in this action. Plaintiff also implies that as a member of the board, I directed the State Bar to investigate plaintiff's motives for filing the instant FOIA action. This is not true. The board did indeed refer plaintiff to the State Bar for further character and fitness investigation, but nothing in the request for investigation directed the State Bar to investigate plaintiff's FOIA action. Further, the Board of Law Examiners' May 4, 2010, opinion states the bases of the board's decision to deny plaintiff's application for admission to the bar. There is no mention of plaintiff's FOIA case in that opinion. That plaintiff was apparently involved in this litigation during the time his application for admission was pending was not an issue before the board and had no bearing on the board's decision, which speaks for itself. In sum, plaintiff has failed to substantiate any basis for my recusal. Because I have no actual bias for or against plaintiff and there is no appearance of impropriety, nor do any other grounds exist for my disqualification, I deny plaintiff's motion.

Leave to Appeal Denied April 16, 2012:

DAVIS v EMERGENCY MANAGER FOR THE DETROIT PUBLIC SCHOOLS, No. 144084; Court of Appeals No. 306165.* On March 8, 2012, the Court heard oral argument on the application for leave to appeal the October 6, 2011, order of the Court of Appeals. On order of the Court, the application is again considered and, pursuant to MCR 7.302(H)(1), we

* As amended by order entered April 17, 2012—REPORTER.

vacate that part of the Court of Appeals October 6, 2011, order providing the legal reasoning for the denial of the application. In all other respects, the application for leave to appeal is denied as moot in light of the fact that Roy S. Roberts was reappointed to serve as Emergency Manager for the Detroit Public Schools, effective April 2, 2012, and he signed an oath of office on that date.

YOUNG, C.J. (*concurring*). I concur in the Court's order denying leave to appeal because the Governor's reappointment of Roy Roberts to the office of Emergency Manager for the Detroit Public Schools has rendered this proceeding moot.

I. FACTS AND PROCEDURAL HISTORY

On May 4, 2011, the Governor appointed Roberts Emergency Manager for the Detroit Public Schools pursuant to MCL 141.1501 *et seq*. Roberts signed a contract agreeing to serve as emergency manager from May 16, 2011, until May 16, 2012. Roberts did not take the oath of office before he began his duties as emergency manager.

On August 11, 2011, Robert Davis submitted an application to the Attorney General, pursuant to MCR 3.306(B)(3)(a), requesting that the Attorney General institute a quo warranto action against Roberts because Roberts had failed to take the oath of office before commencing his duties. Davis alleges that article 11, § 1 of the 1963 Michigan Constitution required Roberts to take the oath of office before he commenced his duties as emergency manager[1] and that his failure to timely take the oath rendered the office vacant pursuant to MCL 201.3(7).[2] Davis alternatively claims that Roberts's failure to file an oath within 60 days of his appointment rendered his original appointment a nullity pursuant to MCL 15.93.[3] Roberts took the oath of office on August 30, 2011. On September 6, 2011, the Attorney General declined Davis's request to initiate a quo warranto action.

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[1] Article 11, § 1 of the 1963 Michigan Constitution provides:

> All officers, legislative, executive and judicial, before entering upon the duties of their respective offices, shall take and subscribe the following oath or affirmation . . . .

[2] MCL 201.3 provides:

> Every office shall become vacant, on the happening of any of the following events, before the expiration of the term of such office:
>
> * * *
>
> 7. His refusal or neglect to take his oath of office, or to give, or renew any official bond, or to deposit such oath, or bond, in the manner and within the time prescribed by law.

[3] MCL 15.93 provides:

Davis then filed an ex parte application for leave to file a complaint for a writ of quo warranto in the Court of Appeals pursuant to MCR 3.306(B)(3)(b). The Court of Appeals denied the application, holding that Davis had failed to demonstrate sufficient apparent merit to justify inquiry by quo warranto. The Court of Appeals reasoned that Roberts's failure to take the oath immediately did not violate MCL 201.3(7), Roberts had remedied his omission by taking the oath of office in August 2011, and Roberts was a de facto officer before he took the oath of office.

Davis filed an application for leave to appeal the decision of the Court of Appeals. We ordered oral argument on the application[4] and heard arguments on March 8, 2012.

While the case was pending before this Court, the Governor reappointed Roberts to the office of Emergency Manager for the Detroit Public Schools on March 30, 2012. The reappointment became effective April 2, 2012. On April 2, 2012, Roberts took the oath of office and filed a certified copy of his oath with the Secretary of State.

The Governor's reappointment of Roberts raises two questions: whether the Governor had the authority to reappoint Roberts and, if so, what effect such reappointment has on this proceeding.

II. THE GOVERNOR'S AUTHORITY TO REAPPOINT THE EMERGENCY MANAGER

MCL 141.1515(4) establishes the Governor's authority to appoint an emergency manager:

> Upon the confirmation of a finding of a financial emergency, the governor shall declare the local government in receivership and shall appoint an emergency manager to act for and in the place and stead of the governing body and the office of chief administrative officer of the local government.

MCL 141.1515(5)(d) discusses removal of an emergency manager and allows the Governor to fill a vacancy in the office of emergency manager:

> Except as otherwise provided in this subdivision, *the emergency manager shall serve at the pleasure of the governor*. An emergency manager is subject to impeachment and conviction by the legislature as if he or she were a civil officer under section 7 of article XI

> Every such officer, except where otherwise directed by law, shall file his oath of office and certificate or bond aforesaid, as the case may be, within 60 days from the receiving of his commission or appointment; and in default thereof, such commission or appointment shall be null and void . . . .

[4] *Davis v Emergency Manager for the Detroit Pub Sch*, 490 Mich 966 (2011).

> of the state constitution of 1963. *A vacancy in the office of emergency manager shall be filled in the same manner as the original appointment*.[5]

MCL 141.1515(8) further elaborates on removal and the Governor's duty to appoint a new emergency manager within 30 days of removal:

> The emergency manager shall continue in the capacity of an emergency manager as follows:
>
> (a) Until removed by the governor or the legislature as provided in subsection (5)(d). If an emergency manager is removed pursuant to this subdivision, the governor shall within 30 days of the removal appoint a new emergency manager.
>
> (b) Until the financial emergency is rectified.

As indicated above, Davis claims that Roberts is an officer within the meaning of article 11, § 1 of the Constitution and that Roberts's failure to take the oath of office before commencing his duties rendered vacant the office of Emergency Manager for the Detroit Public Schools pursuant to MCL 201.3(7). Davis alternatively claims that Roberts's failure to file an oath within 60 days of his appointment rendered his original appointment a nullity pursuant to MCL 15.93. If either of these assertions is true,[6] then the office of Emergency Manager for the Detroit Public Schools was legally vacant no later than July 16, 2011. MCL

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[5] Emphasis added.

[6] I am not convinced that a person who serves as an emergency manager is an "officer" within the meaning of article 11, § 1 of the 1963 Michigan Constitution. Article 11, § 1 of the 1963 Michigan Constitution provides:

> All officers, legislative, executive and judicial, before entering upon the duties of their respective offices, shall take and subscribe the following oath or affirmation . . . .

Neither party, apparently, was aware that nearly a century and a half ago, this Court interpreted the term "officer" as it appeared in the predecessor of article 11, § 1 of the 1963 Constitution. In *Underwood v McDuffee*, 15 Mich 361 (1867), this Court interpreted article 18, § 1 of the 1850 Constitution, which was a predecessor of article 11, § 1 of the 1963 Constitution. Of relevance to this case, the Court stated:

> The term "officer," as there used, can only be taken to refer to such offices as have some degree of permanence, and are not created by a temporary nomination for a single and transient purpose. [*Underwood*, 15 Mich at 366.]

We reiterated the permanence requirement in *Shurbun v Hooper*, 40 Mich 503, 505 (1879):

141.1515(5)(d) gives the Governor the authority to fill vacancies in the office of emergency manager by appointment. Thus, if the office was vacant as Davis claims, the Governor was authorized to fill the vacancy by reappointing Roberts. If Davis's assertions are incorrect, then the Governor's reappointment of Roberts was merely a precautionary exercise of the Governor's authority under MCL 141.1515(5) and (8). Thus, I conclude that the Governor had the statutory authority to reappoint Roberts, regardless of whether Davis's claims have any merit.

Neither MCL 141.1501 *et seq*. nor the statutes applicable to emergency managers[7] preclude reappointment of a person to the office of emergency manager if that person previously held the position.

At oral argument before this Court, Davis argued that allowing the Governor to reappoint Roberts would render article 11, § 1 of the 1963 Constitution meaningless. I disagree. Article 11, § 1 requires "[a]ll officers, legislative, executive and judicial" to take the oath of office before commencing their duties. MCL 201.3(7) provides that failure to comply with this requirement renders the office vacant. While allowing the Governor to reappoint Roberts in this case would mean there are no permanent consequences for Roberts's alleged failure to comply with article 11, § 1 of the 1963 Constitution, it does not follow that the Constitution has no effect whatsoever.

In this case, *if* Roberts was an officer within the meaning of article 11, § 1 of the 1963 Constitution, and he failed to comply with that provision, then his office would have been legally vacant until the Governor reappointed him.[8] Moreover, the failure to properly take an oath by an

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> [T]he term "officer," as used in Art. 18, § 1 of the [1850] constitution, was said to apply and refer to such offices as have some degree of permanence, and are not created by a temporary nomination for a single and transient purpose. [Emphasis added.]

The requirement of "some degree of permanence" set forth in *Underwood* and *Shurbun* is pertinent in light of the fact that each emergency manager position is established and filled to address a particular fiscal crisis and the person appointed continues in that position only so long as a financial crisis exists. See MCL 141.1515(8) and (9). Regardless of whether the Court of Appeals erred by failing to consider whether Roberts is an "officer" within the meaning of article 11, § 1 of the 1963 Constitution, consideration of this issue is no longer necessary because I conclude that the Governor's reappointment of Roberts has rendered this proceeding moot.

[7] MCL 141.1515a provides that an emergency manager is subject to MCL 15.321 to 15.330, as a public servant; MCL 15.341 to 15.348, as a public officer; and MCL 15.301 to 15.310, as if he or she were a state officer.

[8] If Davis's assertions were meritorious and Roberts was ousted for his alleged failure to comply with article 11, § 1 or MCL 15.93, then the

elected official may have more permanent consequences because such an official may not be eligible for appointment to that vacated elective office. In any event, because a violation of this constitutional provision results in the vacation of office, I believe that the purpose of article 11, § 1 is vindicated, not rendered "meaningless" as Davis asserts.

III. THE EFFECT OF REAPPOINTMENT

Because the Governor has reappointed Roberts to the office of Emergency Manager for the Detroit Public Schools, and Roberts has taken the oath of office upon reappointment, the instant proceeding is now moot.

In order for the Court of Appeals to accept a complaint from a citizen for a writ of quo warranto, the citizen must demonstrate sufficient apparent merit to bring the action.[9] Thus, the burden is on Davis to show that there are sufficient grounds to file a complaint for quo warranto to oust Roberts from his position as Emergency Manager for the Detroit Public Schools.

When reappointed, Roberts took and filed the oath of office on April 2, 2012. For his most recent appointment, Roberts complied with all of the constitutional and statutory provisions Davis alleges that Roberts violated. Thus, Roberts appears to be currently serving as a de jure

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actions Roberts took as Emergency Manager for the Detroit Public Schools before ouster would be validated because Roberts would have been serving as a de facto officer. See *Wayne Co Bd of Auditors v Benoit*, 20 Mich 176, 180 (1870) ("Whatever may be the case in regard to a mere intruder, without any claim or color of title, there can be no doubt that a person actually obtaining office with the legal *indicia* of title is a legal officer until ousted, so far as to render his official acts as valid as if his title were not disputed.").

[9] *Penn Sch Dist No 7 v Lewis Cass Intermediate Sch Dist Bd of Ed*, 14 Mich App 109, 118 (1968) ("With regard to an application for leave to bring quo warranto, the controlling considerations should be 'whether an appropriate application was made to the Attorney General, in cases where required, and whether the application discloses sufficient apparent merit to justify further inquiry by quo warranto proceedings.' "), quoting 4 Honigman & Hawkins, Michigan Court Rules Annotated (2d ed), p 237.

See also *Marian v Beard*, 259 Mich 183, 186-87 (1932) ("In the application for leave to file information or to obtain action of the prosecuting attorney or attorney general, the showing of the right to the remedy must be 'precise and positive.' "), citing *Cain v Brown*, 111 Mich 657, 659 (1897); *Boucha v Alger Circuit Judge*, 159 Mich 610, 611 (1910) (dismissing a petition to file an action for quo warranto when the complaint did not make a showing sufficiently clear and definite as to the facts to make out a prima facie case).

emergency manager. Accordingly, there is not sufficient apparent merit to allow Davis to initiate a quo warranto action against Roberts to oust him from his position as Emergency Manager for the Detroit Public Schools.

For these reasons, I concur in the Court's decision to vacate the reasoning of the Court of Appeals' decision and dismiss Davis's application for leave to appeal on grounds of mootness.

MARKMAN, J. (*concurring*). I concur in the order for it is clear that the present controversy concerning the timeliness of the emergency manager's oath has now been rendered moot. However, our state is fortunate that this controversy has arisen in the context of an official who could easily be reappointed to public office, as occurred here, unlike, for example, a state legislator. I write separately only to respond to the Chief Justice's suggestion that the emergency manager might not even be constitutionally required to take an oath.

First, I believe that logic suggests that the emergency manager must take an oath of office. Given that the responsibilities of the emergency manager are, in some circumstances, to carry out the duties of the mayor and the members of the city council of a municipality, or, as in this case, the members of a public school board, all of whom themselves are required to take oaths of office, it would seem anomalous that an official serving in their stead would not also be required to make the same commitment to the laws and constitutions of the United States and Michigan. Moreover, it is noteworthy that the emergency manager, Roy Roberts, has never asserted that he is not required to take an oath and, indeed, he has now undertaken to subscribe to exactly such an oath on two separate occasions.

Second, this case seems significantly distinguishable from *Underwood v McDuffee*, 15 Mich 361 (1867), which held that "referees" are not officers within the meaning of Const 1850, art 18, § 1, a predecessor of Const 1963, art 11, § 1. Such "referees" were "appointed only when [the] parties consent[ed], or waive[d] their right to a jury," and their authority was "confined to the particular suit." *Underwood*, 15 Mich at 367. Unlike referees, emergency managers are not "depend[ent] upon the will of private persons, who may call [them] into existence for their own purposes, and at their own pleasure," and their authority is not "confined to [a] particular suit." *Id*. The "impermanence" of such a referee is far different, in my judgment, from the impermanence of such positions as emergency financial managers and cabinet officers, each of whom serve at the pleasure of the Governor and without fixed terms of office.

Finally, even assuming that an emergency manager is not an "officer" within the meaning of Const 1963, art 11, § 1, respondent himself acknowledges that he is in the "service of the state," within the meaning of MCL 15.151, which requires all such persons "as a condition of their employment, [to] take and subscribe to the oath or affirmation required of members of the legislature and other public officers by section 2 of article 16 of the constitution of 1908 of the state of Michigan." Section 2 of article 16 of the Constitution of 1908 of the state of Michigan, another predecessor of Const 1963, art11, § 1, required officers to take the oath "before they enter[ed] on the duties of their respective offices."

Summary Disposition April 18, 2012:

PEOPLE v JOHNNY HARRIS, No. 143630; Court of Appeals No. 143630; Court of Appeals No. 296631. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we reverse in part the judgment of the Court of Appeals. An expert witness may not testify that sexual abuse occurred. *People v Beckley*, 434 Mich 691 (1990); *People v Peterson*, 450 Mich 349 (1995). The trial court impermissibly allowed Dr. Carrie Ricci to testify that the complainant was the victim of child sexual abuse, and trial counsel was ineffective for failing to object to this evidence. *People v Toma*, 462 Mich 281 (2000). We remand this case to the Court of Appeals. On remand, the Court of Appeals shall determine whether the defendant was prejudiced by the admission of the doctor's diagnosis and whether the defendant is entitled to a new trial. *Id.* at 303-304. We do not retain jurisdiction.

PEOPLE v MICHAEL CHILDS, No. 144169; Court of Appeals No. 297692. The application for leave to appeal the October 13, 2011, judgment of the Court of Appeals is considered. With regard to the defendant's Issue I, pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we affirm the result reached by the Court of Appeals, but vacate that part of the Court of Appeals' opinion holding that the autopsy report was not testimonial and, therefore, that its admission did not violate the defendant's Sixth Amendment right to be confronted with the witnesses against him. In particular, we disagree with the Court of Appeals' reliance on MRE 803(8) and its determination that the autopsy report was not prepared in anticipation of litigation, see *Bullcoming v New Mexico*, 564 US ___; 131 S Ct 2705; 180 L Ed 2d 610 (2011). Nonetheless, we agree that the defendant is not entitled to relief. Defense counsel stipulated to the admission of the autopsy report. Even assuming, arguendo, that there is merit in the defendant's claim that his counsel was ineffective in this regard, the Court of Appeals correctly held that the admission of the report was not outcome determinative. In all other respects, leave to appeal is denied.

Leave to Appeal Denied April 18, 2012:

BOLHUIS v MICHIGAN PUBLIC SCHOOL EMPLOYEES' RETIREMENT SYSTEM, No. 143941; Court of Appeals No. 298279.

CAVANAGH, MARILYN KELLY and HATHAWAY, JJ., would grant leave to appeal.

PEOPLE v NICO THOMAS, No. 144002; Court of Appeals No. 297763.

PEOPLE v BURGETT, No. 144151; Court of Appeals No. 305654.

PEOPLE v CARLOS BROWN, No. 144188; Court of Appeals No. 299496.

Reconsideration Denied April 18, 2012:

KODSY v DEPARTMENT OF TRANSPORTATION, No. 143684; Court of Appeals No. 297833. Leave to appeal denied at 490 Mich 971.

Leave to Appeal Denied April 20, 2012:

PEOPLE v GREENWALD, No. 143895; Court of Appeals No. 305045.

MARILYN KELLY, J. (*dissenting*). I would order the trial court to conduct a hearing to assess defendant's ability to pay the fines and fees imposed on him under MCL 771.3, MCL 769.1k, and MCL 600.4803(1). Defendant is entitled to such a hearing under *People v Music*[1] and *People v Jackson*.[2] Ordering the hearing would secure defendant's ability to present a manifest-hardship defense under MCL 771.3(6)(b) to the enforcement of the costs and fines.

DAVIS v CITY OF DETROIT FINANCIAL REVIEW TEAM, No. 144835; Court of Appeals No. 309250.

Summary Disposition April 23, 2012:

PEOPLE v GARRETT, No. 144213; Court of Appeals No. 305136. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate the sentences of the Oakland Circuit Court in Case Nos. 2009-227878-FH and 2009-227780-FH, and remand this case to that court for resentencing. On remand, the trial court shall sentence the defendant within the appropriate sentencing guidelines range or articulate on the record a substantial and compelling reason for departing from the sentencing guidelines range in accordance with *People v Hendrick*, 472 Mich 555 (2005), *People v Babcock*, 469 Mich 247 (2003), and *People v Smith*, 482 Mich 292 (2008). In addition, the judgment of sentence in Case No. 2011-236370-FH shall be amended to delete the requirement that the defendant register as a sex offender, and the requirement shall be added to the judgment of sentence in Case No. 2009-227878-FH. In all other respects, leave to appeal is denied.

Leave to Appeal Denied April 23, 2012:

WOODS v DEPARTMENT OF CORRECTIONS, No. 143467; Court of Appeals No. 296609.

PEOPLE v ROBERT CHILDRESS, No. 143606; Court of Appeals No. 288657.

PEOPLE v HORNER, No. 143741; Court of Appeals No. 297658.

PEOPLE v FLINT, No. 143874; Court of Appeals No. 302985.

PEOPLE v HANSEN, No. 143875; Court of Appeals No. 302209.

PEOPLE v PAYNE, No. 143890; Court of Appeals No. 301746.

ADAM v SISTERS OF BON SECOURS NURSING CARE CENTER, No. 143896. HATHAWAY, J., would grant leave to appeal.

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[1] *People v Music*, 428 Mich 356, 362 (1987).

[2] *People v Jackson*, 483 Mich 271, 292-293 (2009).

PEOPLE v DONYELLE WOODS, No. 143912; Court of Appeals No. 300697.

PEOPLE v LONNIE BAILEY, No. 143925; Court of Appeals No. 302635.

PEOPLE v LAWTON, No. 143930; Court of Appeals No. 305111.

PEOPLE v MADDOX, No. 143932; Court of Appeals No. 306235.

HATHAWAY, J., not participating. Justice HATHAWAY recuses herself and will not participate in this case as she was the initial presiding trial court judge. See MCR 2.003(B).

PEOPLE v KIMBER, No. 143955; Court of Appeals No. 300814.

PEOPLE v LAMB, No. 143956; Court of Appeals No. 303273.

YOUNG v INDEPENDENT BANK, No. 143975; reported below: 294 Mich App 141.

PEOPLE v RAINES, No. 143982; Court of Appeals No. 304811.

PEOPLE v HOUSTON, No. 143990; Court of Appeals No. 305335.

PEOPLE v CEASOR, No. 143997; Court of Appeals No. 304703.

PEOPLE v KNOLTON, No. 143998; Court of Appeals No. 299159.

PEOPLE v EAVES, No. 143999; Court of Appeals No. 305105.

PEOPLE v STRONG, No. 144003; Court of Appeals No. 302523.

PEOPLE v DOUGLAS, No. 144008; Court of Appeals No. 304008.

PEOPLE v SCHMIDT, No. 144009; Court of Appeals No. 301973.

PEOPLE v DONALD MORRIS, No. 144026; Court of Appeals No. 305109.

PEOPLE v MIKOLOWSKI, No. 144067; Court of Appeals No. 299285.

PEOPLE v KEATTS, No. 144071; Court of Appeals No. 298859.

PEOPLE v DEWAYNE WILLIAMS, No. 144104; Court of Appeals No. 298415.

PEOPLE v MAHONE, No. 144109; reported below: 294 Mich App 208.

PEOPLE v HARRY RILEY, No. 144117; Court of Appeals No. 295838.

PEOPLE v ASHLEY, No. 144129; Court of Appeals No. 299251.

HOPKINS v DUNCAN TOWNSHIP, No. 144132; reported below: 294 Mich App 401.

PEOPLE v TROY JONES, Nos. 144134 and 144135; Court of Appeals Nos. 292793 and 292794.

PEOPLE v RUFUS BROWN, No. 144136; Court of Appeals No. 302656.

PEOPLE v LOVELL, No. 144141; Court of Appeals No. 298164.

PEOPLE v PITTMAN, No. 144152; Court of Appeals No. 298680.

PEOPLE v CORONADO, No. 144163; Court of Appeals No. 299079.

PEOPLE v CLARK, No. 144170; Court of Appeals No. 296779.

PEOPLE v LAWSON, No. 144185; Court of Appeals No. 305811.

PEOPLE v GREER, No. 144193; Court of Appeals No. 305825.

PEOPLE v MARK WILLSON, No. 144198; Court of Appeals No. 298439.

PEOPLE v PHILLIP HARDY, Nos. 144203 and 144204; Court of Appeals Nos. 296509 and 302136.

PEOPLE v SHEILA HARDY, Nos. 144206 and 144207; Court of Appeals Nos. 296510 and 302137.

PEOPLE v LYNCH, No. 144215; Court of Appeals No. 290216.

PEOPLE v KEITH JACKSON, No. 144220; Court of Appeals No. 299026.

BASNER v AUTO-OWNERS INSURANCE COMPANY, Nos. 144224 and 144226; Court of Appeals No. 306520.

PEOPLE v SHEARD, No. 144228; Court of Appeals No. 299084.

PEOPLE v ROBY, No. 144230; Court of Appeals No. 301608.

AGEE v DEPARTMENT OF TRANSPORTATION, No. 144236; Court of Appeals No. 300094.

CAVANAGH and HATHAWAY, JJ., would grant leave to appeal.

PEOPLE v TELLIS, No. 144237; Court of Appeals No. 299062.

PEOPLE v DAVON THOMPSON, No. 144240; Court of Appeals No. 299408.

PEOPLE v CERVANTES, No. 144248; Court of Appeals No. 299491.

PEOPLE v PORTER, No. 144252; Court of Appeals No. 305793.

PEOPLE v HOMBERG, No. 144254; Court of Appeals No. 301434.

PEOPLE v SUSALLA, No. 144258; Court of Appeals No. 299402.

PEOPLE v GRIFFIN, No. 144259; Court of Appeals No. 300254.

SCHIED v STATE COURT ADMINISTRATOR, No. 144263; Court of Appeals No. 306026.

GOLDEN v QUALITY METALCRAFT, INC, No. 144265; Court of Appeals No. 303843.

PEOPLE v ROHL, No. 144266; Court of Appeals No. 305852.

PEOPLE v TILLMAN, No. 144267; Court of Appeals No. 302169.

PEOPLE v LATOYA FLOWERS, No. 144268; Court of Appeals No. 299961.

PEOPLE v NEVILLS, No. 144275; Court of Appeals No. 297134.

ELLISON v SAGINAW COUNTY PROSECUTING ATTORNEY, No. 144280; Court of Appeals No. 303908.

PEOPLE v ZABORSKI, No. 144282; Court of Appeals No. 300061.

PEOPLE v JASON EDWARDS, No. 144283; Court of Appeals No. 306296.

PEOPLE v EMERY, No. 144284; Court of Appeals No. 306194.

PEOPLE v MANSHADOW, No. 144285; Court of Appeals No. 306523.

THOMAS v LIVERNOIS VEHICLE DEVELOPMENT, No. 144287; Court of Appeals No. 297786.

PEOPLE v MCCURDY, No. 144288; Court of Appeals No. 306250.

PEOPLE v EDDIE ANDERSON, No. 144291; Court of Appeals No. 305943.

PEOPLE v MOYA, Nos. 144294 and 144295; Court of Appeals Nos. 298259 and 300868.

PEOPLE v SYKES, No. 144296; Court of Appeals No. 299568.

PEOPLE v PERKINS, No. 144297; Court of Appeals No. 306502.

PEOPLE v COGGINS, No. 144306; Court of Appeals No. 306823.

PEOPLE v STEIN, No. 144309; Court of Appeals No. 305280.

PEOPLE v BORDNER, No. 144311; Court of Appeals No. 305866.

PEOPLE v ANDRA GAINES, No. 144312; Court of Appeals No. 305863.

PEOPLE v LONTINA CARTER, No. 144313; Court of Appeals No. 299320.

PEOPLE v MILTON, No. 144315; Court of Appeals No. 299233.

PEOPLE v VAUGHN, No. 144317; Court of Appeals No. 299445.

PEOPLE v DEANGELO JOHNSON, No. 144321; Court of Appeals No. 305867.

PEOPLE v FERRELL, No. 144324; Court of Appeals No. 306176.

PEOPLE v CAMPANALE, No. 144325; Court of Appeals No. 306041.

NELSON v GENERAL MOTORS CORPORATION, No. 144328; Court of Appeals No. 304202.

WOLVERINE ENGINEERS AND SURVEYORS, INC v CITY OF LESLIE, No. 144335; Court of Appeals No. 299988.

PEOPLE v BASSETT, No. 144343; Court of Appeals No. 306395.

LITTEN v BARTON MALOW COMPANY, No. 144352; Court of Appeals No. 299727.

PEOPLE v ROBINSON, No. 144362; Court of Appeals No. 297172.

PEOPLE v DON HARRIS, No. 144367; Court of Appeals No. 306493.

GRIEVANCE ADMINISTRATOR v MAZE, No. 144369.

PEOPLE v TERRY BAILEY, No. 144371; Court of Appeals No. 298357.

PEOPLE v ASHWORTH, No. 144381; Court of Appeals No. 299887.

PEOPLE v CARR, No. 144389; Court of Appeals No. 298143.

JEFFREY HARRELL BUILDER, INC v WOLFF, No. 144396; Court of Appeals No. 299270.

VITALE v UE&C CATALYTIC, INC, No. 144404; Court of Appeals No. 303651.

PEOPLE v HOPKINS, No. 144410; Court of Appeals No. 306518.

PEOPLE v CROMER, No. 144417; Court of Appeals No. 306481.

GOODMAN v GENERAL MOTORS LLC, No. 144422; Court of Appeals No. 304744.

PEOPLE v GAONA, No. 144426; Court of Appeals No. 306381.

PEOPLE v GOODWIN, No. 144429; Court of Appeals No. 306996.

PEOPLE v STANTON, No. 144437; Court of Appeals No. 296546.

PEOPLE v MCHENRY, No. 144445; Court of Appeals No. 306123.

PEOPLE v HOLMES, No. 144470; Court of Appeals No. 306363.

PEOPLE v HAMILTON, No. 144474; Court of Appeals No. 298944.

PEOPLE v MENZEL HILL, No. 144478; Court of Appeals No. 305967.

PEOPLE v PAGE, No. 144503; Court of Appeals No. 306604.

PEOPLE v DANNY SIMMONS, No. 144560; Court of Appeals No. 301445.

MIDWEST MEMORIAL GROUP LLC v CITIGROUP GLOBAL MARKETS, INC, No. 144705; Court of Appeals No. 301883.

MIDWEST MEMORIAL GROUP LLC v SINGER, No. 144736; Court of Appeals No. 301861.

Leave to Appeal Before Decision by the Court of Appeals Denied April 23, 2012:

PEOPLE v SPENCER, No. 144542; Court of Appeals No. 308103.

Superintending Control Denied April 23, 2012:

LAWRENCE v BOARD OF LAW EXAMINERS, No. 144191.

ZAHRA, J., did not participate for the reasons set forth in his previous statement in this case, 490 Mich 935 (2011)

Reconsideration Denied April 23, 2012:

PEOPLE v JARVIS, No. 142923; Court of Appeals No. 295444. Leave to appeal denied at 490 Mich 878.

MARILYN KELLY, J., would grant the motion for reconsideration.

PEOPLE v WARNER, No. 143084; Court of Appeals No. 301747. Leave to appeal denied at 490 Mich 967.

PEOPLE v SZYDLEK, No. 143248; Court of Appeals No. 294248. Leave to appeal denied at 490 Mich 892.

PEOPLE v HALSTEAD, No. 143378; Court of Appeals No. 299974. Leave to appeal denied at 490 Mich 969.

SCHMITT v JAGUAR/LAND ROVER OF MACOMB LLC, No. 143388; Court of Appeals No. 297562. Leave to appeal denied at 490 Mich 894.

PEOPLE v ROMANDO LEWIS, No. 143427; Court of Appeals No. 296730. Leave to appeal denied at 490 Mich 894.

PEOPLE v BROCKMAN, No. 143457; Court of Appeals No. 300485. Leave to appeal denied at 490 Mich 969.

Leave to Appeal Denied April 27, 2012:

PEOPLE v HANEY, No. 144262; Court of Appeals No. 297750.

DEPARTMENT OF TRANSPORTATION v DETROIT INTERNATIONAL BRIDGE COMPANY, No. 144939; Court of Appeals No. 309389.

Reconsideration Denied April 27, 2012:

SMITH v DEPARTMENT OF HUMAN SERVICES DIRECTOR, No. 144913; Court of Appeals No. 309447. Leave to appeal before decision by the Court of Appeals denied at 491 Mich 898.

MARKMAN, J. (*dissenting*). For the reasons stated in my dissenting statement of April 13, 2012, 491 Mich 898, 898-899, I would grant defendant's motion for reconsideration and then grant either its motion to bypass the Court of Appeals or its motion for a stay.

Summary Disposition May 2, 2012:

HENDRIX v CITY OF DETROIT, No. 144329; Court of Appeals No. 299166. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals and we reinstate the June 15, 2010, order of the Wayne Circuit Court. MCL 125.541(7) entitles the defendant city to a money judgment against the owner of a dangerous building for the full cost of the building's demolition. The city

is also entitled to a judgment lien against the property on which the building sat, but nothing in the statute limits the city to that relief.

Leave to Appeal Granted May 2, 2012:

WHITMAN v CITY OF BURTON, No. 143475; reported below: 293 Mich App 220. The parties shall include among the issues to be briefed whether *Shallal v Catholic Social Servs of Wayne Co*, 455 Mich 604 (1997), correctly held that the primary motivation of an employee pursuing a whistleblower claim must be a desire to inform the public on matters of public concern, as opposed to personal vindictiveness. Persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

PETIPREN v JASKOWSKI, Nos. 144142 and 144143; reported below: 294 Mich App 419. The application for leave to appeal the October 20, 2011, judgment of the Court of Appeals is considered, and it is granted, limited to the issue whether Chief of Police Jaskowski is entitled to absolute immunity under MCL 691.1407(5). The Michigan Association for Justice and the Michigan Association of Chiefs of Police are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issue presented in this case may move the Court for permission to file briefs amicus curiae.

Leave to Appeal Denied May 2, 2012:

REDMOND v VAN BUREN COUNTY, No. 143658; reported below: 293 Mich App 344.

AVERY v GRAND TRUNK WESTERN RAILROAD, INC, No. 143760; Court of Appeals No. 296582.

SILVER STALLION DEVELOPMENT CORPORATION v CITY OF PONTIAC, No. 143972; Court of Appeals No. 298649. We further order damages against the plaintiff for this vexatious appeal, and we remand this case to the Oakland Circuit Court for determination of the defendants' damages. See MCR 7.316(D)(1) and (2). That court shall award actual costs and reasonable attorney fees in favor of the defendants.

WALDER v ST JOHN THE EVANGELIST PARISH, No. 144013; Court of Appeals No. 298178.

CAVANAGH, MARILYN KELLY, and HATHAWAY, JJ., would grant leave to appeal.

PEOPLE v BOU, No. 144180; Court of Appeals No. 299468.

CAVANAGH and MARILYN KELLY, JJ., would grant leave to appeal.

PEOPLE v MCINTOSH, No. 144212; Court of Appeals No. 299442.

STEWART v GENERAL MOTORS CORPORATION, No. 144255; Court of Appeals No. 304012.

HATHAWAY, J., would grant leave to appeal.

PEOPLE v TIMOTHY WILLSON, No. 144310; Court of Appeals No. 305464.

PEOPLE v WILBUR JACKSON, No. 144504; Court of Appeals No. 305888.

PEOPLE v SHIMEL, No. 145008; Court of Appeals No. 308589.

Leave to Appeal Granted May 4, 2012:

FISHER SAND AND GRAVEL COMPANY v NEAL A SWEEBE, INC, No. 143374; reported below: 293 Mich App 66. The parties shall include among the issues to be briefed whether an action on an open account relating to the sale of goods is subject to the four-year limitations period in § 2-725 of the Uniform Commercial Code (MCL 440.2725) or the general six-year limitations period applicable to contract actions, MCL 600.5807(8). The Michigan Creditors Bar Association's motion for leave to file brief amicus curiae is granted. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal Entered May 4, 2012:

BAZZI v MACAULAY, No. 144238; Court of Appeals No. 299239. At oral argument, the parties shall address whether, for the reasons stated in the Court of Appeals dissenting opinion or otherwise, the Oakland Circuit Court was obligated to grant summary disposition in favor of the defendant. The parties may file supplemental briefs within 42 days of the date of this order, but they should not submit mere restatements of their application papers.

Summary Disposition May 9, 2012:

PEOPLE v STANLEY BROWN, No. 144298; Court of Appeals No. 292470. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we reverse in part the judgment of the Court of Appeals and remand this case to the Wayne Circuit Court for a new trial. The trial court erred in concluding that the defendant received the effective assistance of trial counsel. Counsel was ineffective for failing to specifically request the National Counsel on Alcoholism and Drug Dependence staff activity logs before trial, as those logs supported the defendant's claim that he did not have as many individual counseling sessions with the complainants as they alleged. Trial counsel was also ineffective for failing to effectively cross-examine the sole complainant (the "complainant") whose testimony resulted in the defendant's convictions. Counsel failed to point out any of the inconsistencies in the complainant's trial testimony, and also failed to develop the point that her trial testimony was inconsistent in some respects with her preliminary examination

testimony and with her initial statement to the police. Because the defendant's former appellate counsel was ineffective for failing to raise these issues on the defendant's direct appeal, and the defendant was prejudiced thereby, he has met the burden of establishing entitlement to relief under MCR 6.508(D). On retrial, the defendant should be permitted to introduce relevant and admissible evidence produced in the civil suit filed on behalf of the complainant. We do not retain jurisdiction.

Leave to Appeal Granted May 9, 2012:

MACOMB COUNTY v AFSCME COUNCIL 25, No. 144303; reported below: 294 Mich App 149. The parties shall address whether the Court of Appeals properly applied the holding of *Port Huron Ed Ass'n v Port Huron Area Sch Dist*, 452 Mich 309 (1996), when it concluded that the parties intended to modify the collective bargaining agreement by use of the 100% female/ 0% male mortality tables.

The Michigan Association of Counties is invited to file a brief amicus curiae. Other persons or groups interested in the determination of the issue presented in this case may move the Court for permission to file briefs amicus curiae.

KIM v JPMORGAN CHASE BANK, NA, No. 144690; reported below: 295 Mich App 200. The application for leave to appeal the January 12, 2012, judgment of the Court of Appeals is considered, and it is granted, limited to the issues of whether the defendant acquired the plaintiffs' loan by operation of law and, if so, whether MCL 600.3204(3) applies to acquisition of a mortgage by operation of law, and further, if the foreclosure procedures in this case were flawed, whether the foreclosure is void *ab initio* or voidable.

The Michigan Association of Bankers, the Real Property Law Section of the State Bar of Michigan, and the Consumer Law Section of the State Bar of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

Leave to Appeal Denied May 9, 2012:

PARISE v DETROIT ENTERTAINMENT, LLC, No. 144072; reported below: 295 Mich App 25. The defendant's motion for sanctions for a vexatious appeal pursuant to MCR 7.316(D) is granted. We order plaintiff Italo M. Parise to pay $250 to the Clerk of this Court within 28 days of the date of this order.

BERNSTEIN v SEYBURN, KAHN, GINN, BESS & SERLIN, PC, No. 144165; Court of Appeals No. 299184.

PEOPLE v HEIKKINEN, No. 144200; Court of Appeals No. 299558.

MACATAWA BANK v WIPPERFURTH, No. 144269; reported below: 294 Mich App 617.

PEOPLE v STAFANO DAVIS, No. 144293; Court of Appeals No. 299343.
MARILYN KELLY, J., would grant leave to appeal.

PEOPLE v MANNI, No. 144301; Court of Appeals No. 298050.
MARILYN KELLY, J., would grant leave to appeal.

RUZAK v USAA INSURANCE AGENCY, INC, No. 144397; Court of Appeals No. 288053. The application for leave to appeal the December 1, 2011, judgment of the Court of Appeals is considered, and it is denied, there being no majority in favor of granting leave to appeal.

CAVANAGH, MARILYN KELLY, and HATHAWAY, JJ., would grant leave to appeal.

ZAHRA, J., did not participate because earlier in these proceedings he was on the Court of Appeals panel that addressed substantially the same issue presented here.

NILL v BORDERS GROUP, INC, No. 144465; Court of Appeals No. 298446.

Summary Disposition May 11, 2012:

PEOPLE v JOSEPH FRANKLIN, No. 142323; Court of Appeals No. 292469. Leave to appeal having been granted and the briefs and oral arguments of the parties having been considered by the Court, we reverse the November 16, 2010, judgment of the Court of Appeals. Although the Court of Appeals correctly held that MCR 6.310(B)(2)[1] requires the trial court to "provide the defendant the opportunity to affirm or withdraw the plea," the Court of Appeals erroneously held that the failure to provide such an opportunity resulted in plain error requiring reversal. First, given this Court's holding in *People v Grove*, 455 Mich 439 (1997), that the trial court could reject the entire plea agreement and subject the defendant to a trial on the original charges over the defendant's objection, the trial court's error in this case was not "plain, i.e., clear or obvious." *People v Carines*, 460 Mich 750, 763 (1999). However, in the future, such an error will be "plain" because we take this opportunity to clarify that, as both parties agree, *Grove* has been superseded by MCR 6.310(B). Furthermore, even if the error here was plain and resulted in outcome determinative prejudice, this Court still "must exercise its discretion in deciding whether to reverse." *Carines*, 460 Mich at 763. Under these circumstances, where the defendant did not just fail to object at sentencing, but also failed to object during the subsequent trial and waived his right to a jury trial, this Court is exercising its discretion in favor of not reversing the defendant's convictions. "Any other conclusion would be contrary to the rule that defendants cannot 'harbor error as an appellate parachute.' " *People v Pipes*, 475 Mich 267, 278 n 39 (2006) (citation omitted). We remand this case to the Court of Appeals for consideration of the defendant's remaining appellate issues. The Court of Appeals is specifically directed to consider the applicability of *Lafler v*

[1] The Court of Appeals erroneously cited MCR 6.310(B)(2)(a) when it should have cited MCR 6.310(B)(2)(b).

Cooper, 566 US ___; 132 S Ct 1376; 182 L Ed 2d 398 (2012), to defendant's ineffective assistance of counsel claim. We do not retain jurisdiction.

CAVANAGH, J. (*dissenting*). I would affirm the judgment of the Court of Appeals. In my view, the Court of Appeals did not clearly err by concluding that defendant established that he was entitled to relief under plain-error review. The trial court's failure to comply with the language of the court rule ultimately deprived defendant of his opportunity to affirm his plea and the benefit of his agreement with the prosecution. Accordingly, I respectfully dissent.

MARILYN KELLY and HATHAWAY, JJ., concurred with CAVANAGH, J.

Leave to Appeal Granted May 11, 2012:

SMITTER v THORNAPPLE TOWNSHIP, No. 144354; Court of Appeals No. 294768.

Leave to Appeal Denied May 11, 2012:

PEOPLE v BENTON, No. 144053; reported below: 295 Mich App 191.

MARILYN KELLY and HATHAWAY, JJ., would grant leave to appeal.

In re TRIMBLE, Nos. 144924 and 144926; Court of Appeals Nos. 305106 and 305108.

In re BRUNO, Nos. 144954, 144955, 144957, and 144958; Court of Appeals Nos. 305539 and 305540.

Leave to Appeal Denied May 16, 2012:

PEOPLE v LANDAU, No. 145046; Court of Appeals No. 309285.

Leave to Appeal Denied May 18, 2011:

PAGEANT HOMES, INC v BRADLEY, No. 144156; Court of Appeals No. 293359.

CAVANAGH and MARILYN KELLY, JJ., would grant leave to appeal.

MARKMAN, J. (*dissenting*). I respectfully dissent and would grant leave to appeal. The question here is an important one, and the relevant principles of law ought to be clearly rendered. Yet all that we have for the guidance of the affected business communities is a new and *unpublished*, two-page opinion of the Court of Appeals that sets forth principles of property law that may or may not be compatible with previously operative principles that served, with a minimum of litigation, to govern the priority of certain liens in Michigan. I would grant leave not because I am convinced that the Court of Appeals erred in its decision, but because I am convinced that it is necessary in this realm that the law not be unsettled.

Defendant-mortgagor's home was destroyed by fire, and the insurer paid defendant-mortgagee for the total loss of the home. Pursuant to the

mortgage, the mortgagee was only obliged to reconstruct the home if such reconstruction was in its judgment economically feasible and if its security interest would not thereby be lessened. Otherwise, the mortgagee was permitted to retain the proceeds and extinguish the mortgage. Rather than extinguishing the mortgage, the mortgagee opted to reconstruct the home and disbursed the insurance proceeds to do so. The mortgagor issued a partial payment to plaintiff for reconstruction materials, which plaintiff then furnished. However, the mortgagor never fully paid plaintiff for the materials, and plaintiff filed a construction lien. Plaintiff subsequently brought suit to foreclose this lien, but the trial court determined that the mortgage lien had priority. On appeal, the Court of Appeals affirmed on the basis that the disbursement of the insurance proceeds had given rise to no "new indebtedness."

The relevant language of the Construction Lien Act, MCL 570.1101 *et seq*., provides:

> The priority of the mortgage shall exist as to all obligations secured by the mortgage except for indebtedness arising out of advances made subsequent to the first actual physical improvement. [MCL 570.1119(4).]

Thus, for plaintiff's lien to have priority, it must constitute "indebtedness arising out of advances" "secured by the mortgage." That is, plaintiff's lien must satisfy three criteria: (a) it must constitute "indebtedness," (b) it must "arise out of advances," and (c) it must be "secured by the mortgage." Only the third factor seems to be in dispute.

It can at least be argued that the "indebtedness" in the instant circumstances is "secured by the mortgage" as a result of the mortgagee's threshold decision to reconstruct the home instead of extinguishing the mortgage. That is, it may be argued that the mortgagee's decision to reinvigorate the mortgage by reconstructing the destroyed home and its "advance" of insurance proceeds for that purpose caused the "indebtedness" to be "secured by the mortgage" because if the mortgagee had simply retained the proceeds, as it was entitled to do, the mortgage would have been extinguished and no "indebtedness" would have accrued.

In my judgment, this Court should consider whether the Court of Appeals' conclusion that plaintiff's lien must constitute "new" indebtedness is consistent with MCL 570.1119(4) where "new" indebtedness is nowhere mentioned in the statute. Rather, indebtedness must simply be "secured by the mortgage." This case implicates whether the distinction between these concepts is supported by the statute. Because the funds used to reconstruct the home derived from insurance proceeds, it can be argued that the "indebtedness" accrued during reconstruction is not "new." However, because the reconstruction reinvigorated a mortgage that would otherwise have been extinguished, it can also be argued that the funds are nevertheless "secured by the mortgage."

While recognizing that there may be reasonable analyses on both sides of the issue presented in this case, I believe this case presents an issue of jurisprudential and practical significance, worthy of this Court's further consideration. That there are no opinions on the subject pre-

sented, aside from the Court of Appeals' unpublished opinion in this case, suggests that some consensus or understanding has previously operated within this realm. What is unclear is whether the Court of Appeals' opinion reflects this consensus or understanding or instead risks disrupting it. As we have said many times before in our property law decisions, there is no area of the law in which it is more important that the law be clear and settled. I would grant leave to appeal to determine whether we are furthering or undermining this objective.

Summary Disposition May 21, 2012:

PEOPLE v HOWELL, No. 143849; Court of Appeals No. 300405. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration, as on leave granted, of the issue whether the trial court erred in amending the judgments of sentence to impose consecutive sentences. See MCR 6.435(A) and (B).

Leave to Appeal Denied May 21, 2012:

MORALEZ v PATTERSON, Nos. 144520, 144521, 144522, and 144523; Court of Appeals Nos. 303831, 303832, 303834, and 303835.

PEOPLE v EARLS, No. 143933; Court of Appeals No. 281248.

PEOPLE v FIELDS, No. 143970; Court of Appeals No. 303330.

BRYANT v DEPARTMENT OF CORRECTIONS, No. 144040; Court of Appeals No. 302143.

PEOPLE v BROOKS, No. 144065; Court of Appeals No. 293840.

PEOPLE v MATTISON, No. 144087; Court of Appeals No. 298703.

JONES v JONES, No. 144162; Court of Appeals No. 302624.

LUCRE, INC v VERIZON NORTH, INC, No. 144183; Court of Appeals No. 298296.

PEOPLE v MEYER, No. 144216; Court of Appeals No. 300025.

PEOPLE v JONATHAN WILLIAMS, No. 144229; Court of Appeals No. 295241.

PEOPLE v MICHAEL WILSON, No. 144251; Court of Appeals No. 299787.

MANSHARAMANI v DEMOPOULOS, No. 144270; Court of Appeals No. 299870.

PEOPLE v KEVIN WILLIAMS, No. 144272; Court of Appeals No. 296521.

PEOPLE v KERN, No. 144276; Court of Appeals No. 306181.

4G INNOVATION LLC v ETAS, INC, No. 144278; Court of Appeals No. 296786.

PEOPLE v BEANE, No. 144290; Court of Appeals No. 298956.

BAYAGICH v ROSE TOWNSHIP, No. 144299; Court of Appeals No. 298466.

PEOPLE v BODMAN, No. 144326; Court of Appeals No. 299509.

PEOPLE v BARBIERI, No. 144336; Court of Appeals No. 298251.

FINK v CIVIL SERVICE COMMISSION, No. 144383; Court of Appeals No. 299124.

PEOPLE v THOMAS WASHINGTON, No. 144388; Court of Appeals No. 299607.

CHAMBERS v HOLLANDER, No. 144393; Court of Appeals No. 302064.

GRIEVANCE ADMINISTRATOR v MACUGA, No. 144400.

PEOPLE v VALLEAU, No. 144403; Court of Appeals No. 298234.

PEOPLE v KELLY, No. 144412; Court of Appeals No. 306262.

PEOPLE v REASONER, No. 144416; Court of Appeals No. 301009.

PEOPLE v CALVIN WILLIAMS, No. 144438; Court of Appeals No. 298152.

PEOPLE v LAWRENCE, No. 144439; Court of Appeals No. 299498.

PEOPLE v WILLIAM COLLIER, No. 144443; Court of Appeals No. 299928.

PEOPLE v THOMPSON, No. 144457; Court of Appeals No. 298888.

PEOPLE v ROUSE, No. 144459; Court of Appeals No. 305961.

PEOPLE v JOSEPH GREEN, No. 144468; Court of Appeals No. 291335.

PEOPLE v CAMPBELL, No. 144469; Court of Appeals No. 307126.

PEOPLE v DORN, No. 144472; Court of Appeals No. 297784.

PEOPLE v MATTHEW COLEMAN, No. 144473; Court of Appeals No. 307011.

PEOPLE v HENDERSON, No. 144477; Court of Appeals No. 306534.

COLLINS v LEFKOWITZ, No. 144484; Court of Appeals No. 298801.

PEOPLE v MALDONADO, No. 144486; Court of Appeals No. 298144.

PEOPLE v VANCE, No. 144488; Court of Appeals No. 300200.

PEOPLE v DOSS, No. 144492; Court of Appeals No. 299519.

PEOPLE v DEVAUGHN MASON, No. 144493; Court of Appeals No. 300008.

PEOPLE v HAAK, No. 144494; Court of Appeals No. 300824.

PEOPLE v SHAQUAN WASHINGTON, No. 144495; Court of Appeals No. 306503.

PEOPLE v BECKTEL, No. 144496; Court of Appeals No. 300284.

LABELLE LIMITED PARTNERSHIP v CENTRAL MICHIGAN UNIVERSITY BOARD OF TRUSTEES, No. 144497; Court of Appeals No. 303698.

PEOPLE v MICHAEL WASHINGTON, No. 144500; Court of Appeals No. 306134.

PEOPLE v TERRANCE WILLIAMS, No. 144501; Court of Appeals No. 286097.

PEOPLE v RUSSELL, No. 144502; Court of Appeals No. 300211.

PEOPLE v HUGHES, No. 144505; Court of Appeals No. 301051.

PEOPLE v JAMAL THOMAS, Nos. 144506 and 144507; Court of Appeals Nos. 299917 and 299918. The defendant pleaded guilty to four offenses, three of which were crimes against a person; thus, even if the conspiracy conviction is not counted, see *People v Bonilla-Machado*, 489 Mich 412 (2011), offense variable 13 was still correctly scored at 25 points for three crimes against a person within a five-year period.

YOUNG, C.J. (*concurring in part and dissenting in part*). I concur in the Court's decision to deny defendant's application for leave to appeal because OV 13 was correctly scored at 25 points. I do not support the portion of the order that indicates defendant's conspiracy conviction was not a crime against a person for purposes of OV 13 for the reasons set forth in my dissenting opinion in *People v Bonilla-Machado*, 489 Mich 412, 441-450 (2011).

PEOPLE v THOMAS MOORE, No. 144508; Court of Appeals No. 307123.

PEOPLE v KORSTANGE, No. 144512; Court of Appeals No. 306944.

PEOPLE v KANDRA WALKER, No. 144513; Court of Appeals No. 294313.

PEOPLE v ARNETT JONES, No. 144514; Court of Appeals No. 306877.

PEOPLE v FLAKES, No. 144516; Court of Appeals No. 298679.

NIGHTWATCH CAPITAL GROUP, LLC v QUESTOR MANAGEMENT COMPANY, LLC, No. 144517; Court of Appeals No. 299378.

PEOPLE v COFFELL, No. 144518; Court of Appeals No. 299882.

PEOPLE v STROHM, No. 144525; Court of Appeals No. 306843.

PEOPLE v SCHALK, No. 144526; Court of Appeals No. 307439.

PEOPLE v HICKS, No. 144527; Court of Appeals No. 298126.

PEOPLE v LARRY, No. 144528; Court of Appeals No. 300370.

PEOPLE v WATERS, No. 144529; Court of Appeals No. 307386.

EVERETT TOWNSHIP v PURSLEY, No. 144536; Court of Appeals No. 303895.

PEOPLE v MARQUISE HARRIS, No. 144537; Court of Appeals No. 300957.

PEOPLE v HULL, No. 144549; Court of Appeals No. 300576.

PEOPLE v PARKER, No. 144550; Court of Appeals No. 303439.

PEOPLE v RUTHERFORD, No. 144552; Court of Appeals No. 299614.

PEOPLE v CURTIS JACKSON, No. 144553; Court of Appeals No. 298676.

PEOPLE v WILLIAM WATSON, No. 144554; Court of Appeals No. 301200.

PEOPLE v KIRK JOHNSON, No. 144556; Court of Appeals No. 306653.

PEOPLE v KIRK JOHNSON, No. 144558; Court of Appeals No. 306948.

PEOPLE v SCOTT STEVENS, No. 144559; Court of Appeals No. 306470.

In re MOORE ESTATE, No. 144562; Court of Appeals No. 298100.

UNDERWOOD v SELENT, No. 144564; Court of Appeals No. 298312.

PEOPLE v LYONS, No. 144571; Court of Appeals No. 306572.

PEOPLE v BOYER, No. 144573; Court of Appeals No. 299749.

PEOPLE v BARKOVICH, No. 144574; Court of Appeals No. 299750.

PEOPLE v PERRY COLEMAN, No. 144581; Court of Appeals No. 303509.

PEOPLE v FRANCO-AVINA, No. 144582; Court of Appeals No. 301503.

PEOPLE v LOTT, No. 144583; Court of Appeals No. 308224.

PEOPLE v BRANDON SMITH, No. 144585; Court of Appeals No. 306557.

JONES v JONES, No. 144586; Court of Appeals No. 307581.

PEOPLE v GACOLBY MOORE, No. 144594; Court of Appeals No. 306899.

PEOPLE v STEPHEN NELSON, No. 144597; Court of Appeals No. 306890.

PEOPLE v CAIN, No. 144606; Court of Appeals No. 298416.

PEOPLE v MALONE, No. 144610; Court of Appeals No. 299873.

PEOPLE v HAROLD THOMAS, No. 144611; Court of Appeals No. 303742.

PEOPLE v MOTLEY, No. 144617; Court of Appeals No. 306931.

PEOPLE v BALLARD, Nos. 144632 and 144633; Court of Appeals Nos. 298986 and 299626.

RHOADES ESTATE v TRINITY HEALTH-MICHIGAN, No. 144634; Court of Appeals No. 295082.

HATHAWAY, J., would grant leave to appeal.

PEOPLE v HAVEMAN, No. 144636; Court of Appeals No. 301543.

PEOPLE v CYPRIAN, No. 144647; Court of Appeals No. 307307.

ZATTLIN v ALDEN STATE BANK, No. 144650; Court of Appeals No. 299919.

PEOPLE v CHANEY, No. 144656; Court of Appeals No. 307142.

PEOPLE v CARPENTER, No. 144657; Court of Appeals No. 306947.

PEOPLE v VINCENT WIGGINS, No. 144659; Court of Appeals No. 300583.

PEOPLE v ELLSWORTH, No. 144701; Court of Appeals No. 307044.

RULE v US BANK, No. 144711; Court of Appeals No. 301874.

RAJI v GENESEE COUNTY LAND BANK, No. 144744; Court of Appeals No. 307678.

ISSAC v SDW HOLDINGS CORPORATION, No. 144772; Court of Appeals No. 301347.

HATHAWAY, J., would grant leave to appeal.

PEOPLE v BOUMAN, No. 144848; Court of Appeals No. 307325.

Superintending Control Denied May 21, 2012:

TAYLOR v ATTORNEY GRIEVANCE COMMISSION, No. 144334.

MCNEES v COURT OF APPEALS DISTRICT CLERK, No. 144406.

MOORE v ATTORNEY GRIEVANCE COMMISSION, No. 144418.

HUDSON v ATTORNEY GRIEVANCE COMMISSION, No. 144420.

Reconsideration Denied May 21, 2012:

STAIR v 13TH CIRCUIT COURT CLERK, No. 143588; Court of Appeals No. 302119. Leave to appeal denied at 490 Mich 970.

PEOPLE v HAROLD CAGE, No. 143632; Court of Appeals No. 304175. Leave to appeal denied at 490 Mich 914.

CLANCY v MILLENIUM PAINTING COMPANY, No. 143647; Court of Appeals No. 300926. Summary disposition at 490 Mich 916.

RICHARD v SCHNEIDERMAN & SHERMAN, PC, No. 143839; Court of Appeals No. 297353. Summary disposition at 490 Mich 1001.

PEOPLE v TERRY WILLIAMS, No. 144045; Court of Appeals No. 297588. Leave to appeal denied at 491 Mich 854.

Summary Disposition May 23, 2012:

MOODY v GETWELL MEDICAL TRANSPORT, Nos. 143986, 143987, and 144096; Court of Appeals Nos. 301783 and 301784. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted.

PEOPLE v HOFFMAN, No. 144235; Court of Appeals No. 306314. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration, as on leave granted, of the defendant's second issue regarding a claimed failure of the sentencing court to comply with the procedural requirements of MCL 28.724(5) and MCL 769.1(13) before ordering the defendant to register as a sex offender. In all other respects, leave to appeal is denied.

Leave to Appeal Granted May 23, 2012:

FARMERS INSURANCE EXCHANGE v MICHIGAN INSURANCE COMPANY, Nos. 144144, 144145, and 144159; Court of Appeals Nos. 298984 and 298985. The applications for leave to appeal the October 18, 2011, judgment of the Court of Appeals are considered, and they are granted, limited to the issue whether the "primary purpose/incidental nature" test for determining whether a commercial vehicle is being used in the business of transporting passengers is consistent with the language of MCL 500.3114(2) and, if so, whether it was applied properly to the facts of this case. The Insurance Institute of Michigan and the Insurance and Indemnity Law Section of the State Bar of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issue presented in this case may move the Court for permission to file briefs amicus curiae.

BAILEY v SCHAAF, No. 144055; reported below: 293 Mich App 611. The parties shall include among the issues to be briefed whether the Court of Appeals erred when it extended the limited duty of merchants—to involve the police when a situation on the premises poses an imminent risk of harm to identifiable invitees, see *MacDonald v PKT, Inc*, 464 Mich 322 (2001)—to landlords and other premises proprietors, such as the defendant apartment complex and property management company. The application for leave to appeal as cross-appellant remains pending. The Michigan Defense Trial Counsel, Inc., and the Michigan Association for Justice are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

ELBA TOWNSHIP v GRATIOT COUNTY DRAIN COMMISSIONER, No. 144166; reported below: 294 Mich App 310. The parties shall include among the issues to be briefed whether, as the Court of Appeals concluded, "[w]ithout the requisite number of signatures attached to the #181-0 Drain petition, the Drain Commissioner had no authority or jurisdiction to act, and the proceedings establishing the No. 181 Consolidated Drainage District were void," thus authorizing the circuit court to exercise equitable jurisdiction. *Elba Twp v Gratiot Co Drain Comm'r*, 294 Mich App 310, 341 (2012). The Michigan Association of County Drain Commissioners is invited to file a brief amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

Leave to Appeal Denied May 23, 2012:

ALFIERI v BERTORELLI, No. 144140; reported below: 295 Mich App 189.

RAMEY v GENERAL MOTORS CORPORATION, No. 144253; Court of Appeals No. 303953.

HATHAWAY, J., would grant leave to appeal.

BRYCE v CHRYSLER GROUP, LLC, No. 144271; Court of Appeals No. 303867.

PEOPLE v MARSHALL, No. 144401; Court of Appeals No. 301571.

Summary Disposition May 25, 2012:

PEOPLE v CORTEZ, No. 144302; reported below: 294 Mich App 481. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate that part of the Court of Appeals' opinion holding that the failure to provide *Miranda* warnings did not violate the defendant's Fifth Amendment rights. We remand this case to the Court of Appeals for reconsideration of that issue in light of *Howes v Fields*, 565 US ___; 132 S Ct 1181; 182 L Ed 2d 17 (2012). In all other respects, leave to appeal is denied.

Leave to Appeal Denied May 25, 2012:

NEWELL v VILLAGE OF OTTER LAKE, No. 144304; Court of Appeals No. 299543.

In re MORTIMORE ESTATE, No. 143307; Court of Appeals No. 297280. Leave to appeal having been granted and the briefs and oral arguments of the parties having been considered by the Court, we vacate our order of October 26, 2011, 490 Mich 896. The application for leave to appeal the May 17, 2011, judgment of the Court of Appeals is denied.

YOUNG, C.J. (*dissenting*). We granted leave to appeal in this case to address the quantum of proof necessary to rebut a presumption of undue influence in a will contest. The majority today vacates that order granting leave to appeal, thereby leaving in place a decision of the Court of Appeals that erroneously concluded that there was a "mandatory presumption" of undue influence and that the proponent of the will bore the burden of overcoming it. Because this is not, and has never been, the law of this state, I dissent.

I would reverse the Court of Appeals and clarify that the proponent of a will does not have to prove the absence of undue influence by a preponderance of the evidence in order to rebut a presumption of undue influence. Instead, consistently with well-established law providing that the burden of proof always remains with the *contestant* of a will,[1] the proponent need only introduce substantial evidence sufficient to create a question of fact regarding undue influence, at which point the trier of fact

[1] See MCL 700.3407(c); *In re Cooch Estate*, 367 Mich 445, 451 (1962).

weighs the totality of the evidence and all permissible inferences therefrom to determine whether the will was a product of undue influence. It is inconsistent and illogical to conclude that the burden of proof rests with the *contestant* of a will, but then require the *proponent* of a will to rebut a presumption of undue influence by a preponderance of the evidence—which is the precise standard that satisfies a party's ultimate burden of proof in a civil case.

I. BACKGROUND

The doctrine of undue influence exists in the law of donative transfers as a tool to protect susceptible individuals from improper influences that unduly alter a donor's true intent. A donative transfer is procured by undue influence if the wrongdoer exerted such influence over the donor to overcome the donor's free will and cause the donor to make a transfer that the donor otherwise would not have made. To establish undue influence, "it must be shown that the grantor was subjected to threats, misrepresentation, undue flattery, fraud, or physical or moral coercion sufficient to overpower volition, destroy free agency and impel the grantor to act against his inclination and free will."[2] However, not all influence is undue, as this Court has explained:

> "[I]nfluences to induce testamentary disposition may be specific and direct without becoming undue as it is not improper to advise, persuade, solicit, importune, entreat, implore, move hopes, fears, or prejudices or to make appeals to vanity, pride, sense of justice, obligations of duty, ties of friendship, affection, or kindred, sentiment of gratitude or to pity for distress and destitution, although such will would not have been made but for such influence, *so long as the testator's choice is his own and not that of another*[.]"[3]

Our caselaw provides that the burden of proof for establishing undue influence is borne by the contestant of a will,[4] and that burden does *not* shift, but remains with the contestant throughout the entirety of the proceedings.[5] This standard is in accord with MCL 700.3407(1), which provides the burdens of proof applicable in contested estate cases:

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[2] *Kar v Hogan*, 399 Mich 529, 537 (1976); see also *Nelson v Wiggins*, 172 Mich 191, 199-200 (1912).

[3] *In re Spillette Estate*, 352 Mich 12, 18 (1958), quoting *In re Jennings' Estate*, 335 Mich 241, 247-248 (1952) (emphasis added).

[4] *Cooch Estate*, 367 Mich at 451.

[5] See, e.g., *Kar*, 399 Mich at 538-539 ("The ultimate burden of proof in undue influence cases does not shift; it remains with the plaintiff throughout the entire trial. . . . A plaintiff has the burden of proof (risk of nonpersuasion) for all elements necessary to establish the case. This burden never shifts during trial. Therefor, plaintiffs, who alleged the

All of the following apply in a contested case:

* * *

(c) A contestant of a will has the burden of establishing lack of testamentary intent or capacity, undue influence, fraud, duress, mistake, or revocation.

(d) A party has the ultimate burden of persuasion as to a matter with respect to which the party has the initial burden of proof.

Ordinarily, undue influence "is not to be presumed, but must be proved by the person seeking to have the will declared invalid."[6] However, Michigan law recognizes an initial *presumption* of undue influence applicable in situations in which the testator has a confidential or fiduciary relationship with a person who receives a benefit under the testator's will.[7] The presumption of undue influence is created upon the introduction of evidence that would establish "(1) the existence of a confidential or fiduciary relationship between the grantor and a fiduciary, (2) the fiduciary or an interest which he represents benefits from a transaction, and (3) the fiduciary had an opportunity to influence the grantor's decision in that transaction."[8]

MRE 301 governs presumptions in civil actions; it provides:

> In all civil actions and proceedings not otherwise provided for by statute or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.

Thus, once a presumption is created, that presumption is a "procedural device which regulates the *burden of going forward* with the evidence and is dissipated when substantial evidence is submitted by the opponents to the presumption."[9] In the case of a contested will, the presumption establishes a prima facie challenge to the will—thereby protecting the challenge from dismissal—and requires the proponents of the will to

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existence of undue influence, bore the ultimate burden of persuading the trier of fact that undue influence was used to procure the deed.").

[6] *In re Anderson Estate*, 353 Mich 169, 172 (1958); see also *In re Reed's Estate*, 273 Mich 334, 344 (1935) ("Undue influence cannot be presumed, but must be proved and in connection with the will and not with other things.").

[7] *Pritchard v Hutton*, 187 Mich 346, 358-359 (1915).

[8] *Kar*, 399 Mich at 537.

[9] *Widmayer v Leonard*, 422 Mich 280, 286 (1985) (emphasis added).

submit substantial evidence in rebuttal. However, as MRE 301 carefully notes, presumptions do not shift the ultimate burden of persuasion.

If the will's proponent fails to produce sufficient rebuttal evidence, then the presumption remains intact and establishes a *mandatory inference* of undue influence that should be weighed by the fact-finder with the evidence generally to determine whether undue influence in fact exists in the case. However, if rebutted, the presumption is eliminated and the fact-finder must assess all the evidence to determine whether undue influence has been proved by the will's contestant.[10] Because undue influence must not be presumed, this Court has explained:

> "It is now quite generally held by the courts that a rebuttable or *prima facie* presumption has no weight as evidence. It serves to establish a *prima facie* case, but if challenged by rebutting evidence, the presumption cannot be weighed against the evidence. Supporting evidence must be introduced, and it then becomes a question of weighing the actual evidence introduced, without giving any evidential force to the presumption itself."[11]

Ultimately, whether the testator's free will was overcome is still the crucial question for the determination of undue influence, and that fact must be proved to, and resolved by, the finder of fact.

II. ANALYSIS AND APPLICATION

Applying these principles, I believe that the Court of Appeals erred in its analysis and conclusions. The Court of Appeals held that, once established, there was a "mandatory presumption" of undue influence that the *proponent* of the will bore the burden of overcoming.[12] The Court reasoned that because the probate court, sitting as fact-finder, found that the evidence for and against undue influence was essentially evenly split, the will's *proponent* had not met *her* burden to disprove the presumption of undue influence.

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[10] See *id.* at 289.

[11] *In re Cotcher's Estate*, 274 Mich 154, 159 (1936), quoting *Gillett v Mich United Traction Co*, 205 Mich 410, 414 (1919).

[12] *In re Mortimore Estate*, unpublished opinion per curiam of the Court of Appeals, issued May 17, 2011 (Docket No. 297280), p 1. First and foremost, Michigan law has never recognized a "mandatory *presumption*" of undue influence. As discussed earlier, when sufficient rebuttal evidence does not exist, at most the presumption of undue influence becomes only a "mandatory *inference*" to be weighed with the other evidence by the fact-finder. The use by the Court of Appeals of this unprecedented phrase only serves to confuse further this complex area of the law.

By instituting a "mandatory presumption" of undue influence, the Court of Appeals, *in effect*, shifted the ultimate burden of persuasion to Helen Fisher—the *proponent* of the will. It is erroneous and illogical to state that the burden of proof always remains with the *contestant* of a will, but then require the *proponent* of a will to rebut a presumption of undue influence by a preponderance of the evidence. *The preponderance standard is the very same level of evidence that satisfies the ultimate burden of proof in a civil case*. I therefore cannot agree with the statement in *Kar*, upon which the Court of Appeals primarily relied for its ultimate conclusion, that

> [i]f the trier of fact finds the evidence by the defendant as rebuttal to be equally opposed by the presumption, then the defendant has failed to discharge his duty of producing sufficient rebuttal evidence and the "mandatory inference" remains unscathed. This does not mean that the ultimate burden of proof has shifted from plaintiff to defendant, but rather that plaintiff may satisfy the burden of persuasion with the use of the presumption, which remains as substantive evidence, *and that the plaintiff will always satisfy the burden of persuasion when the defendant fails to offer sufficient rebuttal evidence*.[13]

Key to the analysis of this issue is that the burden of proof of undue influence *always* rests on the *contestant* of the will. Because *Kar* states that the *proponent* of the will must *disprove* the claim of undue influence by a preponderance of the evidence at the rebuttal stage, how can it be said that this scheme has not shifted the burden of persuasion onto the proponent? Although *Kar* disclaimed this conclusion—stating that "[t]his does not mean that the ultimate burden of proof has shifted from plaintiff to defendant"—I am unable to read *Kar* in any other way. This is particularly true where, as *Kar* provides, the failure to rebut the presumption means that the contestant receives a mandatory inference of undue influence that will *"always satisfy"* the burden of persuasion.

I believe that requiring evidence that equals the ultimate burden of proof at the initial rebuttal stage sets too high of a bar for rebutting the presumption. To the extent that *Kar* implies that a will's proponent must rebut a presumption of undue influence by a preponderance of the evidence, yet holds that this does not shift the ultimate burden of persuasion, *Kar* is internally inconsistent and should be clarified. Moreover, *Kar* was decided before the enactment of MRE 301 and MCL

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[13] *Kar*, 399 Mich at 542 (emphasis added); see *Mortimore Estate*, unpub op at 6 ("The trial court's statements recognize that [defendant] presented evidence to rebut the presumption of undue influence but when weighed against opposing evidence in favor of the presumption, the trial court essentially found the evidence equally convincing. As such, [defendant] did not overcome her duty to rebut the presumption.").

700.3407,[14] and its statements regarding the quantum of proof necessary to rebut a presumption of undue influence are inherently inconsistent with MRE 301 and MCL 700.3407, as well as caselaw of this Court. At the very least, this Court ought to address the problem created by *Kar* because, as this case illustrates, *Kar* is distorting the burden of proof in this important area of the law.

Instead, consistently with our caselaw, I would hold that where a presumption of undue influence arises, a will's proponent need only come forth with "substantial evidence" in rebuttal.[15] Ultimately, this standard requires that *a proponent of the will come forward with some objective evidence supporting the position that no undue influence existed, but does not require that the proponent "prove" by a preponderance that no undue influence existed*.

As even the proponent Helen Fisher concedes, I agree that this was an appropriate case giving rise to the presumption of undue influence. However, I would hold that Fisher offered sufficient evidence to rebut the presumption, thereby creating only a permissible inference to be weighed with the evidence generally by the finder of fact. Given that the probate court in this case found that the evidence was relatively evenly split on the question of undue influence, I am perplexed how the Court of Appeals and a majority of this Court could conclude that Fisher did not present sufficient evidence in rebuttal to eliminate the initial presumption of undue influence.

The trial judge, an experienced probate judge sitting as fact-finder in this case, was well positioned to weigh all the evidence and understand the complexities presented in this case. The probate court was certainly aware of the unusual facts and circumstances that surrounded the creation of this will. Yet, the court admitted that it was perplexed by this case, finding it to be an extraordinarily rare case in which the testimony by witnesses was totally partisan and contradictory. The probate court noted that there was very little overlap and that the evidence was essentially evenly split. Ultimately, the probate court concluded clearly and unequivocally that "*there* [*are*] *not sufficient grounds to find undue influence under any of the conditions and standard*[*s*] *of the case law*" and that petitioners "did not prove undue influence." I would not upset this conclusion on the basis of an erroneous theory requiring the will's proponent to demonstrate, by a preponderance of the evidence, the *nonexistence* of undue influence.

Accordingly, I would reverse the judgment of the Court of Appeals and reinstate the trial court's findings and conclusions of law. For all these reasons, I respectfully dissent from this Court's decision to deny leave to

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[14] *Kar* was decided by this Court on December 31, 1976; MRE 301 became effective on March 1, 1978, while MCL 700.3407 became effective on April 1, 2000.

[15] See *Widmayer*, 422 Mich at 286 (providing that a presumption "is dissipated when substantial evidence is submitted by the opponents to the presumption").

appeal, which thereby deprives us of the opportunity to provide much needed clarity in the law governing the presumption of undue influence.

MARKMAN and MARY BETH KELLY, JJ., concurred with YOUNG, C.J.

ALEXANDER ESTATE v TRILLIUM HOSPITAL, No. 144590; Court of Appeals No. 297593.

Leave to Appeal Before Decision by the Court of Appeals Denied May 25, 2012:

In re MAYS, No. 144971; Court of Appeals No. 309577.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal Entered June 1, 2012:

PEOPLE v MINCH, No. 144631; reported below: 295 Mich App 92.

Leave to Appeal Denied June 1, 2012:

PEOPLE v LEON WALKER, Nos. 144639 and 144640; Court of Appeals Nos. 304593 and 304702.

MARKMAN, J. (*concurring*). I concur in the denial of defendant's application for leave to appeal because his alleged actions unquestionably fell within the range of conduct proscribed by MCL 752.795, and there is no contention by defendant that the statute is unconstitutional. However, I share the dissenting justice's concern that MCL 752.795 encompasses an extremely broad range of conduct, and further believe that it potentially extends well beyond even its application in the instant case. Therefore, I write separately to urge the Legislature to consider whether it intends to criminalize the full range of conduct to which the statute potentially extends.

YOUNG, C.J., concurred with MARKMAN, J.

MARILYN KELLY, J. (*dissenting*). I would grant leave to appeal. Defendant will be tried on two counts of violating MCL 752.795, Michigan's fraudulent-computer-access statute. This law forbids unauthorized access of a computer or computer program "to acquire, alter, damage, delete or destroy property or otherwise use the service of a computer program, computer, computer system, or computer network."[1] A person convicted of violating MCL 752.795 is subject to a possible prison term of 5 years or a fine of as much as $10,000, or both.[2] Repeat offenders may receive up to a 10-year prison sentence or a fine of as much as $50,000, or both.[3]

The factual basis for one of the charges against defendant is that he allegedly accessed his wife's e-mail account without her permission. This

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[1] MCL 752.795.

[2] MCL 752.797(2)(a).

[3] MCL 752.797(2)(b).

may be the first time in the 33 years since MCL 752.795 became law and the 16 years since it was amended to its present form that the statute has been used as the basis for criminal charges for the behavior in question.

Defendant argues that the language of MCL 752.795 is ambiguous. Also, he insists that the statute was not intended to criminalize a person's reading of his or her spouse's e-mails. He provides examples of innocuous conduct for which a person could be criminally prosecuted under the prosecution's reading of the statute.[4] Defendant also raises a significant question about whether Internet-based e-mail accounts fit within the statute's reference to "a computer program, computer, computer system, or computer network."

I think defendant's arguments are worthy of this Court's review. Accordingly, I would grant leave to appeal to consider whether the statute's language applies to defendant's conduct and, if so, whether this prosecution is based on an overbroad and unreasonable reading of the statute.

Finally, I note that the Legislature is considering a bill introduced specifically because of this prosecution that would exempt defendant's conduct from the scope of MCL 752.795.[5] Given that this Court has declined to consider the issues involved here, the Legislature would do well to consider whether it intends that MCL 752.795 subject the behavior involved here to criminal penalties.

I respectfully dissent and would grant defendant's application for leave to appeal.

COALITION FOR A SAFER DETROIT v DETROIT CITY CLERK, No. 145079; reported below: 295 Mich App 362.

In re WILSON, No. 145093; Court of Appeals No. 304689.

Summary Disposition June 6, 2012:

PEOPLE v JEFFREY WARD, No. 144888; Court of Appeals No. 303477. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we reverse the judgment of the Ionia Circuit Court and we remand this case to the 64A District Court for reinstatement of the charge of operating a motor vehicle while intoxicated. MCL 257.625(1)(C). The Fourth Amendment is not implicated when a law enforcement officer merely approaches an individual and directs questions to that person. *Florida v Royer*, 460 US 491, 497-498; 103 S Ct 1319; 75 L Ed 2d 229 (1983); *People v Jenkins*, 472 Mich 26 (2005); *People v Shankle*, 227 Mich App 690 (1998). Even before the deputy sheriff engaged in conversation with the defendant, evidence that the vehicle had been recently driven, that the strong odor of alcohol

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[4] For example, defendant argues that a parent could be convicted for monitoring his or her child's Internet and e-mail usage. He argues that a person could be convicted for using the calculator or word-processing programs on his or her spouse's computer without permission.

[5] HB 4532 (introduced April 12, 2011).

emanated from the vehicle when the driver's side window was lowered, and that the defendant appeared to be intoxicated gave the deputy sufficient basis to detain and ultimately charge the defendant with a criminal offense.

Leave to Appeal Granted June 6, 2012:

HARRIS v AUTO CLUB INSURANCE ASSOCIATION, No. 144579; Court of Appeals No. 300256. The parties shall include among the issues to be briefed whether the plaintiff is entitled to a double recovery from both Auto Club Insurance Association and Blue Cross Blue Shield of Michigan of medical expenses arising from a motorcycle accident involving a motor vehicle.

PEOPLE v CLARY, No. 144696; Court of Appeals No. 301906. The parties shall include among the issues to be briefed (1) whether the prosecutor's impeachment of the defendant's testimony on the basis of the defendant's failure to testify at his earlier trial violated the defendant's Fifth Amendment right against self-incrimination and (2) whether the prior consistent statements by the complainant were admissible under MRE 801(d)(1)(B). The Prosecuting Attorneys Association of Michigan and the Criminal Defense Attorneys of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

Reconsideration Granted June 6, 2012:

MORRIS v BLUE CROSS BLUE SHIELD OF MICHIGAN, No. 143432; Court of Appeals No. 296343. Leave to appeal denied at 490 Mich 918. We vacate that part of our November 23, 2011, order that denied leave to appeal. On reconsideration, the application for leave to appeal the April 21, 2011, judgment of the Court of Appeals is considered and, it appearing to this Court that the case of *Harris v Auto Club Ins Ass'n*, lv gtd 491 Mich 933 (2012), is pending on appeal before this Court and that the decision in that case may resolve an issue raised in the present application for leave to appeal, we order that the application be held in abeyance pending the decision in that case.

Leave to Appeal Denied June 6, 2012:

PEOPLE v MERLONE, No. 143848; Court of Appeals No. 304704.

PEOPLE v STURGES, No. 144208; Court of Appeals No. 296585.

PEOPLE v TERRY GREEN, No. 144289; Court of Appeals No. 299268.

GENTRY v WAYNE COUNTY DEPUTY SHERIFF, No. 144355; Court of Appeals No. 296580.

CAVANAGH, MARILYN KELLY, and HATHAWAY, JJ., would grant leave to appeal.

PEOPLE v CURLEY, No. 144490; Court of Appeals No. 298960.

PEOPLE v RATTERREE, No. 144569; Court of Appeals No. 300445.

PEOPLE v ROPER, No. 144577; Court of Appeals No. 300666.

PEOPLE v JAMES MOORE, No. 144607; Court of Appeals No. 298829.

UNIVERSITY OF MICHIGAN v GRADUATE EMPLOYEES ORGANIZATION/AFT, No. 144898; Court of Appeals No. 308663.

Leave to Appeal Granted June 8, 2012:

PEOPLE v DONALD HARDY, No. 144327; Court of Appeals No. 306106. The parties shall address whether the trial court erroneously assessed 50 points for offense variable 7, MCL 777.37(1)(a), because the defendant racked a shotgun during the carjacking and whether trial counsel was ineffective for waiving this issue. We further order the Oakland Circuit Court, in accordance with Administrative Order 2003-03, to determine whether the defendant is indigent and, if so, appoint counsel to represent the defendant in this Court. The Criminal Defense Attorneys of Michigan and the Prosecuting Attorneys Association of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issue presented in this case may move the Court for permission to file briefs amicus curiae.

PEOPLE v DEVON GLENN, No. 144979; reported below: 295 Mich App 529. The parties shall address whether the trial court erroneously assessed 50 points for offense variable 7, MCL 777.37(1)(a), for committing assaultive acts beyond those necessary to commit the offense. The Criminal Defense Attorneys of Michigan and the Prosecuting Attorneys Association of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

Summary Disposition June 15, 2012:

In re BUDD/BUDD-DONAHUE/DONAHUE MINORS, No. 143894; Court of Appeals No. 301995. By order of November 10, 2011, the application for leave to appeal the September 29, 2011 judgment of the Court of Appeals was held in abeyance pending the decision in *In re Morris*, (Docket No. 142759). On order of the Court, the case having been decided on May 4, 2012, 491 Mich 81 (2012), the application is again considered and, pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we reverse that part of the judgment of the Court of Appeals applying the conditional-affirmance remedy, conditionally reverse the Wayne Circuit Court, Family Division's termination of the respondent's parental rights, and remand this case to the circuit court for resolution of the notice requirements of the Indian Child Welfare Act (ICWA), 25 USC 1901 *et seq*. On remand, the circuit court shall first ensure that notice is properly made to the appropriate entities. If the circuit court conclusively determines that ICWA does not apply to the child protective proceeding—because the children are not Indian children or because the properly noticed tribe does not timely respond—the circuit

court's order terminating the respondent's parental rights shall be reinstated. If, however, the circuit court concludes that ICWA does apply to the child protective proceeding, the circuit court's order terminating the respondent's parental rights must be vacated and all proceedings must begin anew in accord with the procedural and substantive requirements of ICWA. We do not retain jurisdiction.

Leave to Appeal Denied June 15, 2012:

PEOPLE v FISK, No. 144261; Court of Appeals No. 297455.

MARILYN KELLY, J. (*concurring*). This defendant has been sentenced to four life sentences, two of which are nonparolable. He has not challenged any of the life sentences. Therefore, requiring resentencing for the felonies with the lower offense classes would be a waste of judicial resources. Remanding this case could have no practical effect on the sentences this defendant will serve.

Our decision is not intended to apply to cases in which the failure to score lower offense class felonies could possibly affect the sentence a defendant will serve. Therefore, our refusal to remand for a useless task cannot possibly dilute the sentencing guidelines or threaten the integrity of the law as the dissenting justice fears.

MARKMAN, J. (*dissenting*). Our sentencing guidelines state, "If the defendant was convicted of multiple offenses, subject to section 14 of chapter XI [of the Code of Criminal Procedure], score *each offense* as provided in this part." MCL 777.21(2) (emphasis added). Section 14 of chapter XI requires the probation officer to score only the felony with the highest offense class when concurrent sentences are to be imposed. MCL 771.14(2)(e)(*iii*). The prosecutor argues that when concurrent sentences are imposed, the trial court only has to score the highest-class felony, while defendant argues that, even if the probation officer only has to score the guidelines for the highest-class felony, the court itself must score the guidelines for all felonies.

While there is room for puzzlement with regard to why different obligations would obtain for the trial court and the probation officer, MCL 777.21(2) nonetheless is explicit that the trial court must score "each offense." This is underscored by other sentencing statutes. MCL 769.34(2) states that "the minimum sentence imposed by a court of this state for a felony . . . committed on or after January 1, 1999 shall be within the *appropriate sentence range*," and MCL 769.34(3) states, "A court may depart from the *appropriate sentence range* . . . [only] if the court has a substantial and compelling reason for that departure and states on the record the reasons for departure." (Emphasis added.) In order for the trial court to know whether it is sentencing within the "appropriate sentence range," it must obviously score an offense in the first place. Moreover, there is no apparent reason why a comprehensive scheme of sentencing guidelines would arbitrarily except from its coverage felonies simply on the basis that they are scored at the same time as other criminal offenses. That the probation officer may have a more limited scoring obligation when concurrent sentences are to be imposed does little, in my judgment, to overcome the explicit statutory directive that the trial court must "score each offense." MCL 777.21(2).

As a result of the majority's decision not to address this issue, a trial court is now empowered to sentence a defendant on the lower-class felony to

a term that may exceed the guidelines—indeed, that may even exceed the guidelines that are applicable to the highest-class felony—without the obligation to articulate any substantial and compelling reason for what would otherwise be an upward departure. Concomitantly, the trial court would be empowered to sentence a defendant on the lower-class felony to a term that may depart below the guidelines without the obligation to articulate a substantial and compelling basis for doing so. It is hard to conceive that the Legislature, in framing the guidelines, could have contemplated that those guidelines, designed to promote reasonably equal sentences for reasonably equally situated defendants, could be so easily circumvented and for no apparent good reason.

I am cognizant that in most cases scoring the lower-class felony will have little practical effect because (1) if the trial court departs upward in imposing a sentence for the lower-class felony, this sentence will in all likelihood, as in this case, still not exceed the sentence imposed for the highest-class felony and (2) if the trial court departs downward in imposing a sentence for the lower-class felony, the defendant will still be required to serve the presumably lengthier sentence imposed for the highest-class felony. Nonetheless, the trial court should be required, as the law provides, to score all felonies and sentence within the applicable guideline range for each, because otherwise a trial court could, *absent the articulation of substantial and compelling reasons* (a) depart upward so high in imposing a sentence for the lower-class felony that the sentence might exceed even the guideline range of the highest-class felony or (b) depart downward in imposing a sentence for the lower-class felony, which sentence would become the effective sentence of the court in the event that defendant's convictions and sentences for the highest-class felonies were subsequently reversed on appeal.

I respectfully disagree with the concurring justice that addressing the sentencing guidelines issue in this case would constitute a "waste of judicial resources" because it is unlikely to have any "practical impact" on this defendant. Specifically, I do not believe it is a "waste of judicial resources" for this Court to require sentencing courts to undertake what is plainly obligated of them by the Legislature, particularly in the face of Court of Appeals decisions apparently relieving these courts of such obligations. By denying leave to appeal, this Court ensures that large numbers of criminal sentencings will take place in which the requirements of the Legislature will not be complied with. And although, as I have acknowledged, more often than not such noncompliance with the sentencing guidelines will have no "practical impact" on a defendant's sentence, in some number of such cases there *will* be a practical impact and an appeal will not be undertaken by the prosecutor or the defendant in reliance on what I believe are clearly erroneous decisions of the Court of Appeals. In the end, trial courts will be allowed to impose sentences that are above or below the guideline range *absent* the obligation of having to articulate "substantial and compelling" reasons for doing so. And as a result, the sentencing guidelines enacted by the Legislature to render criminal sentences more uniform and less arbitrary will have been slightly diluted, and for no good reason at all. It is no "waste of judicial resources" for this Court to undertake every reasonable effort to maintain the integrity of the law that has become the foundation of our state's criminal justice system. The concurring justice also contends that "our refusal to remand for a useless task cannot possibly dilute the sentencing guidelines or threaten the integrity of the law . . . ." This is true, of course, only if one assumes that the trial courts of the state do not

feel bound to follow the binding decisions of the Court of Appeals.

Because I continue to believe that the guidelines require that *all* felonies be scored and that *all* departures be justified, I would remand to the trial court for it to score all the offenses for which defendant was convicted and either sentence defendant within the guideline range or else articulate substantial and compelling reasons in support of a departure. I would also require the trial court to adjust defendant's sentences that exceed the statutory maximums, which would then also require the court to ensure that defendant's minimum sentences do not exceed 2/3 of the statutory maximum sentences, as they currently do.

PEOPLE V FILE, No. 144491; Court of Appeals No. 299493.

MARILYN KELLY, J. (*dissenting*). I dissent from the Court's order denying defendant's application for leave to appeal. I would grant the application because I believe that defendant has raised a meritorious issue. He argues that he asserted his right to counsel when he stated, "I want to talk to a lawyer because I'm not sure, I love [my girlfriend] and I don't want her in trouble." At that point, defendant argues that his interrogation by the police should have stopped.[1]

Summary Disposition June 20, 2012:

LECH V HUNTMORE ESTATES CONDOMINIUM ASSOCIATION, Nos. 144356 and 144357; Court of Appeals Nos. 296489 and 297196. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals as it applies to the Jacobson defendants and reinstate the Livingston Circuit Court's order granting the Jacobson defendants' motion for summary disposition. The Court of Appeals erred in finding that the plaintiff could assert the rights of LANS Development Corporation because a covenant against encumbrances is personal and does not run with the land. *Pease v Warner*, 153 Mich 140, 151-152 (1908); *McMurtry v Smith*, 320 Mich 304, 308 (1948). Moreover, the orders entered by the Livingston Circuit Court in the interpleader action, Case No. 05-021757-CH, did not confer upon the plaintiff the right to assert the rights of LANS Development Corporation. With respect to count IV of the plaintiff's complaint, MCL 559.184a was not applicable because, under the unique circumstances of this case, the plaintiff was not a "prospective purchaser."

In re FORFEITURE OF 1999 FORD CONTOUR, No. 144796; Court of Appeals No. 300482. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate that part of the Court of Appeals' judgment that directs the Wayne Circuit Court to enter an order granting summary disposition in favor of the plaintiff. The claimant raised two defenses to the forfeiture action. We do not disturb the Court of Appeals' ruling that the prosecutor is entitled to summary disposition on the claimant's claim that his vehicle is exempt from forfeiture under the exception set forth at MCL 333.7521(1)(d)(*iii*). Nor do we disturb the Court of Appeals' ruling that the claimant's affidavit did not establish that he is entitled to avoid forfeiture under the innocent owner exception set forth at MCL 333.7521(1)(d)(*ii*). The Court of Appeals concluded that the claimant's affidavit failed to establish that the claimant *did not* have knowledge of

[1] *Edwards v Arizona*, 451 US 477, 482 (1981).

or consent to his wife's acts. Accepting this as true, we note that the affidavit did not establish that the claimant *did* have knowledge of or consent to his wife's acts, and the plaintiff did not come forward with evidence on this point. Accordingly, this remains an open question of material fact. Because there is a genuine issue of material fact regarding a defense that the claimant has raised to the forfeiture, the Court of Appeals erred in ordering entry of judgment in favor of the plaintiff. *Maiden v Rozwood*, 461 Mich 109 (1999). In all other respects, leave to appeal is denied. We remand this case to the trial court for further proceedings not inconsistent with this order.

PECK v PECK, No. 145135; Court of Appeals No. 306329. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals, for the reasons stated in the Court of Appeals dissenting opinion, and we reinstate the judgment of the Clare Circuit Court.

Leave to Appeal Granted June 20, 2012:

PEOPLE v ELLIOTT, No. 144983; reported below: 295 Mich App 623. The parties shall address whether, and, in light of *Howes v Fields*, 565 US ___; 132 S Ct 1181; 182 L Ed 2d 17 (2012), under what custodial circumstances, a parole officer not acting in concert with the police is required to provide the warnings prescribed by *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966), before questioning an in-custody parolee who, during police questioning, has previously invoked his right to counsel under *Edwards v Arizona*, 451 US 477; 101 S Ct 1880; 68 L Ed 2d 378 (1981), about an offense giving rise to an alleged parole violation, if the parole officer's testimony concerning the parolee's responses to such questioning is to be admissible at the trial for that offense. The Prosecuting Attorneys Association of Michigan, the Criminal Defense Attorneys of Michigan, and the Criminal Law Section of the State Bar of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issue in this case may move the Court for leave to file briefs amicus curiae.

Leave to Appeal Denied June 20, 2012:

PEOPLE v MEISSNER, No. 144274; reported below: 294 Mich App 438.

CAVANAGH, MARILYN KELLY, and HATHAWAY, JJ., would grant leave to appeal.

PEOPLE v MONTANEZ, No. 144372; Court of Appeals No. 285480.

PEOPLE v MCNEAL, No. 144441; Court of Appeals No. 306158.

PEOPLE v TOLBERT, No. 144570; Court of Appeals No. 298159.

In re BRENT, No. 145036; Court of Appeals No. 298720.

HATHAWAY, J., did not participate because of a familial relationship with the referee in this case.

Summary Disposition June 22, 2012:

PEOPLE v HENIX, No. 144531; Court of Appeals No. 301618. Pursuant to MCR 7.302(H)(1), we affirm that part of the Court of Appeals' judgment holding that the defendant failed to demonstrate that his trial counsel was ineffective. Defendant argues that his trial attorney's performance fell below an objective standard of reasonableness in failing to move to suppress physical evidence seized from the house, as well as the defendant's inculpatory statements to the police during questioning inside the house. However, even if this evidence were to be suppressed, considering the weight and strength of the untainted evidence presented at trial, the defendant cannot demonstrate a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. See *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Carbin*, 463 Mich 590, 599-600 (2001). In light of this, we vacate as unnecessary that part of the Court of Appeals' judgment holding that the defendant's Fourth Amendment rights were not violated when the police officers forcibly entered the house where the defendant was staying. In all other respects, leave to appeal is denied.

CAVANAGH, J. (*concurring in part and dissenting in part*). I concur with the order that in light of the remaining untainted evidence, defendant cannot demonstrate a reasonable probability that, but for counsel's error of failing to move for suppression of the illegally acquired evidence, the result of the proceeding would have been different.

I respectfully dissent, however, from that portion of the order vacating as "unnecessary" the Court of Appeals' judgment holding that defendant's Fourth Amendment rights were not violated when the police kicked open the door of the house where defendant was staying and entered without a warrant. Rather, I would reverse the Court of Appeals on this issue because the record fails to demonstrate that the officers were in hot pursuit of a fleeing suspect or that any exigent circumstances justified a warrantless entry into the house to make a routine felony arrest. See *Payton v New York*, 445 US 573, 598, 590; 100 S Ct 1371; 63 L Ed 2d 639 (1980); *Minnesota v Olson*, 495 US 91, 100; 110 S Ct 1684; 109 L Ed 2d 85 (1990). Indeed, when the police officers first observed defendant leaving the scene of the crime, they initiated no pursuit, nor did they even attempt to make contact with defendant. It was only after confirming that a crime had occurred and running a computer check on the license plates from the vehicle defendant was driving that the police proceeded to the home where defendant was staying. By the time the police arrived at the home, defendant had already arrived, parked the vehicle, and entered the house. In short, "there was no immediate or continuous pursuit of [defendant] from the scene of a crime." *Welsh v Wisconsin*, 466 US 740, 753; 104 S Ct 2091; 80 L Ed 2d 732 (1984). Further, Officer Ken Bluew testified that several officers were stationed around the house to prevent escape and there was no indication that defendant was armed or posed a danger to anyone inside the home. Thus, there was no reason that the officers could not have secured a search warrant before entering the home.

In my view, the majority errs by determining that the Court of Appeals' conclusion that defendant's Fourth Amendment rights were not violated was "unnecessary." Because one of defendant's claims of ineffective assistance is predicated on the conclusion that his Fourth Amendment rights were violated, I believe it is necessary for this Court to reverse the Court of Appeals' conclusion to the contrary.

MARILYN KELLY, J., concurred with CAVANAGH, J.

LALONE v RIEDSTRA DAIRY LTD, No. 145028; Court of Appeals No. 308207. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted.

HATHAWAY, J., would deny leave to appeal.

Leave to Appeal Denied June 22, 2012:

MITCHELL v MITCHELL, No. 144959; reported below: 296 Mich App 513.

Summary Disposition June 25, 2012:

PEOPLE v ELLEN WATSON, No. 144068; Court of Appeals No. 305809. By order of April 18, 2012, the prosecuting attorney was directed to answer the application for leave to appeal the October 12, 2011, order of the Court of Appeals. On order of the Court, the answer having been received, the application for leave to appeal is again considered and, pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted.

Leave to Appeal Denied June 25, 2012:

PEOPLE v CLIFTON, No. 143711; Court of Appeals No. 304684.

PEOPLE v REED, No. 144041; Court of Appeals No. 303178.

PEOPLE v ROBERT COOK, No. 144042; Court of Appeals No. 301788.

PEOPLE v ROQUE, Nos. 144047 and 144048; Court of Appeals Nos. 296197 and 297082.

PEOPLE v HARRINGTON, No. 144060; Court of Appeals No. 303086.

PEOPLE v MIXON, No. 144061; Court of Appeals No. 303325.

PEOPLE v BRIDGES, No. 144063; Court of Appeals No. 305629.

PEOPLE v ANTHONY CHILDS, No. 144070; Court of Appeals No. 303497.

PEOPLE v DOBBS, No. 144073; Court of Appeals No. 302427.

HATHAWAY, J., not participating. Justice Hathaway recuses herself and will not participate in this case as she was the presiding trial court judge. See MCR 2.003(B).

PEOPLE v PEREZ, No. 144079; Court of Appeals No. 305834.

PEOPLE v VERGINO SMITH, No. 144086; Court of Appeals No. 305363.

PEOPLE v BACON, No. 144089; Court of Appeals No. 303355.

PEOPLE v DOUGLAS WILLIAMS, No. 144098; Court of Appeals No. 303334.

PEOPLE v BEASLEY, No. 144102; Court of Appeals No. 303214.

PEOPLE v ANTHONY KING, No. 144103; Court of Appeals No. 303361.

PEOPLE v DISNEY, No. 144105; Court of Appeals No. 302386.

PEOPLE v DEJESUS, No. 144112; Court of Appeals No. 303977.

PEOPLE v MAY, No. 144114; Court of Appeals No. 305360.

PEOPLE v TURNPAUGH, No. 144115; Court of Appeals No. 303628.

PEOPLE v DAVID JONES, No. 144122; Court of Appeals No. 305324.

PEOPLE v GRABINSKI, No. 144126; Court of Appeals No. 305286.

PEOPLE v PHILPOTS, No. 144138; Court of Appeals No. 303230.

PEOPLE v JEFFERSON, No. 144146; Court of Appeals No. 301833.

PEOPLE v BALL, No. 144150; Court of Appeals No. 304796.

PEOPLE v LATIMER, No. 144154; Court of Appeals No. 301780.

PEOPLE v WESTBROOK, No. 144171; Court of Appeals No. 301669.

PEOPLE v INGRAM, No. 144174; Court of Appeals No. 302663.

PEOPLE v WILLIAM BROWN, No. 144175; Court of Appeals No. 302867.

PEOPLE v BILLER, No. 144176; Court of Appeals No. 305254.

PEOPLE v DERRICK COLEMAN, No. 144177; Court of Appeals No. 304578.

PEOPLE v JOEL CARTER, No. 144179; Court of Appeals No. 300682.

PEOPLE v TIMMY COLLIER, No. 144232; Court of Appeals No. 304731.

MCCARTHY v SOSNICK, Nos. 144241, 144242, 144243, 144244, 144245, and 144246; Court of Appeals Nos. 293482, 29385, 295784, 293483, 294383, and 295782. We further conclude that the application for leave to appeal is frivolous and vexatious. MCR 7.316(D). Plaintiff Patrick McCarthy is ordered to pay the Clerk of this Court $500 within 28 days of the date of this order. We direct the Clerk of this Court not to accept any further filings from Mr. McCarthy in any noncriminal matter until he has made the payment required by this order.

PEOPLE v THOMAS LEWIS, No. 144249; Court of Appeals No. 304895.

PEOPLE v MURPHY, No. 144277; Court of Appeals No. 303904.

PEOPLE v LAVARON MORRIS, No. 144281; Court of Appeals No. 305100.

PEOPLE v LEROY HARRIS, No. 144286; Court of Appeals No. 305537.

PEOPLE v CARLOS SIMMONS, No. 144307; Court of Appeals No. 304357.

PEOPLE v JULIUS DAVIS, No. 144308; Court of Appeals No. 305909.

PEOPLE v CURTIS ANDERSON, No. 144323; Court of Appeals No. 303778.

PEOPLE v PUTRUS, No. 144337; Court of Appeals No. 304081.

PEOPLE v TOWNSEND, No. 144340; Court of Appeals No. 306278.

PEOPLE v BROWNLEE, No. 144342; Court of Appeals No. 305774.

PEOPLE v BARNES, No. 144344; Court of Appeals No. 304728.

CITY OF ECORSE v SALISBURY, No. 144348; Court of Appeals No. 299155.

PEOPLE v BLANTON, No. 144353; Court of Appeals No. 306045.

E T MACKENZIE COMPANY v SUTTON PLACE-RAISIN TWP, LLC, No. 144359; Court of Appeals No. 297864.

PEOPLE v WAYNE PERRY, No. 144363; Court of Appeals No. 304829.

PEOPLE v MANNINA, No. 144364; Court of Appeals No. 305534.

PEOPLE v CARLOS SIMMONS, No. 144378; Court of Appeals No. 304356.

PEOPLE v PEARSON, No. 144390; Court of Appeals No. 305752.

PEOPLE v DENNIS WILSON, No. 144391; Court of Appeals No. 299834.

PEOPLE v HALL, No. 144392; Court of Appeals No. 305501.

PEOPLE v BOLDEN, No. 144398; Court of Appeals No. 298770.

PEOPLE v KEVIN JOHNSON, No. 144399; Court of Appeals No. 304062.

PEOPLE v MARIO BROWN, No. 144407; Court of Appeals No. 303720.

PEOPLE v TIMMY COLLIER, No. 144413; Court of Appeals No. 305960.

CITY OF FRANKFORT v POLICE OFFICERS ASSOCIATION OF MICHIGAN, INC, No. 144427; Court of Appeals No. 298307.

DUBUC v GREEN OAK TOWNSHIP, No. 144434; Court of Appeals No. 305199.

PEOPLE v TRENT GARDNER, No. 144448; Court of Appeals No. 297981.

MCCARTHY v SOSNICK, Nos. 144450, 144451, 144452, 144453, 144454, and 144455; Court of Appeals Nos. 293482, 294385, 295784, 293483, 294383, and 295782. We further conclude that the application for leave to appeal is frivolous and vexatious. MCR 7.316(D). Plaintiff Patrick McCarthy is ordered to pay the Clerk of this Court $500 within 28 days of the date of this order. We direct the Clerk of this Court not to accept any further filings from Mr. McCarthy in any noncriminal matter until he has made the payment required by this order.

QUALITY ONE CONSTRUCTION & DEVELOPMENT, INC v CITY OF DEARBORN, No. 144462; Court of Appeals No. 303674.

P & R DEVELOPERS, LLC v SCOTT T BOSGRAAF TRUST, No. 144463; Court of Appeals No. 297439.

PEOPLE v LEONARD COOPER, No. 144471; Court of Appeals No. 298127.

PEOPLE v PIPPEN, No. 144481; Court of Appeals No. 300171.

BROWN v BURK, No. 144498; Court of Appeals No. 298994.

PEOPLE v LATTIMORE, No. 144530; Court of Appeals No. 298155.

PEOPLE v BRIAN WHITE, No. 144532; Court of Appeals No. 301593.

PEOPLE v JUSTIN HILL, No. 144539; Court of Appeals No. 300539.

PEOPLE v OSCAR WILLIAMS, No. 144543; Court of Appeals No. 303886.

PEOPLE v MCGLYNN, No. 144561; Court of Appeals No. 294673.

PEOPLE v LAIRD, No. 144565; Court of Appeals No. 300457.

SECURA INSURANCE COMPANY v FARM BUREAU INSURANCE COMPANY OF MICHIGAN, No. 144568; Court of Appeals No. 298106.

PEOPLE v HAMPTON, No. 144572; Court of Appeals No. 297224.

PEOPLE v JEFFRY ANDERSON, No. 144575; Court of Appeals No. 304262.

SOURS v TITAN INSURANCE COMPANY, No. 144589; Court of Appeals No. 301328.

JADALI v MICHIGAN NEUROLOGY ASSOCIATES, No. 144602; Court of Appeals No. 297975.

PEOPLE v VILLAREAL, No. 144605; Court of Appeals No. 307062.

PEOPLE v ERIKA DAVIS, No. 144614; Court of Appeals No. 300647.

PEOPLE v GOUCH, No. 144616; Court of Appeals No. 299706.

PEOPLE v JEREMIAH JOHNSON, No. 144619; Court of Appeals No. 300538.

PEOPLE v JAMES, No. 144628; Court of Appeals No. 298638.

PEOPLE v WILDER, No. 144638; Court of Appeals No. 301327.

PEOPLE v DERRICK SMITH, No. 144645; Court of Appeals No. 303615.

SCALA v AZTEC MANUFACTURING CORPORATION, No. 144646; Court of Appeals No. 303244.

PEOPLE v DESONIA, No. 144661; Court of Appeals No. 301579.

PEOPLE v CRYSLER, No. 144662; Court of Appeals No. 307264.

THADEN v GORINAC, No. 144664; Court of Appeals No. 299036.

PEOPLE v CHANG, No. 144672; Court of Appeals No. 306865.

THADEN v GORINAC, No. 144675; Court of Appeals No. 299036.

NOLAN v AUTO-OWNERS INSURANCE COMPANY, No. 144676; Court of Appeals No. 300106.

HOLLIS v KINROSS CORRECTIONAL FACILITY WARDEN, No. 144677; Court of Appeals No. 305242.

PEOPLE v ERMATINGER, No. 144680; Court of Appeals No. 307032.

PEOPLE v BEAN, No. 144682; Court of Appeals No. 307525.

PEOPLE v PFEIFFER, No. 144683; Court of Appeals No. 301614.

BURNSIDE v GENESEE CIRCUIT JUDGE, No. 144685; Court of Appeals No. 306913.

PEOPLE v KEAN, No. 144688; Court of Appeals No. 292312.

PEOPLE v ROYALL, No. 144699; Court of Appeals No. 301481.

PEOPLE v FREDDIE SMITH, No. 144703; Court of Appeals No. 299989.

PEOPLE v TURNER, No. 144704; Court of Appeals No. 301226.

PEOPLE v NORBERT JONES, No. 144706; Court of Appeals No. 299613.

YOOST v CASPARI, No. 144707; reported below: 295 Mich App 209.

PEOPLE v FINK, No. 144708; Court of Appeals No. 300769.

PEOPLE v PAREDES, No. 144709; Court of Appeals No. 307140.

PEOPLE v JAMES JOHNSON, No. 144712; Court of Appeals No. 299163.

PEOPLE v WHITEHEAD, No. 144713; Court of Appeals No. 306992.

PEOPLE v ENGEL, No. 144714; Court of Appeals No. 301303.

PEOPLE v RUSHAD CHILDRESS, No. 144715; Court of Appeals No. 307058.

PEOPLE v TWINING, No. 144716; Court of Appeals No. 307107.

PEOPLE v EDMOND, No. 144719; Court of Appeals No. 307808.

PEOPLE v FUNDARO, No. 144720; Court of Appeals No. 301194.

SIMPSON v MEMBERSELECT INSURANCE COMPANY, No. 144726; Court of Appeals No. 299658.

PEOPLE v ZYRONE SANDERS, No. 144731; Court of Appeals No. 301065.

PEOPLE v DAVID COOK, No. 144738; Court of Appeals No. 300321.

PEOPLE v MICHAEL T J PERRY, No. 144739; Court of Appeals No. 307383.

PEOPLE v ANDRE FRANKLIN, No. 144742; Court of Appeals No. 300371.

PEOPLE v MICHAEL MORGAN, No. 144743; Court of Appeals No. 302900.

PEOPLE v BRADLEY GAINES, No. 144746; Court of Appeals No. 306652.

PEOPLE v JERMEY LLOYD, No. 144747; Court of Appeals No. 307463.

PEOPLE v CURRIE, No. 144748; Court of Appeals No. 307334.

In re APPLICATION OF CONSUMERS ENERGY COMPANY CONCERNING BIG ROCK POINT PLANT, No. 144749; Court of Appeals No. 296853.

HICKS v AUTO CLUB GROUP INSURANCE COMPANY, No. 144750; Court of Appeals No. 295391.

MICHIGAN BASIC PROPERTY INSURANCE ASSOCIATION v WASHINGTON, No. 144757; Court of Appeals No. 299597.

PEOPLE v JOSEPH WARD, No. 144764; Court of Appeals No. 306623.

PEOPLE v CHRISTOPHER FLOWERS, No. 144766; Court of Appeals No. 307417.

PEOPLE v SHANE LLOYD, No. 144775; Court of Appeals No. 307588.

PEOPLE v CORDARO HARDY, No. 144776; Court of Appeals No. 292998.

PEOPLE v STACKHOUSE, No. 144778; Court of Appeals No. 301207.

PEOPLE v IVORY, No. 144779; Court of Appeals No. 300861.

PEOPLE v DONELL WILLIAMS, No. 144782; Court of Appeals No. 300320.

PEOPLE v ERROL MARTIN, No. 144786; Court of Appeals No. 293703.

PEOPLE v ZUNIGA, No. 144790; Court of Appeals No. 301473.

PEOPLE v ASHTON SMITH, No. 144793; Court of Appeals No. 298157.

VUCAJ v CM TRANSPORTATION,\CSC, INC, No. 144798; Court of Appeals No. 304546.

PEOPLE v CONERLY, No. 144800; Court of Appeals No. 301804.

PEOPLE v VICTOR COOPER, No. 144803; Court of Appeals No. 300876.

GIBLER v CIVIL SERVICE COMMISSION, No. 144804; Court of Appeals No. 304418.

PEOPLE v LU, No. 144807; Court of Appeals No. 300854.

PEOPLE v PATWIN, No. 144808; Court of Appeals No. 300013.

PEOPLE v MARK MORGAN, No. 144810; Court of Appeals No. 302716.

PEOPLE v HAWKINS, No. 144811; Court of Appeals No. 304766.

PEOPLE v WILLIAM RONEY, No. 144814; Court of Appeals No. 307965.

PEOPLE v WILLIAM RONEY, No. 144816; Court of Appeals No. 307966.

KALAJ v KHAN, No. 144817; reported below: 295 Mich App 420.

HOTCHKISS v CLAY TOWNSHIP BOARD, No. 144819; Court of Appeals No. 302981.

PEOPLE v MICHAEL THEODORE PERRY, No. 144821; Court of Appeals No. 307267.

PEOPLE v JIMMIE BROWN, No. 144823; Court of Appeals No. 307786.

PEOPLE v SYDOW, No. 144825; Court of Appeals No. 307610.

PEOPLE v MARTINEZ, No. 144826; Court of Appeals No. 303550.

PEOPLE v JENKINS, No. 144829; Court of Appeals No. 304143.

PEOPLE v FERGUSON, No. 144831; Court of Appeals No. 308265.

ROBERTSON v CHRYSLER GROUP LLC, No. 144832; Court of Appeals No. 304361.

HALFORD v CITY OF FLINT, No. 144843; Court of Appeals No. 304068.
CAVANAGH and HATHAWAY, JJ., would grant leave to appeal.

PEOPLE v PRYOR, No. 144846; Court of Appeals No. 302014.

PEOPLE v HAWLEY, No. 144847; Court of Appeals No. 307750.

KILGORE v CHRYSLER GROUP LLC, No. 144849; Court of Appeals No. 304304.

PEOPLE v GASHI, No. 144854; Court of Appeals No. 307547.

PEOPLE v MCDANIELS, No. 144863; Court of Appeals No. 308744.

DOE v FERRIS, No. 144864; Court of Appeals No. 307516.

PEOPLE v NORMAN, No. 144867; Court of Appeals No. 307828.

PEOPLE v CUMMINGS, No. 144868; Court of Appeals No. 300604.

PEOPLE v DEBRY DAVIS, No. 144869; Court of Appeals No. 302225.

PEOPLE v DICE, No. 144871; Court of Appeals No. 307337.

ROBERTS v COOLEY, No. 144873; Court of Appeals No. 299985.

WOODS v EATON CORPORATION, No. 144874; Court of Appeals No. 305332.
HATHAWAY, J., would grant leave to appeal.

W G WADE SHOWS, INC v HAMAN, No. 144908; Court of Appeals No. 299987.

STORNELLO v DEPARTMENT OF CORRECTIONS, No. 145013; Court of Appeals No. 306664.
HATHAWAY, J., would grant leave to appeal.

ARMOCK v CANTEEN SERVICES, INC, No. 145019; Court of Appeals No. 302737.

PEOPLE v THADDEUS WILLIAMS, No. 145074; Court of Appeals No. 306161.

Superintending Control Denied June 25, 2012:

HELM v ATTORNEY GRIEVANCE COMMISSION, No. 144717.

JONES v ATTORNEY GRIEVANCE COMMISSION, No. 144805.

Reconsideration Denied June 25, 2012:

SEATON v WAYNE COUNTY CLERK, No. 143686; Court of Appeals No. 297502. Leave to appeal denied at 491 Mich 885.

PEOPLE v PATRICK LEWIS, No. 143821; Court of Appeals No. 303836. Leave to appeal denied at 491 Mich 852.

UNEMPLOYMENT INSURANCE AGENCY v GERSTENSCHLAGER, No. 143837; Court of Appeals No. 304928. Leave to appeal denied at 491 Mich 891.

PEOPLE v WALK, No. 143857; Court of Appeals No. 300722. Leave to appeal denied at 491 Mich 885.

PEOPLE v FLINT, No. 143874; Court of Appeals No. 302985. Leave to appeal denied at 491 Mich 907.

PEOPLE v OETTING, No. 143887; Court of Appeals No. 305518. Leave to appeal denied at 491 Mich 892.

PEOPLE v NOONAN, No. 143892; Court of Appeals No. 305035. Leave to appeal denied at 491 Mich 892.

In re MCCORMICK ESTATE, No. 143918; Court of Appeals No. 296547. Leave to appeal denied at 491 Mich 853.

BERGER v KATZ, Nos. 143950 and 143951; Court of Appeals Nos. 291663 and 293880. Leave to appeal denied at 491 Mich 886.

PEOPLE v CARRIER, No. 143966; Court of Appeals No. 305630. Leave to appeal denied at 491 Mich 853.

PEOPLE v BERNARD MOORE, No. 144043; Court of Appeals No. 298400. Leave to appeal denied at 491 Mich 854.

PEOPLE v GUTIERREZ, No. 144093; Court of Appeals No. 295169. Leave to appeal denied at 491 Mich 892.

PEOPLE v TROY JONES, Nos. 144134 and 144135; Court of Appeals Nos. 292793 and 292794. Leave to appeal denied at 491 Mich 908.

Leave to Appeal Denied June 29, 2012:

CITY OF NORTON SHORES v MUNICIPAL EMPLOYEES' RETIREMENT SYSTEM, No. 144358; Court of Appeals No. 302673.

MARKMAN, J. (*concurring*). I concur in the majority's order denying leave to appeal. I write separately only to note that I find *Malleis v Employment Security Comm*, 340 Mich 78 (1954), which plaintiff relies on heavily, to be of questionable value. Indeed, *Hajduk v Revere Copper & Brass, Inc*, 268 Mich 220 (1934), an opinion that *Malleis* quoted with approval, was expressly overruled by *Autio v Proksch Constr Co*, 377 Mich 517, 526, 535 (1966) (describing *Hajduk* as a "blatantly erroneous interpretive decision"). *Malleis* judicially created a six-year limitations period where the Legislature had created none. More recently, this Court has consistently applied statutes as they are written and has declined to add statutory-like provisions when the Legislature has not created such provisions. As this Court has explained, "a court may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself." *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 63, 66 (2002) (declining to add a requirement to object to any deficiencies in a notice of intent before the complaint is filed in a medical malpractice action because "[i]n the absence of such a statutory requirement, we do not have the authority to create and impose an extrastatutory affirmative duty on the defendant"); see also *People v Wager*, 460 Mich 118, 121 (1999) (declining to add a requirement to conduct a blood alcohol test within a "reasonable time" because "[n]owhere does the [pertinent statute] impose a requirement concerning the interval of time in which the test must be given"). Therefore, I question the continuing validity of *Malleis*.

CITY OF ROOSEVELT PARK v MUNICIPAL EMPLOYEES' RETIREMENT SYSTEM, No. 144360; Court of Appeals No. 302674.

MARKMAN, J. (*concurring*). I concur in the majority's order denying leave to appeal. I write separately only to note that I find *Malleis v Employment Security Comm*, 340 Mich 78 (1954), which plaintiff relies on heavily, to be of questionable value. Indeed, *Hajduk v Revere Copper & Brass, Inc*, 268 Mich 220 (1934), an opinion that *Malleis* quoted with approval, was expressly overruled by *Autio v Proksch Constr Co*, 377 Mich 517, 526, 535 (1966) (describing *Hajduk* as a "blatantly erroneous interpretive decision"). *Malleis* judicially created a six-year limitations period where the Legislature had created none. More recently, this Court has consistently applied statutes as they are written and has declined to add statutory-like provisions when the Legislature has not created such provisions. As this Court has explained, "a court may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself." *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 63, 66 (2002) (declining to add a requirement to object to any deficiencies in a notice of intent before the complaint is filed in a medical malpractice action because "[i]n the absence of such a statutory requirement, we do not have the authority to create and impose an extrastatutory affirmative duty on the defendant"); see also *People v Wager*, 460 Mich 118, 121 (1999) (declining to add a requirement to conduct a blood alcohol test within a "reasonable time" because "[n]owhere does the [pertinent statute] impose a requirement

concerning the interval of time in which the test must be given"). Therefore, I question the continuing validity of *Malleis*.

GAGNON v GLOWACKI, No. 144944; reported below: 295 Mich App 557. HATHAWAY, J., would grant leave to appeal.

In re BRITTON, Nos. 145219 and 145220; Court of Appeals Nos. 306495 and 306498.

Leave to Appeal Denied July 6, 2012:

In re KEG, No. 145136; Court of Appeals No. 306173.

In re HILLS, No. 145227; Court of Appeals No. 304428.

Rehearing Denied July 6, 2012:

PEOPLE v RAO, No. 142537; Court of Appeals No. 289343. Reported at 491 Mich 271.

YOUNG, C.J. (*concurring*). I concur fully in the denial of defendant's motion for rehearing, but write briefly to respond to defendant's claim that the proffered evidence was "exculpatory," leading to the conclusion that "there has been a wrongful conviction in this case."

As indicated in the trial court's opinion and order denying defendant's motion for a new trial, the "newly discovered evidence" at issue was exhibits J,[1] K,[2] and L.[3] While the actual x-ray films were submitted as an exhibit,[4] it is patently obvious that the proper interpretation of radiological films, and the clinical significance of that interpretation, lay well beyond the understanding and competence of an untrained layman, thus necessitating the use of expert medical opinion[5] to support defendant's claim of exculpatory evidence.

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[1] Exhibit J was the radiology report of Dr. Gibson dated May 6, 2009.

[2] Exhibit K consisted of the x-ray films of the victim dated May 6, 2009.

[3] Exhibit L was the supplemental report of Dr. Rothfeder dated June 11, 2009. Dr. Rothfeder was one of several medical experts who testified for the defense at defendant's trial.

[4] See MRE 703.

[5] See MRE 702 (stating that an expert witness may testify "[i]f the court determines that scientific, technical, or other specialized knowledge will *assist the trier of fact to understand the evidence or to determine a fact in issue*") (emphasis added); *People v Smith*, 425 Mich 98, 106 (1986) (stating that whether the use of an expert is proper "is to be determined on the basis of assisting the trier" and is a "common sense inquiry" that considers "whether the untrained layman would be qualified to determine intelligently and to the best possible degree the particular issue" without the expert's assistance) (citation and quotation marks omitted).

However, the Court of Appeals *specifically disavowed* that exhibit L, the supplemental report of Dr. Rothfeder, provided the basis for reversing the trial court's order denying defendant's motion for a new trial. The Court of Appeals stated that "the newly discovered evidence consists of the condition of [RS's] ribs as revealed in the 2009 skeletal survey, *not Rothfeder's report*."[6]

This leaves exhibit J, the radiology report of Dr. Gibson, as the sole basis for the Court of Appeals' conclusion that the 2009 skeletal survey "shatter[ed] the scientific cornerstone of the prosecution's evidence that the rib abnormalities were consistent only with fractures, and not an underlying bone abnormality."[7] However, this conclusion is not remotely consistent with Dr. Gibson's report. The report states that on May 6, 2009 (18 months after the child was removed from the home and 10 months after defendant's trial concluded), the victim had some irregularities and abnormalities on several of her ribs "*which may be due to old fractures*." The report provides no basis to conclude that the "irregularities" and "abnormalities" were indicative of metabolic bone disease. Moreover, when Dr. Rothfeder's supplemental report indicated that the 2009 skeletal survey suggested metabolic bone disease, Dr. Gibson's follow-up correspondence was blunt and clear, removing any lingering doubt regarding his medical opinion: "The changes in the ribs described in my report could be accounted for on the basis of past trauma. I did not, in my opinion, *see any evidence on the films to suggest metabolic bone disease*."

Thus, contrary to the assertions of defendant and the conclusion of the Court of Appeals, the evidence relied on by defendant was not exculpatory. I fully concur in the denial of defendant's motion for rehearing.

MARILYN KELLY and HATHAWAY, JJ., would grant rehearing.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal Entered July 11, 2012:

STAND UP FOR DEMOCRACY v SECRETARY OF STATE, No. 145387; reported below: 297 Mich App 45. At oral argument, the parties shall address: (1) whether plaintiff actually complied with the 14-point-type requirement in MCL 168.482(2), specifically given the terms "point" and "type;" and (2) if not, whether substantial compliance with the 14-point-type requirement in MCL 168.482(2) is sufficient to give plaintiff a clear legal right to certification of the petition. The parties may file supplemental briefs regarding those issues within 7 days of the date of this order, but they should not submit mere restatements of their application papers.

YOUNG, C.J. (*concurring*). I concur in the decision to order oral argument on the application. However, I also ask the parties to address specific issues related to our resolution of the question whether plaintiff

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[6] *People v Rao*, unpublished opinion per curiam of the Court of Appeals, issued December 7, 2010 (Docket No. 289343), p 9 (emphasis added).

[7] *Id*. at 10.

has actually complied with the requirement of MCL 168.482(2) that the heading be printed in 14-point type.

First, I would like the parties to address the definitions of "point" and "type" as they stood at the time the Legislature enacted MCL 168.482 in 1954 and amended it in 1965, specifically, whether the "point" measurement of "type" requires a size measurement of the entire printer's block rather than of the actual character produced by the block. See, e.g., *Webster's New International Dictionary of the English Language, Second Edition* (1948); *Webster's Third New International Dictionary of the English Language Unabridged* (1965).

Second, I would like the parties to address whether these definitions of "point" and "type" continue to control the interpretation of MCL 168.482(2), notwithstanding subsequent amendments of the statute in 1993 and 1998 that did not alter the terms "point" and "type" within that subsection.

Finally, if the original definitions of "point" and "type" control the interpretation of MCL 168.482(2) today, I would like the parties to address how the Court is to determine whether the computer font used in this case complies with those definitions.

MARKMAN, J., (*concurring*). I concur in the decision to order oral argument on the application. However, I respectfully ask the parties to address the following questions:

First, in addressing the meaning of the terms "point" and "type," see, e.g., *Webster's New Collegiate Dictionary* (2d ed) (1960), what is the significance, if any, of the context in which those terms are used, i.e., within a statute that provides that the heading of the petition "shall be . . . *printed in* capital *letters in* 14-point boldface type"? MCL 168.482(2) (emphasis added).

Second, assuming that the statute requires a size measurement of the entire printer's block rather than of the actual printed character itself, how is such a block to be measured and what are the sizes of the blocks at issue in this case?

Third, assuming that the printer's block is determinative, would a 3-point font, for example, be sufficient under the statute as long as the blank space between the two lines is sufficiently large?

Fourth, what legislative purpose would be served under MCL 168.482(2) by a type-size requirement that measures the size of the printer's block compared to a requirement that measures the size of the actual printed character?

SPECIAL ORDERS

SPECIAL ORDERS

In this section are orders of the Supreme Court
(other than orders entered in cases before the Court)
of general interest to the bench and bar of the state.

Orders Entered April 18, 2012:

PROPOSED AMENDMENT OF MCR 2.603.

On order of the Court, this is to advise that the Court is considering an amendment of Rule 2.603 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at http://courts.michigan.gov/supremecourt/Resources/Administrative/PH.htm.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[Additions are indicated in underlining and deleted language is overstricken.]

RULE 2.603. DEFAULT AND DEFAULT JUDGMENT.

(A) [Unchanged.]

(B) Default Judgment.

(1) [Unchanged.]

(2) Default Judgment Entered by Clerk. On request of the plaintiff supported by an affidavit as to the amount due, the clerk may sign and enter a default judgment for that amount and costs against the defendant, if

(a) the plaintiff's claim against a defendant is for a sum certain or for a sum that can by computation be made certain;

(b) the default was entered because the defendant failed to appear; ~~and~~

(c) the defaulted defendant is not an infant or incompetent person, and~~.~~

(d) the damages amount requested is not greater than the amount stated in the complaint.

(3)-(4) [Unchanged.]

(C)-(E) [Unchanged.]

Staff Comment: The proposed amendment of MCR 2.603 would clarify that a court clerk could enter a default judgment if the requested

damages are less than the amount claimed in the original complaint, to reflect payments that may have been made or otherwise credited.

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

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be sent to the Supreme Court Clerk in writing or electronically by August 1, 2012, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2011-06. Your comments and the comments of others will be posted at http://courts.michigan.gov/supremecourt/Resources/Administrative/index.htm#proposed.

PROPOSED AMENDMENT OF MCR 3.979.

On order of the Court, this is to advise that the Court is considering amendment of Rule 3.979 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at http://courts.michigan.gov/supremecourt/Resources/Administrative/PH.htm.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

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

RULE 3.979. JUVENILE GUARDIANSHIPS.

(A)–(B) [Unchanged.]

(C) Court Jurisdiction; Review Hearings; Lawyer-Guardian ad Litem.

(1) Jurisdiction. The court's jurisdiction over a juvenile guardianship shall continue until terminated by court order. The court's jurisdiction over a juvenile under section 2(b) of the Juvenile Code, MCL 712A.2(b), and the jurisdiction of the MCI under section 3 of 1935 PA 220, MCL 400.203, shall be terminated after the court appoints a juvenile guardian under this section and conducts a review hearing pursuant to MCR 3.975 when parental rights to the child have not been terminated, or a review hearing pursuant to MCR 3.978 when parental rights to the child have been terminated. Upon notice by the Department of Human Services that extended guardianship assistance beyond age 18 will be provided to a youth pursuant to MCL 400.665, the court shall retain jurisdiction over the guardianship until that youth no longer receives extended guardianship assistance.

(2) Review Hearings. The review hearing following appointment of the juvenile guardian must be conducted within 91 days of the most

recent review hearing if it has been one year or less from the date the child was last removed from the home, or within 182 days of the most recent review hearing if it has been more than one year from the date the child was last removed from the home.

(3) Lawyer-Guardian ad Litem. The appointment of the lawyer-guardian ad litem in the child protective proceeding terminates upon entry of the order terminating the court's jurisdiction pursuant to MCL 712A.2(b). At any time after a juvenile guardian is appointed, the court may reappoint the lawyer-guardian ad litem or may appoint a new lawyer-guardian ad litem if the court is satisfied that such action is warranted. A lawyer-guardian ad litem appointed under this subrule is subject to the provisions of MCL 712A.17d.

(D) Court Responsibilities.

(1) Annual Review.

(a) The court shall conduct a review of a juvenile guardianship annually. The review shall be commenced within 63 days after the anniversary date of the appointment of the guardian. The court may conduct a review of a juvenile guardianship at any time it deems necessary. If the report of the juvenile guardian has not been filed as required by subrule (E)(1), the court shall take appropriate action.

(b) If extended guardianship assistance has been provided to a youth pursuant to MCL 400.665, the court shall conduct an annual review hearing at least once every 12 months after the youth's eighteenth birthday to determine that the guardianship meets the criteria under MCL 400.667. Notice of the hearing shall be sent to the guardian and the youth as provided in MCR 3.920(D)(1). The court shall issue an order to support its determination and serve the order on the Department of Human Services, the guardian, and the youth.

(2)–(4) [Unchanged.]

(E)–(F) [Unchanged.]

Staff Comment: The proposed amendment of MCR 3.979 implements the judicial action requirements of 2011 PA 225 and 2011 PA 229 by (1) acknowledging court jurisdiction over guardianships for which the Department of Human Services will continue providing subsidies after the wards reach age 18 and (2) requiring that the supervising courts conduct annual review hearings and make appropriate findings. Adoption of the proposed amendment will enable Michigan to receive federal Title IV-E funding for the post-18 guardianship program.

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

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on these proposals may be sent to the Supreme Court Clerk in writing or electronically by August 1, 2012, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2012-10. Your comments and the comments of others will be posted at http://courts.michigan.gov/supremecourt/Resources/Administrative/index.htm#proposed.

Orders Entered May 2, 2012:

PROPOSED NEW MCR 1.111 AND 8.127.

On order of the Court, this is to advise that the Court is considering adoption of new Rule 1.111 and Rule 8.127 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at the following: www.courts.michigan.gov/supremecourt/resources/administrative/ph.htm.

Please note that three alternative provisions are offered for consideration in MCR 1.111 at subrules (B) and (F)(4).

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[The text below is new.]

RULE 1.111. FOREIGN LANGUAGE INTERPRETERS.

(A) Definitions

When used in this rule, the following words and phrases have the following definitions:

(1) "Case or Court Proceeding" means any hearing, trial, or other appearance before any court in this state in an action, appeal, or other proceeding, including any matter conducted by a judge, magistrate, referee, or other hearing officer.[1]

(2) "Certified foreign language interpreter" means a person who has:

(a) passed a foreign language interpreter test administered by the State Court Administrative Office or a similar state or federal test approved by the state court administrator,

(b) met all the requirements established by the state court administrator for this interpreter classification, and

(c) registered with the State Court Administrative Office.

(3) "Interpret" and "interpretation" mean the oral rendering of spoken communication from one language to another without change in meaning.

(4) "Limited English proficient person" means a person who does not speak English as his or her primary language, and who has a limited ability to read, write, speak, or understand English, and by reason of his or her limitations, is not able to understand and meaningfully participate in the case or court proceeding.

(5) "Qualified foreign language interpreter" means:

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[1] This provision would not be necessary if Alternative B (for subrule [B]) is adopted, which includes the definition for "court proceeding" and "court operations."

(a) A person who provides interpretation services, provided that the person has:

(i) registered with the State Court Administrative Office; and

(ii) met the requirements established by the state court administrator for this interpreter classification; and

(iii) been determined by the court after voir dire to be competent to provide interpretation services for the proceeding in which the interpreter is providing services, or

(b) A person who works for an entity that provides in-person interpretation services provided that:

(i) both the entity and the person have registered with the State Court Administrative Office; and

(ii) the person has met the requirements established by the state court administrator for this interpreter classification; and

(iii) the person has been determined by the court after voir dire to be competent to provide interpretation services for the proceeding in which the interpreter is providing services, or

(c) A person who works for an entity that provides interpretation services by telecommunication equipment, provided that:

(i) the entity has registered with the State Court Administrative Office; and

(ii) the entity has met the requirements established by the state court administrator for this interpreter classification; and

(iii) the person has been determined by the court after voir dire to be competent to provide interpretation services for the proceeding in which the interpreter is providing services

Alternative A

(B) Appointment of a Foreign Language Interpreter

(1) If a person requests a foreign language interpreter and the court determines such services are necessary for the person to meaningfully participate in the case or court proceeding, or on the court's own determination that foreign language interpreter services are necessary for a person to meaningfully participate in the case or court proceeding, the court shall appoint a foreign language interpreter for that person if the person is a party, a participant, or a witness while testifying in a civil or criminal case or court proceeding.

(2) The court may appoint a foreign language interpreter for a person other than a party who has a substantial interest in the case or court proceeding.

(3) In order to determine whether the services of a foreign language interpreter are necessary to provide a person with a meaningful opportunity to participate under subrule (B)(1), the court shall conduct an examination of the person on the record. During the examination, the court may use a foreign language interpreter. For purposes of this

examination, the court is not required to comply with the requirements of subrule (F) and the foreign language interpreter may participate remotely.

Alternative B

(B) Appointment of a Foreign Language Interpreter

(1) The court shall assign an interpreter for a Limited English Proficient person during or ancillary to a court proceeding or court operations for all parties in interest. For purposes of this rule, the following definitions apply:

(a) A court proceeding is any hearing, trial or other appearance before any Michigan state court in an action, appeal, or other proceeding, including any matter conducted by a judicial officer.

(b) Court operations include offices of the courts, services, and programs managed or conducted by the court and probation which involve contact with the public or parties in interest.

(c) Parties in interest include a party to a case; a victim; a witness; the parent, legal guardian, or custodian of a minor party; and the legal guardian or custodian of an adult party.

Alternative C

(B) Appointment of a Foreign Language Interpreter

(1) If the case or court proceeding is one in which the court would be required to appoint an attorney for a person if he or she were indigent, the court shall appoint a foreign language interpreter if that person requests interpreting services and the court determines that such services are necessary for the person to meaningfully participate in the case or court proceeding, or on the court's own determination that court appointed foreign language interpreter services are necessary for that person to meaningfully participate in the case or court proceeding.

(2) The court may appoint a foreign language interpreter in other instances at the court's discretion.

(3) In order to determine whether the services of a foreign language interpreter are necessary to provide a person with a meaningful opportunity to participate under subrule (B)(1), the court shall conduct an examination of the person on the record. During the examination, the court may use a foreign language interpreter. For purposes of this examination, the court is not required to comply with the requirements of subrule (F) and the foreign language interpreter may participate remotely.

(C) Waiver of Appointment of Foreign Language Interpreter

A person may waive the right to a foreign language interpreter established under subrule (B)(1) unless the court determines that the interpreter is required for the protection of the person's rights and the integrity of the case or court proceeding. The court must find on the record that a person's waiver of an interpreter is knowing and voluntary.

When accepting the person's waiver, the court may use a foreign language interpreter. For purposes of this waiver, the court is not required to comply with the requirements of subrule (F) and the foreign language interpreter may participate remotely.

(D) Recordings

The court may make a recording of anything said by a foreign language interpreter or a limited English proficient person while testifying or responding to a colloquy during those portions of the proceedings.

(E) Avoidance of Potential Conflicts of Interest

(1) The court should use all reasonable efforts to avoid potential conflicts of interest when appointing a person as a foreign language interpreter and shall state its reasons on the record for appointing the person if any of the following applies:

(a) The interpreter is compensated by a business owned or controlled by a party or a witness;

(b) The interpreter is a friend, a family member, or a household member of a party or witness;

(c) The interpreter is a potential witness;

(d) The interpreter is a law enforcement officer;

(e) The interpreter has a pecuniary or other interest in the outcome of the case;

(f) The appointment of the interpreter would not serve to protect a party's rights or ensure the integrity of the proceedings;

(g) The interpreter does have, or may have, a perceived conflict of interest;

(h) The appointment of the interpreter creates an appearance of impropriety.

(2) A court employee may interpret legal proceedings as follows:

(a) The court may employ a person as an interpreter. The employee must meet the minimum requirements for interpreters established by subrule (A)(2). The state court administrator may authorize the court to hire a person who does not meet the minimum requirements established by subrule (A)(2) for good cause including the unavailability of a certification test for the foreign language and the absence of certified interpreters for the foreign language in the geographic area in which the court sits. The court seeking authorization from the state court administrator shall provide proof of the employee's competency to act as an interpreter and shall submit a plan for the employee to meet the minimum requirements established by subrule (A)(2) within a reasonable time.

(b) The court may use an employee as an interpreter if the employee meets the minimum requirements for interpreters established by this rule and is not otherwise disqualified.

(F) Appointment of Foreign Language Interpreters

(1) When the court appoints a foreign language interpreter under subrule (B)(1), the court shall appoint a certified foreign language interpreter whenever practicable. If a certified foreign language interpreter is not reasonably available, and after considering the gravity of the

proceedings and whether the matter should be rescheduled, the court may appoint a qualified foreign language interpreter who meets the qualifications in (A)(5). The court shall make a record of its reasons for using a qualified foreign language interpreter.

(2) If neither a certified foreign language interpreter nor a qualified foreign language interpreter is reasonably available, and after considering the gravity of the proceeding and whether the matter should be rescheduled, the court may appoint a person whom the court determines through voir dire to be capable of conveying the intent and content of the speaker's words sufficiently to allow the court to conduct the proceeding without prejudice to the limited English proficient person.

(3) The court shall appoint a single interpreter for a case or court proceeding. The court may appoint more than one interpreter after consideration of the nature and duration of the proceeding; the number of parties in interest and witnesses requiring an interpreter; the primary languages of those persons; and the quality of the remote technology that may be utilized when deemed necessary by the court to ensure effective communication in any case or court proceeding.

Alternative A

(4) The court may set reasonable compensation for interpreters. Interpreter costs are to be paid out of funds provided by law, by the court, or by one or more of the parties, as the court directs.

(a) In criminal proceedings, the court may order the defendant to pay the interpreter costs as allowed by law.

(b) In civil proceedings, the court may order a party to reimburse the interpreter costs.

(c) If a party shows by ex parte affidavit or otherwise that he or she is receiving any form of public assistance or is unable because of indigence to pay the interpreter costs, the court shall order those costs waived or suspended until the conclusion of the litigation.

Alternative B

(4) The court shall pay for all language interpretation services provided for a party in interest. The court may, at its discretion, provide and pay for language interpretation for Limited English Proficient persons other than parties in interest directly impacted by a court proceeding.

Alternative C

(4) The court may set reasonable compensation for interpreters. Interpreter costs are to be paid out of funds provided by law, by the court, by one or more of the parties, or by the person requesting the interpreter, as the court directs. Interpreter costs may be taxed as costs, in the

discretion of the court. In all proceedings, the court may order a person (including a party) to reimburse the court the cost of providing interpreting services, subject to the following:

(a) If an interpreter is appointed pursuant to MCR 1.111(B)(1), and the person requiring the interpreter demonstrates by ex parte affidavit or otherwise that he or she is receiving any form of public assistance or is unable because of indigency to pay the interpreter costs, the court shall not impose interpreter costs on that person until the conclusion of the litigation.

(b) If an interpreter is appointed pursuant to MCR 1.111(B)(1), the person requesting the interpreter may not be required to pay for interpreter costs prior to a court proceeding as a condition of having an interpreter present at the proceeding.

(c) In all other cases, the court may require a person (including a party) to arrange for the payment of interpreter costs prior to the provision of interpreter services in a court proceeding.

(G) Administration of Oath or Affirmation to Interpreters

The court shall administer an oath or affirmation to a foreign language interpreter substantially conforming to the following: "Do you solemnly swear or affirm that you will truly, accurately, and impartially interpret in the matter now before the court and not divulge confidential communications, so help you God?"

RULE 8.127. FOREIGN LANGUAGE BOARD OF REVIEW AND REGULATION OF FOREIGN LANGUAGE INTERPRETERS.

(A) Foreign Language Board of Review

(1) The Supreme Court shall appoint a Foreign Language Board of Review, which shall include:

(a) a circuit judge;

(b) a probate judge;

(c) a district judge;

(d) a court administrator;

(e) a fully-certified foreign language interpreter who practices regularly in Michigan courts;

(f) an advocate representing the interests of the limited English proficiency populations in Michigan;

(g) a prosecuting attorney in good standing and with experience using interpreters in the courtroom;

(h) a criminal defense attorney in good standing and with experience using interpreters in the courtroom;

(i) a family law attorney in good standing and with experience using interpreters in the courtroom.

(2) Appointments to the board shall be for terms of three years. A board member may be appointed to no more than two full terms. Initial appointments may be of different lengths so that no more than three terms expire in the same year. The Supreme Court may remove a member at any time.

(3) If a position on the board becomes vacant because of death, resignation, or removal, or because a member is no longer employed in the capacity in which he or she was appointed, the board shall notify the state court administrator who will recommend a successor to the Supreme Court to serve the remainder of the term.

(4) The state court administrator shall assign a staff person to serve as executive secretary to the board.

(B) Responsibilities of Foreign Language Board of Review

The Foreign Language Board of Review has the following responsibilities:

(1) The board shall recommend to the state court administrator a Michigan Code of Professional Responsibility for Court Interpreters, which the state court administrator may adopt in full, in part, or in a modified form. The Code shall govern the conduct of Michigan court interpreters.

(2) The board must review a complaint that the State Court Administrative Office schedules before it pursuant to subrule (D). The board must review the complaint and any response and hear from the interpreter and any witnesses at a meeting of the board. The board shall determine what, if any, action it will take, which may include revoking certification, prohibiting the interpreter from obtaining certification, suspending the interpreter from participating in court proceedings, placing the interpreter on probation, imposing any fines authorized by law, and placing any remedial conditions on the interpreter.

(3) Interpreter Certification Requirements

The board shall recommend requirements for interpreters to the state court administrator that the state court administrator may adopt in full, in part, or in a modified form concerning the following:

(a) requirements for certifying interpreters as defined in MCR 1.111(A)(2). At a minimum, those requirements must include that the applicant is at least 18 years of age and not under sentence for a felony for at least two years and that the interpreter attends an orientation program for new interpreters.

(b) requirements for interpreters to be qualified as defined in MCR 1.111(A)(5).

(c) requirements under which an interpreter certified in another state or in the federal courts may apply for certification based on the certification already obtained. The certification must be a permanent or regular certification and not a temporary or restricted certification.

(d) requirements for interpreters as defined in MCR 1.111(A)(2) to maintain their certification.

(e) requirements for entities that provide interpretation services by telecommunications equipment to be qualified as defined in MCR 1.111(A)(5).

(C) Interpreter Registration

(1) Interpreters who meet the requirements of MCR 1.111(A)(2) and MCR 1.111(A)(5)(a) and (b), must register with the State Court Administrative Office and renew their registration before October 1 of each year in order to maintain their status. The fee for registration is $60. The fee

for renewal is $30. The renewal application shall include a statement showing that the applicant has used interpreting skills during the 12 months preceding registration. Renewal applications must be filed or postmarked on or before September 30. Any application filed or postmarked after that date must be accompanied by a late fee of $100. Any late registration made after December 31 or any application that does not demonstrate efforts to maintain proficiency shall require board approval.

(2) Entities that employ a certified foreign language interpreter as defined in MCR 1.111(A)(2), or a qualified foreign language interpreter as defined in MCR 1.111(A)(5) must also register with the State Court Administrative Office and pay the registration fee and renewal fees.

(D) Interpreter Misconduct

(1) An interpreter, trial court judge, or attorney who becomes aware of misconduct on the part of an interpreter committed in the course of a trial or other court proceeding that violates the Michigan Code of Professional Responsibility for Court Interpreters must report details of the misconduct to the State Court Administrative Office.

(2) Any person may file a complaint in writing on a form provided by the State Court Administrative Office. The complaint shall describe in detail the incident and the alleged misconduct or omission. The State Court Administrative Office may dismiss the complaint if it is plainly frivolous, insufficiently clear, or alleges conduct that does not violate this rule. If the complaint is not dismissed, the State Court Administrative Office shall send the complaint to the interpreter by regular mail or electronically at the address on file with the office.

(3) The interpreter shall answer the complaint within 28 days after the date the complaint is sent. The answer shall admit, deny, or further explain each allegation in the complaint. If the interpreter fails to answer, the allegations in the complaint are considered true and correct.

(4) The State Court Administrative Office may review records and interview the complainant, the interpreter, and witnesses, or set the matter for a hearing before the Foreign Language Board of Review. Before setting the matter for a hearing, the State Court Administrative Office may propose a resolution to which the interpreter may stipulate.

(5) If the complaint is not resolved by stipulation, the State Court Administrative Office shall notify the Foreign Language Board of Review, which shall hold a hearing. The State Court Administrative Office shall send notice of the date, time, and place of the hearing to the interpreter by regular mail or electronically. The hearing shall be closed to the public. A record of the proceedings shall be maintained but shall not be public.

(6) The interpreter may attend all of the hearings except the board's deliberations. The interpreter may be represented by counsel and shall be permitted to make a statement, obtain testimony from the complainant and witnesses, and comment on the claims and evidence.

(7) The State Court Administrative Office shall maintain a record of all interpreters who are sanctioned for misconduct. If the interpreter is certified in Michigan under MCR 1.111(A)(2) because of certification pursuant to another state or federal test, the state court administrator shall report the findings and any sanctions to the certification authority in the other jurisdiction.

(8) This subrule shall not be construed to:

(a) restrict an aggrieved person from seeking to enforce this rule in the proceeding, including an appeal; or

(b) require exhaustion of administrative remedies.

(9) The State Court Administrative Office shall make complaint forms readily available and shall also provide complaint forms in such languages as determined by the State Court Administrative Office.

(10) Entities that employ interpreters are subject to the same requirements and procedures established by this subrule.

Staff Comment: This proposal includes two separate proposed rules that relate to foreign language interpreters. The first proposed rule, MCR 1.111, would establish the procedure for appointment of interpreters, and establish the standards under which such appointment would occur. The proposed rule includes alternative language for subrules (B) and (F)(4).

The second proposed rule, MCR 8.127, would create a board to oversee certification of interpreters and other interpreter-related functions, and provide a procedure for imposing discipline upon interpreters who commit misconduct. The board's structure and responsibilities are similar to those of the Court Reporting and Recording Board of Review described in MCR 8.108.

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

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be sent to the Supreme Court Clerk in writing or electronically by September 1, 2012, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2012-03. Your comments and the comments of others will be posted at www.courts.mi.gov/supremecourt/resources/administrative/index.htm.

PROPOSED AMENDMENT OF MCR 2.116.

On order of the Court, this is to advise that the Court is considering an amendment of Rule 2.116 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at http://courts.michigan.gov/supremecourt/Resources/Administrative/PH.htm.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

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

RULE 2.116. SUMMARY DISPOSITION.

(A)-(B) [Unchanged.]

(C) Grounds. The motion may be based on one or more of these grounds, and must specify the grounds on which it is based:

(1)-(6) [Unchanged.]

(7) The claim is barred because of release, payment, prior judgment, immunity granted by law, statute of limitations, statute of frauds, an agreement to arbitrate, selection of a forum other than Michigan in which to file an action on a controversy, infancy or other disability of the moving party, or assignment or other disposition of the claim before commencement of the action.

(8)-(10) [Unchanged.]

(D)-(J) [Unchanged.]

Staff Comment: Inclusion of the revised proposed clarifying language in MCR 2.116(C)(7) would clarify the procedure for bringing a motion for summary disposition on the grounds of a forum selection clause.

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

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be sent to the Supreme Court Clerk in writing or electronically by September 1, 2012, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2011-08. Your comments and the comments of others will be posted at http://courts.michigan.gov/supremecourt/Resources/Administrative/index.htm#proposed.

PROPOSED AMENDMENT OF MCR 6.419.

On order of the Court, this is to advise that the Court is considering alternative amendments of Rule 6.419 of the Michigan Court Rules. Before determining whether either alternative proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at http://courts.michigan.gov/supremecourt/Resources/Administrative/PH.htm.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

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

Alternative A

RULE 6.419. MOTION FOR DIRECTED VERDICT OF ACQUITTAL.

~~(A) Before Submission to Jury. After the prosecutor has rested the prosecution's case-in-chief and before the defendant presents proofs, the~~

~~court on its own initiative may, or on the defendant's motion must, direct a verdict of acquittal on any charged offense as to which the evidence is insufficient to support conviction. The court may not reserve decision on the defendant's motion. If the defendant's motion is made after the defendant presents proofs, the court may reserve decision on the motion, submit the case to the jury, and decide the motion before or after the jury has completed its deliberations.~~

(A) Before Submission to the Jury. After the prosecutor has rested the prosecution's case-in-chief or after the close of all the evidence, the court on the defendant's motion must direct a verdict of acquittal on any charged offense for which the evidence is insufficient to sustain a conviction. The court may on its own consider whether the evidence is insufficient to sustain a conviction. If the court denies a motion for a judgment of acquittal at the close of the government's evidence, the defendant may offer evidence without having reserved the right to do so.

(B) Reserving Decision. The court may reserve decision on the motion, proceed with the trial (where the motion is made before the close of all the evidence), submit the case to the jury, and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict. If the court reserves decision, it must decide the motion on the basis of the evidence at the time the ruling was reserved.

(B)-(E) [Unchanged in substance, but relettered (C)-(F).]

Alternative B

RULE 6.419. MOTION FOR DIRECTED VERDICT OF ACQUITTAL.

(A) Before Submission to Jury. After the prosecutor has rested the prosecution's case-in-chief and before the defendant presents proofs, the court on its own initiative may, or on the defendant's motion must, direct a verdict of acquittal on any charged offense as to which the evidence is insufficient to support conviction. The court may not reserve decision on the defendant's motion. If the defendant's motion is made after the defendant presents proofs, the court may reserve decision on the motion, submit the case to the jury, and decide the motion before or after the jury has completed its deliberations.

(B) Reconsideration of Ruling Made Before Submission to Jury. The trial court may reconsider its decision granting a directed verdict, and an appellate court may entertain an interlocutory appeal from a decision granting a directed verdict, until such time as the case is submitted to the jury. If reconsideration is sought and denied, the court shall, on request, grant a stay of at least 24 hours to permit the prosecuting attorney to seek appellate review.

(B)-(E) [Unchanged in substance, but relettered (C)-(F).]

Staff Comment: Alternative A would revise MCR 6.419 to be similar to the federal corollary of this rule (FR Crim P 29[b]). Under this language, the trial court would be entitled to reserve judgment on a motion for directed verdict. Alternative B would allow a trial court to reconsider its

decision to grant a directed verdict. This language was proposed based on the United States Supreme Court decision of *Smith v Massachusetts*, 543 US 462 (2005).

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

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be sent to the Supreme Court Clerk in writing or electronically by September 1, 2012, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2010-34. Your comments and the comments of others will be posted at http://courts.michigan.gov/supremecourt/Resources/Administrative/index.htm#proposed.

PROPOSED AMENDMENT OF MCR 7.118.

On order of the Court, this is to advise that the Court is considering an amendment of Rule 7.118 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at http://courts.michigan.gov/supremecourt/Resources/Administrative/PH.htm.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

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

RULE 7.118. APPEALS FROM THE MICHIGAN PAROLE BOARD.

(A)-(C) [Unchanged.]

(D) Application for Leave to Appeal.

(1) *Parties*.

(a) Only the prosecutor or a victim may file an application for leave to appeal.

(b) The prisoner shall be the appellee.

(c) The parole board may move to intervene as an appellee.

(2) *Time Requirements*. An application for leave to appeal must be filed within 28 days after the parole board mails a notice of action granting parole and a copy of any written opinion to the prosecutor and the victim, if the victim requested notification under MCL 780.771.

(3) *Manner of Filing; Appointment of Counsel*. An application for leave must comply with MCR 7.105, must include statements of jurisdiction and venue, and must be served on the parole board and the prisoner. If the victim seeks leave, the prosecutor must be served. If the prosecutor seeks leave, the victim must be served if the victim requested notification under MCL 780.771.

(a) Service on the parole board, the victim, or the prosecutor must be accomplished by certified mail, return receipt requested, in compliance with MCR 2.105(A)(2).

(b) Service on a prisoner incarcerated in a state correctional facility must be accomplished by serving the application for leave on the warden or administrator, along with the form approved by the State Court Administrative Office for personal service on a prisoner. Otherwise, service must be accomplished by certified mail, return receipt requested, as described in MCR 2.103(C) and MCR 2.104(A)(2) or in compliance with MCR 2.105(A)(2). In addition to the pleadings, service on the prisoner must also include a notice in a form approved by the State Court Administrative Office advising the prisoner that:

(i) the prisoner may be entitled to appointed counsel if the court finds that the appellee is financially unable to retain an attorney; and

~~(i)~~(ii) the prisoner may respond to the application for leave to appeal through retained or appointed counsel or in propria persona, although no response is required, and

~~(ii)~~(iii) if an order of parole is issued under MCL 791.236 before the completion of appellate proceedings, a stay may be granted in the manner provided by MCR 7.108, except that no bond is required.

(c) Proof of service must be promptly filed with the clerk of the circuit court and must include a copy of the return receipt and, in the case of the prisoner, a copy of the certificate of service executed by the appropriate prison official.

(d) A request by the appellee for the appointment of counsel must be made in the circuit court within 14 days after the appellee receives notice of the appellant's application for leave to appeal. If a request for an attorney is timely filed and the court finds that the appellee is financially unable to retain an attorney,

(i) the court shall appoint an attorney within 14 days after the appellee's request is filed; and

(ii) the 28-day period in which the court is required to make its determination under (G)(1) begins to run from the date of entry of an order appointing or denying the appointment of an attorney.

A request for counsel under this rule must be accompanied by an affidavit of financial condition.

(4) *Venue.* An application for leave to appeal a decision of the parole board may only be filed in the circuit court of the sentencing county under MCL 791.234(9).

(E) Late Application. A late application for leave to appeal may be filed under MCR 7.105(F).

(F) Stay of Order of Parole.

(1) An order of parole issued under MCL 791.236 shall not be executed until 28 days after the mailing of the notice of action.

(2) If an order is issued under MCL 791.235 before completion of appellate proceedings, a stay may be granted in the manner provided by MCR 7.108, except that no bond is required.

(G) Decision to Grant Leave to Appeal.

(1) The circuit court shall make its determination within 28 days after the application for leave to appeal is filed.

(2) If the court does not make its determination within 28 days or as otherwise provided in this rule, the court shall enter an order to produce the prisoner before the court for a show-cause hearing to determine whether the prisoner shall be released on parole pending disposition of the appeal.

(H) Procedure After Leave to Appeal Granted. If leave to appeal is granted, MCR 7.105(D)(4) applies along with the following:

(1) *Appointed Counsel Continues.* If a court appoints counsel for an appellee under (D)(3)(d), that representation continues if leave to appeal is granted by the circuit court, or if subsequent appellate procedures are pursued in the Court of Appeals.

(~~1~~2) *Record on Appeal.*

(a) The record on appeal shall consist of the prisoner's central office file at the Department of Corrections and any other documents considered by the parole board in reaching its decision.

(b) Within 14 days after being served with an order granting leave to appeal, the parole board shall send copies of the record to the circuit court and the other parties. In all other respects, the record on appeal shall be processed in compliance with MCR 7.109.

(c) The expense of preparing and serving the record on appeal may be taxed as costs to a nonprevailing appellant, except that expenses may not be taxed to an indigent party.

(~~2~~3) *Briefs.* Briefs must comply with MCR 7.111, except:

(a) the appellant's brief is due 28 days after the record is served on the parties, and

(b) the appellee's brief, if filed, is due 21 days after the appellant's brief is served on the appellee.

(~~3~~4) *Burden of Proof.* The appellant has the burden of establishing that the decision of the parole board was

(a) in violation of the Michigan Constitution, a statute, an administrative rule, or a written agency regulation that is exempted from promulgation pursuant to MCL 24.207, or

(b) a clear abuse of discretion.

(~~4~~5) *Remand to the Parole Board.* On motion by a party or on the court's own motion, the court may remand the matter to the parole board for an explanation of its decision.

(a) The parole board shall hear and decide the matter within 28 days of the date of the order, unless the board determines that an adjournment is necessary to obtain evidence or there is other good cause for an adjournment.

(b) The time for filing briefs on appeal under subrule (G)(2) is tolled while the matter is pending on remand.

(I) Subsequent Appeal to the Court of Appeals. An appeal of a circuit court decision is by emergency application for leave to appeal to the Court of Appeals under MCR 7.205(E), and the Court of Appeals shall expedite the matter.

(J) Parole Board Responsibility After Reversal or Remand.

(1) If a decision of the parole board is reversed or remanded, the board shall review the matter and take action consistent with the circuit court's decision within 28 days.

(2) If the circuit court order requires the board to undertake further review of the file or to reevaluate its prior decision, the board shall provide the parties with an opportunity to be heard.

(3) An appeal to the Court of Appeals does not affect the board's jurisdiction to act under this subsection.

Staff Comment: The concept for this proposal was submitted by the State Bar of Michigan Prisons & Corrections Section. The section asserts that if a prosecutor or victim files an appeal of a decision of the Michigan Parole Board to grant parole, the appellee (the prisoner) should be entitled to be represented by counsel if the prisoner is indigent. The proposed amendments would require a prisoner to request representation within 14 days of notice of the appeal, and establish other procedural steps.

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

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be sent to the Supreme Court Clerk in writing or electronically by September 1, 2012, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No.

PROPOSED AMENDMENT OF MCR 9.113.

On order of the Court, this is to advise that the Court is considering an amendment of Rule 9.113 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at http://courts.michigan.gov/supremecourt/Resources/Administrative/PH.htm.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

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

RULE 9.113. ANSWER BY RESPONDENT.

(A) Answer. Within 21 days after being served with a request for investigation under MCR 9.112(C)(1)(b) or such further time as permitted by the administrator, the respondent shall file with the administrator a written answer signed by respondent in duplicate fully and fairly disclosing all the facts and circumstances pertaining to the alleged misconduct. Misrepresentation in the answer is grounds for discipline. Respondent's signature constitutes verification that he or she has read the document. The administrator shall provide a copy of the answer and

any supporting documents, or documents related to a refusal to answer under MCR 9.113(B)(1), to the person who filed the request for investigation ~~unless~~. If the administrator determines that there is cause for not disclosing some or all of the documents supporting the answer, then the supporting documents need not be provided to the person who filed the request for investigation.

(B)-(D) [Unchanged.]

Staff Comment: This proposed amendment would clarify that the grievance administrator is required to disclose an answer in a Request for Investigation to the complainant, but may decline to disclose supporting documents if there is good cause not to do so.

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

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be sent to the Supreme Court Clerk in writing or electronically by September 1, 2012, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2011-03. Your comments and the comments of others will be posted at http://courts/michigan.gov/suprememcourt/Resources/Administrative/index.htm#proposed.

Order Entered June 7, 2012:

PROPOSED AMENDMENT OF ADMINISTRATIVE ORDER NO. 1989-1 (FILM OR ELECTRONIC MEDIA COVERAGE OF COURT PROCEEDINGS). On order of the Court, this is to advise that the Court is considering an amendment of Administrative Order No. 1989-1. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at http://courts.michigan.gov/supreemecourt/Resources/Administrative/PH.htm.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

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

ADMINISTRATIVE ORDER NO. 1989-1.

FILM OR ELECTRONIC MEDIA COVERAGE OF COURT PROCEEDINGS.

The following guidelines shall apply to film or electronic media coverage of proceedings in Michigan courts:

1. Definitions.

(a) "Film or electronic media coverage" means any recording or broadcasting of court proceedings by the media using television, radio, photographic, or recording equipment.

(b) "Media" or "media agency" means any person or organization engaging in news gathering or reporting and includes any newspaper, radio or television station or network, news service, magazine, trade paper, professional journal, or other news reporting or news gathering agency.

(c) "Judge" means the judge presiding over a proceeding in the trial court, the presiding judge of a panel in the Court of Appeals, or the Chief Justice of the Supreme Court.

2. Limitations.

(a) In the trial courts.

~~(a)~~(i) Film or electronic media coverage shall be allowed upon request in all court proceedings. Requests by representatives of media agencies for such coverage must be made in writing to the clerk of the particular court not less than three business days before the proceeding is scheduled to begin. A judge has the discretion to honor a request that does not comply with the requirements of this subsection. The court shall provide that the parties be notified of a request for film or electronic media coverage.

~~(b)~~(ii) A judge may terminate, suspend, limit, or exclude film or electronic media coverage at any time upon a finding, made and articulated on the record in the exercise of discretion, that the fair administration of justice requires such action, or that rules established under this order or additional rules imposed by the judge have been violated. The judge has sole discretion to exclude coverage of certain witnesses, including but not limited to the victims of sex crimes and their families, police informants, undercover agents, and relocated witnesses.

~~(c)~~(iii) Film or electronic media coverage of the jurors or the jury selection process shall not be permitted.

~~(d)~~(iv) A trial judge's decision to terminate, suspend, limit, or exclude film or electronic media coverage is not appealable, by right or by leave.

(b) In the Court of Appeals and the Supreme Court.

(i) Film or electronic media coverage shall be allowed upon request in all court proceedings except for good cause as determined under MCR 8.116(D). Requests by representatives of media agencies for such coverage must be made in writing to the clerk of the particular court not less than three business days before the proceeding is scheduled to begin. A judge has the discretion to honor a request that does not comply with the requirements of this subsection. The court shall provide that the parties be notified of a request for film or electronic media coverage. An order denying permission to film or otherwise provide electronic media coverage must state with particularity the reasons for the denial.

(ii) A judge may terminate, suspend, limit, or exclude film or electronic media coverage at any time upon a finding, made and articulated

on the record, that good cause requires such action or that rules established under this order or additional rules imposed by the judge have been violated.

(iii) If a judge terminates, suspends, limits, or excludes film or electronic media coverage, the person who requested permission to film or otherwise provide for electronic media coverage may appeal that decision to the Chief Judge of the Court of Appeals. If the Chief Judge affirms the judge's decision, the requester may appeal by leave to the Supreme Court.

3.-9. [Unchanged.]

Staff Comment: The proposed amendment of Administrative Order No. 1989-1 adds new language that clarifies and expands the standards for allowing film or electronic media coverage of court proceedings in the Court of Appeals and the Supreme Court.

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

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be sent to the Supreme Court Clerk in writing or electronically by October 1, 2012, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2011-09. Your comments and the comments of others will be posted at http://courts.michigan.gov/supremecourt/Resources/Administrative/index.htm#proposed.

Order Entered June 20, 2012:

PROPOSED AMENDMENT OF MCR 2.105.

On order of the Court, this is to advise that the Court is considering an amendment of Rule 2.105 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or re- jected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at http://courts.michigan.gov/supremecourt/Resources/Administrative/PH.htm.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

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

RULE 2.105. PROCESS; MANNER OF SERVICE.

(A)-(H) [Unchanged.]

(I) Discretion of the Court

(1) [Unchanged.]

(2) A request for an order under the rule must be made in a verified motion dated not more than 14 days before it is filed. The motion must set forth sufficient facts to show that process cannot be served under this rule and must state the defendant's address or last known address, or that no address of the defendant is known. If the name or present address of the defendant is unknown, the moving party must set forth facts showing diligent inquiry to ascertain it. For purposes of this rule, "diligent inquiry" shall include an online search if the moving party has reasonable access to the Internet. A hearing on the motion is not required unless the court so directs.

(3) [Unchanged.]

(J)-(K) [Unchanged.]

Staff Comment: The proposed amendment of MCR 2.105 would state that a "diligent inquiry" in support of a request for substituted service must include an online search if the moving party has reasonable access to the Internet.

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

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be sent to the Supreme Court Clerk in writing or electronically by October 1, 2012, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2011-14. Your comments and the comments of others will be posted at http://courts.michigan.gov/supremecourt/Resources/Administrative/index.htm#proposed.

Orders Entered July 5, 2012:

PROPOSED ADMINISTRATIVE ORDER NO. 2012-XX TO IMPLEMENT TRIAL COURT PERFORMANCE MEASURES.

On order of the Court, this is to advise that the Court is considering adoption of an administrative order regarding implementation of trial court performance measures. Before the Court determines whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter will be considered at a public hearing by the Court before a final decision is made. Notices and agendas of future public hearings are posted at www.courts.michigan.gov/supremecourt/resources/administrative/ph.htm.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

Proposed Administrative Order No. 2012-XX

Performance measurement is a critical means to assess the services provided to the public and the processes used to deliver those services. Performance measurement can assist in assessing and recognizing areas within courts that are working well, and those that require attention and improvement.

Trial court performance measures are not a new concept. The National Center for State Courts first issued the 10 CourTools in 2005; in the 1990s, SCAO formed a task force, including judges and court administrators, to study how to measure a court's performance. In 2009, the state court administrator convened the Trial Court Performance Measures Committee, which piloted performance measures and offered recommendations. The committee stressed that all trial courts should embrace performance measures as an opportunity to provide high-quality public service in the most efficient way. Further, because transparency and accountability are integral elements of an efficient and effective judiciary, SCAO's standardized statewide performance measure reports should be readily available to the public.

In an effort to ensure continued improvement in the judiciary, the Court adopts this order.

A. The State Court Administrative Office is directed to:

1. Develop a plan for implementation of performance measures in all trial courts.

2. Assist trial courts in implementing and posting performance measures.

3. In conjunction with the Trial Court Performance Measures Committee, assess and report on the effectiveness of the performance measures and modify the measures as needed.

B. Trial courts are directed to:

1. Comply with the trial court performance measures plan developed by the State Court Administrative Office.

2. Report performance measure information to the State Court Administrative Office.

C. SCAO's standardized statewide performance measure reports shall be made available to the public on the Internet.

Staff Comment: This administrative order would implement the use of performance measures in trial courts.

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

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be sent to the Supreme Court Clerk in writing or electronically by November 1, 2012, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2012-15. Your comments and the comments of others will be posted at http://courts.michigan.gov/supremecourt/Resources/Administrative/index.htm#proposed.

PROPOSED ADMINISTRATIVE ORDER NO. 2012-XX TO ALLOW STATE COURT ADMINISTRATIVE OFFICE TO AUTHORIZE A JUDICIAL OFFICER'S APPEARANCE BY VIDEO COMMUNICATION EQUIPMENT.

On order of the Court, this is to advise that the Court is considering adoption of an administrative order to allow approval of judicial officer appearance by video communication equipment. Before the Court deter

mines whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter will be considered at a public hearing by the Court before a final decision is made. Notices and agendas of future public hearings are posted at www.courts.michigan.gov/supremecourt/resources/administrative/ph.htm.

Publication of this proposal does not mean the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its current form.

Proposed Administrative Order No. 2012-XX

The State Court Administrative Office is authorized, until further order of this Court, to approve the use of two-way interactive video technology in the trial courts to allow judicial officers to preside remotely in any proceeding that may be conducted by two-way interactive technology or communication equipment without the consent of the parties under the Michigan Court Rules and statutes. Remote participation by judicial officers shall be limited to the following specific situations:

1) judicial assignments;

2) circuits and districts that are comprised of more than one county and would require a judicial officer to travel to a different courthouse within the circuit or district;

3) district court districts that have multiple court locations in which a judicial officer would have to travel to a different courthouse within the district;

4) a multiple district plan in which a district court magistrate would have to travel to a different district.

The judicial officer who presides remotely must be physically present in a courthouse located within his or her judicial circuit, district, or multiple district area.

For circuits or districts that are comprised of more than one county, each court that seeks permission to allow its judicial officers to preside by video communication equipment must submit a proposed local administrative order for approval by the State Court Administrator pursuant to MCR 8.112(B). The local administrative order must describe how the program will be implemented and the administrative procedures for each type of hearing for which two-way interactive video technology will be used. The State Court Administrative Office shall either approve the proposed local administrative order or return it to the chief judge for amendment in accordance with requirements and guidelines provided by the State Court Administrative Office.

For judicial assignments, the assignment order will allow remote participation by judges as long as the assigned judge is physically present in a courthouse located within the judge's judicial circuit or district. A local administrative order is not required for assignments.

For multiple district plans, the plan will allow remote participation by district court magistrates as long as the magistrate is physically present in a courthouse located within the multiple district area. No separate local administrative order is required.

The State Court Administrative Office shall assist courts in implementing the technology, and shall report periodically to this Court regarding its assessment of the program. Those courts using the technology shall provide statistics and otherwise cooperate with the State Court Administrative Office in monitoring the use of video communication equipment.

Staff Comment: This administrative order would allow the State Court Administrative Office to authorize a judge to preside using videoconferencing equipment in certain types of proceedings.

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

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be sent to the Supreme Court Clerk in writing or electronically by November 1, 2012, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2012-16. Your comments and the comments of others will be posted at http://courts.michigan.gov/supremecourt/Resources/Administrative/index.htm#proposed.

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INSURANCE 2

CHILD CUSTODY

INDIAN CHILD WELFARE ACT

1. At the preliminary hearing in involuntary child custody proceedings, the court must inquire about Indian heritage; notice of the proceeding must be given to the tribe if the court knows or has reason to know that the child is an Indian child; a court has reason to know that a child may be an Indian child when sufficiently reliable information of virtually any criteria on which tribal membership might be based is before the court (25 USC 1912[a]). *In re Morris*, 491 Mich 81.
2. If sufficient indicia of Indian heritage are presented to the court in an involuntary child custody proceeding to give the court reason to believe that the child is or may be an Indian child, determination of the tribal status of the child, the parents of the child, or both, requires notice pursuant to the Indian Child Welfare Act (25 USC 1912[a]). *In re Morris*, 491 Mich 81.
3. A parent my not waive the rights granted by the Indian Child Welfare Act to an Indian child's tribe (25 USC 1901 *et seq*.). *In re Morris*, 491 Mich 81.

4. When notice to the tribe is required in child custody proceedings under the Indian Child Welfare Act, the trial court must identify the child's tribe and ensure that the tribe receives notice of the proceedings; if the child's tribe cannot be determined, notice must be sent to the Bureau of Indian Affairs (BIA); the court may discharge its duty by directing the petitioner to compose and send a notice containing as much information as is reasonably available to the child's tribe, or the BIA when applicable, with the information needed to make the determination of tribal membership or eligibility for tribal membership (25 USC 1912[a]; 25 CFR 23.11[b], [c][2]). *In re Morris*, 491 Mich 81.
5. When notice to the tribe is required in child custody proceedings under the Indian Child Welfare Act, notice must be made by personal service or sent by registered mail with return receipt requested, and the trial court has a duty to ensure the record includes, at a minimum, (1) the original or a copy of each actual notice personally served or sent via registered mail and (2) the original or a legible copy of the return receipt or other proof of service showing delivery of the notice (25 USC 1912[a]). *In re Morris*, 491 Mich 81.
6. When notice to the tribe is required in child custody proceedings under the Indian Child Welfare Act (ICWA), other than temporary placements pending the tribal or Bureau of Indian Affairs (BIA) notification, the trial court may not conduct any foster-care-placement or termination-of-parental-rights proceedings until (1) the expiration of the periods for response set forth in the act or (2) the properly noticed tribe or the BIA responds with information sufficient to allow the trial court to conclude that the child is not an Indian child within the meaning of ICWA; the possibility that the child is an Indian child, however, does not divest the trial court of jurisdiction to order temporary foster care pending tribal notice (25 USC 1912[a]). *In re Morris*, 491 Mich 81.
7. When an Indian tribe does not have exclusive jurisdiction over the child under the Indian Child Welfare Act (ICWA), if the child's tribe or the Bureau of Indian Affairs responds with information sufficient for the trial court to conclude that the child is an Indian child within the meaning of ICWA and the child's tribe declines the transfer of jurisdiction or the trial court determines that

there exists good cause to keep the matter in state court, the substantive and procedural protections afforded by ICWA still apply to the proceedings (25 USC 1911). *In re Morris*, 491 Mich 81.

8. When notice to the tribe is required in child custody proceedings under the Indian Child Welfare Act (ICWA), the proper remedy for tribal-notice errors is conditional reversal, requiring remand to correct the notice error with the ruling reversed unless ICWA does not apply; if the child is determined on remand to be an Indian child, then the foster-care or termination-of-parental-rights proceedings are invalidated and the proceedings begin anew under ICWA's standards; if no Indian child is involved or the tribe given proper notice does not respond within the times allotted by the act, any notice violation is harmless (25 USC 1912[a]). *In re Morris*, 491 Mich 81.

CIRCUIT COURT JURISDICTION—*See*

ENVIRONMENT 3

COMMON-LAW DEFENSES—*See*

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CONDITIONAL REVERSAL OF CUSTODY PROCEEDINGS INVOLVING INDIAN CHILDREN—*See*

CHILD CUSTODY 8

CONFRONTATION CLAUSE—*See*

CONSTITUTIONAL LAW 1, 3, 4

CONSENT—*See*

CONSTITUTIONAL LAW 1

CONSTITUTIONAL LAW

CONFRONTATION CLAUSE

1. A defendant has the constitutional right to be confronted with the witnesses against him or her; this right may be waived by the defendant personally, or it may be waived by defense counsel as long as counsel's decision constitutes reasonable trial strategy, which is presumed,

and the defendant does not object on the record (US Const, Am VI; Const 1963, art 1, § 20). *People v Buie*, 491 Mich 294.

DOUBLE JEOPARDY

2. *People v Evans*, 491 Mich 1.

EVIDENCE

3. Both the Michigan and United States Constitutions provide that in all criminal prosecutions, the accused shall have the right to be confronted with the witnesses against him or her; the admission of an out-of-court testimonial statement violates the defendant's right to confront the witnesses against him or her unless the declarant appears at trial or the defendant has had a previous opportunity to cross-examine the declarant (US Const, Am VI; Const 1963, art 1, § 20). *People v Nunley*, 491 Mich 686.

4. A certificate of mailing, which is the document certifying that the Secretary of State mailed a person notice that his or her driver's license was suspended or revoked, is not testimonial in nature and may be admitted into evidence absent accompanying witness testimony without violating the Confrontation Clause (US Const, Am VI; Const 1963, art 1, § 20; MCL 257.212, MCL 257.904[1]). *People v Nunley*, 491 Mich 686.

JURIES

5. The Sixth Amendment of the United States Constitution guarantees a defendant the right to be tried by an impartial jury drawn from a fair cross section of the community; to establish a prima facie case of a violation of the fair-cross-section requirement, a defendant must show (1) that the group alleged to have been excluded is a distinct group in the community, (2) that the representation of this group in venires from which juries were selected was not fair and reasonable in relation to the number of those persons in the community, and (3) that this underrepresentation was a result of systematic exclusion of the group in the jury-selection process; parts two and three of the test are distinct; thus, even if a defendant can show underrepresentation that was systematic, the defendant must still show that the extent of any underrepresentation was not fair and reasonable (US Const, Am VI). *People v Bryant*, 491 Mich 575.

6. When determining whether the representation of a distinct group in venires from which juries were selected was fair and reasonable in relation to the number of those persons in the community, courts must examine the composition of jury pools and venires over time using the most reliable data available, not just the composition of the individual defendant's venire; statistical estimates may be used if they provide the most reliable data available; the United States Supreme Court has not specified the preferred method for measuring whether representation of a distinct group in a venire was fair and reasonable, and no individual method should be used exclusive of others; provided that the parties have proffered sufficient evidence, courts should apply a case-by-case approach that considers the results of all the tests (US Const, Am VI). *People v Bryant*, 491 Mich 575.
7. The Sixth Amendment of the United States Constitution guarantees a defendant the right to be tried by an impartial jury drawn from a fair cross section of the community; African-Americans are a distinct group in the community for the purpose of determining whether there was a violation of the fair-cross-section requirement (US Const, Am VI). *People v Bryant*, 491 Mich 575.

RIGHT TO PUBLIC TRIAL

8. Under the Sixth Amendment of the United States Constitution, criminal defendants have the right to a public trial, including public voir dire; while a member of the public may invoke the right to a public trial under the First Amendment of the United States Constitution, when it is the accused alone who has invoked the right, the analysis proceeds solely under the Sixth Amendment (US Const Am I, US Const, Am VI). *People v Vaughn*, 491 Mich 642.
9. A violation of the right to a public trial is a structural error, but the right to a public trial does not fall within the narrow class of foundational constitutional rights that are preserved absent a personal waiver because a violation of a defendant's right to a public trial does not necessarily affect qualitatively the guilt-determining process or the defendant's ability to participate in that process; the right, however, cannot be waived by silence; rather, in the absence of a timely objection, the traditional rule of review regarding forfeited constitutional

error from *People v Carines*, 460 Mich 750 (1999), applies (US Const, Am VI; Const 1963, art 1, § 20). *People v Vaughn*, 491 Mich 642.

CONTROLLED SUBSTANCES

MARIJUANA

1. A defendant is entitled to the dismissal of criminal charges under MCL 333.26428 in any prosecution involving marijuana if he or she establishes at the evidentiary hearing on the motion to dismiss (1) that after the Michigan Medical Marihuana Act, MCL 333.26421 *et seq*., was enacted and before the defendant was arrested, a physician has stated that, in the physician's professional opinion after having completed a full assessment of the defendant's medical history and current medical condition made in the course of a bona fide physician-patient relationship, the defendant is likely to receive therapeutic or palliative benefit from the medical use of marijuana, (2) that the defendant did not possess an amount of marijuana that was more than reasonably necessary for this purpose, and (3) that the defendant's use was to treat or alleviate his or her serious or debilitating medical condition or symptoms, as long as none of the circumstances in MCL 333.26427(b) exists; a defendant need not meet the requirements of MCL 333.26424 to establish this affirmative defense; if the motion to dismiss is denied, a defendant may not raise the defense at trial but may move for interlocutory appeal of the denial. *People v Kolanek*, 491 Mich 382.
2. The Michigan Medical Marihuana Act, MCL 333.26421 *et seq*., does not operate retrospectively. *People v Kolanek*, 491 Mich 382.

CORRECTIONS TO PROPERTY ASSESSMENTS—*See*

TAXATION 1, 2

COURTS

ORDERS OF THE SUPREME COURT

1. An order of the Michigan Supreme Court is binding precedent if it constitutes a final disposition of an application for leave to appeal and contains a concise statement of the applicable facts and reasons for the decision; these requirements can be satisfied by refer-

ring in the order to another opinion (Const 1963, art 6, § 6). *DeFrain v State Farm Mut Auto Ins Co*, 491 Mich 359.

CRIMINAL DEFENSES—*See*

CONTROLLED SUBSTANCES 1

CRIMINAL LAW 7

HOMICIDE 2

CRIMINAL LAW

See, also, CONSTITUTIONAL LAW 1, 2, 3, 4, 5, 6, 7, 8, 9

CONTROLLED SUBSTANCES 1, 2

HOMICIDE 1, 2

ROBBERY 1

SENTENCES 1, 2

DRIVING WHILE LICENSE SUSPENDED OR REVOKED

1. The elements of driving with a suspended or revoked license are (1) that the defendant's license was suspended or revoked, (2) that the defendant was notified of the suspension or revocation as provided in MCL 257.212, and (3) that the defendant operated a motor vehicle on a public highway while his or her license was suspended or revoked (MCL 257.904[1]). *People v Nunley*, 491 Mich 686.

EVIDENCE

2. MCL 768.27a, which allows the admission of evidence that a defendant charged with a sexual offense against a minor committed another sexual offense against a minor, is a substantive rule of evidence that irreconcilably conflicts with and prevails over MRE 404(b), which requires the exclusion of other-acts evidence if its only relevance is to show a defendant's character or propensity to commit the charged offense. *People v Watkins*, 491 Mich 450.

3. Evidence admissible under MCL 768.27a, which allows the admission of evidence that a defendant charged with a sexual offense against a minor committed another sexual offense against a minor, may be excluded under MRE 403 if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury or by considerations of undue delay, waste of time, or needless presentation of

cumulative evidence; when applying MRE 403 to evidence admissible under MCL 768.27a, courts must weigh the propensity inference in favor of the evidence's probative value rather than its prejudicial effect and may not exclude the evidence as overly prejudicial merely because it allows a jury to draw a propensity inference; the evidence may be excluded on the basis of other considerations that include (1) the dissimilarity between the other acts and the charged crime, (2) the temporal proximity of the other acts to the charged crime, (3) the infrequency of the other acts, (4) the presence of intervening acts, (5) the lack of reliability of the evidence supporting the occurrence of the other acts, and (6) the lack of need for evidence beyond the complainant's and the defendant's testimony; courts should apply this balancing to each separate piece of evidence offered under MCL 768.27a and determine in the context of the entire trial how many separate pieces of evidence may be admitted under MCL 768.27a before the probative value of such evidence is outweighed by the other considerations in MRE 403 permitting exclusion of evidence. *People v Watkins*, 491 Mich 450.

NEW TRIAL

4. For a new trial to be granted on the basis of newly discovered evidence, a defendant must show that (1) the evidence itself, not merely its materiality, was newly discovered, (2) the newly discovered evidence was not cumulative, (3) the party could not, using reasonable diligence, have discovered and produced the evidence at trial, and (4) the new evidence makes a different result probable on retrial; the defendant carries the burden of satisfying all four parts of this test. *People v Rao*, 491 Mich 271.

5. Evidence may not be considered newly discovered for purposes of a motion for a new trial simply because it was unavailable at the time of trial; when a defendant is aware of evidence before trial, he or she is charged with the burden of using reasonable diligence to make that evidence available and to produce it at trial; what constitutes reasonable diligence to produce evidence at trial depends on the circumstances of the case; the law affords a defendant procedural avenues to secure and produce evidence, and a defendant must employ those avenues in a timely manner because evidence that is

known to the defendant, yet not produced until after trial, will not be considered grounds for a new trial. *People v Rao*, 491 Mich 271.

PLEA PROCEEDINGS

6. Guilty and no-contest plea proceedings are governed by MCR 6.302; subrules (B) through (E) impose explicit requirements on trial courts conducting plea hearings, but the broader directive of MCR 6.302(A) that a plea must be understanding, voluntary, and accurate is premised on the requirements of constitutional due process and might not be entirely satisfied by mere compliance with subrules (B) through (D) in specific cases. *People v Cole*, 491 Mich 325.

RESISTING AND OBSTRUCTING PERSONS PERFORMING LAW-ENFORCEMENT DUTIES

7. MCL 750.81d, which prohibits an individual from assaulting, battering, wounding, resisting, obstructing, opposing, or endangering a person who the individual knows or has reason to know is performing his or her duties, did not abrogate the common-law right to resist illegal police conduct, including unlawful arrests and unlawful entries into constitutionally protected areas. *People v Moreno*, 491 Mich 38.

CRIMINAL SEXUAL CONDUCT—*See*

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DRIVING WHILE LICENSE SUSPENDED OR REVOKED—*See*
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ELEMENTS OF SECOND-DEGREE MURDER—*See*

HOMICIDE 1

EMBRYOS OR FETUSES—*See*

NEGLIGENCE 1

ENVIRONMENT

NATURAL RESOURCES AND ENVIRONMENTAL PROTECTION ACT

1. A municipality can be held responsible under the Natural Resources and Environmental Protection Act (NREPA) for, and required to prevent, a discharge of raw human sewage that originated within the municipality's borders, even if the raw sewage was discharged by a private party and not by the municipality itself; the rebuttable presumption created in MCL 324.3109(2) is that NREPA has been violated when raw sewage has been discharged into state waters, not that the municipality itself discharged the sewage. *Dep't Environmental Quality v Worth Twp*, 491 Mich 227.
2. A municipality, such as a township, may be held responsible for a discharge of raw human sewage under MCL 324.3109 despite the fact that other municipalities, such as the county and state within which the township is located, could also have been held responsible for the discharge. *Dep't Environmental Quality v Worth Twp*, 491 Mich 227.
3. A circuit court has jurisdiction to require a municipality to take necessary corrective action to prevent a discharge of raw human sewage pursuant to the court's authority under MCL 324.3115(1) to restrain violations of and require compliance with part 31 of NREPA, MCL 324.3101 *et seq*. *Dep't Environmental Quality v Worth Twp*, 491 Mich 227.

EQUITABLE REMEDIES—*See*

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FACTUAL CAUSE OF VICTIM'S DEATH—*See*
SENTENCES 2

FAIR AND REASONABLE REPRESENTATION OF DISTINCT GROUPS IN VENIRES—*See*
CONSTITUTIONAL LAW 5, 6

FAIR CROSS SECTION OF THE COMMUNITY IN JURY SELECTION—*See*
CONSTITUTIONAL LAW 5, 6, 7

FETUSES—*See*
NEGLIGENCE 1

FIFTH AMENDMENT—*See*
CONSTITUTIONAL LAW 2

FINANCIAL RESPONSIBILITY ACT—*See*
INSURANCE 2

FIRST AMENDMENT—*See*
CONSTITUTIONAL LAW 8

FIRST-DEGREE CRIMINAL SEXUAL CONDUCT—*See*
SENTENCES 1

FORFEITURE OF RIGHT TO PUBLIC TRIAL—*See*

CONSTITUTIONAL LAW 9

FOURTEENTH AMENDMENT—*See*

CRIMINAL LAW 6

SENTENCES 1

FRAUD—*See*

INSURANCE 1, 2, 3, 4

GENERAL PROPERTY TAX ACT—*See*

TAXATION 1, 2

GOOD-CAUSE REQUIREMENT FOR USING TWO-WAY, INTERACTIVE VIDEO TECHNOLOGY—*See*

TRIAL 1

GUILTY PLEAS—*See*

CRIMINAL LAW 6

SENTENCES 1

HEARSAY—*See*

CONSTITUTIONAL LAW 3

HOMICIDE

SECOND-DEGREE MURDER

1. Second-degree murder is a death caused by an act of the defendant with malice and without justification or excuse; manslaughter requires the same elements with the exception of malice; voluntary manslaughter occurs when the defendant killed in the heat of passion, the passion was caused by adequate provocation, and there was no lapse of time during which a reasonable person could have controlled his or her passions; provocation is not an element of voluntary manslaughter but is instead a circumstance that negates the presence of malice (MCL 750.317; MCL 750.321). *People v Reese*, 491 Mich 127.

SELF-DEFENSE

2. The doctrine of imperfect self-defense does not exist in Michigan law as a freestanding defense that mitigates

murder to voluntary manslaughter; to distinguish the two crimes, the finder of fact must determine whether the prosecution proved the presence of malice, which is an element of murder but not manslaughter; factual circumstances that have been characterized as imperfect self-defense, however, may negate the malice element of second-degree murder (MCL 750.317; MCL 750.321). *People v Reese*, 491 Mich 127.

ILLEGAL POLICE CONDUCT—*See*

CRIMINAL LAW 7

IMPARTIAL JURIES—*See*

CONSTITUTIONAL LAW 5, 6

IMPERFECT RIGHT OF SELF-DEFENSE—*See*

HOMICIDE 2

INDIAN CHILD WELFARE ACT—*See*

CHILD CUSTODY 1, 2, 3, 4, 5, 6, 7, 8

INDIAN CHILDREN—*See*

CHILD CUSTODY 1, 2, 7

INSURANCE

See, also, LIMITATION OF ACTIONS 1

NO-FAULT

1. An insurer has no duty to investigate or verify the representations of a potential insured; an insurance company may avail itself of traditional legal and equitable remedies to avoid liability under a policy of no-fault insurance on the basis of fraud in the application for insurance, even when the fraud was easily ascertainable and the claimant is a third party. *Titan Ins Co v Hyten*, 491 Mich 547.
2. The legal and equitable remedies for fraud are manifold, but the available remedies may be limited by statute; an insurer's ability to avoid liability on the basis of fraud in obtaining a motor vehicle liability policy with respect to the insurance required by the financial responsibility act is statutorily limited, but the limitation only applies to a motor vehicle liability insurance policy that has been certified under the act as proof of financial respon-

sibility (MCL 257.518, MCL 257.519, MCL 257.520). *Titan Ins Co v Hyten*, 491 Mich 547.

3. A no-fault insurer has 55 days during which it may reassess its risk and cancel a no-fault insurance policy if the risk is unacceptable to the insurer; the statute does not preclude an insurer from pursuing traditional legal and equitable remedies if the insurer uncovers fraud after the 55-day period for risk reassessment has expired (MCL 500.3220). *Titan Ins Co v Hyten*, 491 Mich 547.
4. To establish actionable fraud, the party asserting fraud must prove that (1) the opposing party made a material misrepresentation; (2) it was false; (3) when the opposing party made the representation, he or she knew it was false or else made it recklessly, without any knowledge of its truth and as a positive assertion; (4) he or she made it with the intention that it should be acted on by the asserting party; (5) the asserting party acted in reliance on it; and (6) the asserting party thereby suffered injury. *Titan Ins Co v Hyten*, 491 Mich 547.

UNINSURED-MOTORIST BENEFITS

5. Because uninsured-motorist coverage is optional and not statutorily mandated, the policy language alone controls the circumstances entitling a claimant to an award of benefits; an unambiguous notice-of-claim provision requiring notice of the claim to the insurer within a specific period as a condition precedent to the provision of uninsured-motorist benefits is enforceable without a showing that the insured's failure to comply with the provision prejudiced the insurer. *DeFrain v State Farm Mut Auto Ins Co*, 491 Mich 359.

INVOCATION OF THE RIGHT TO A PUBLIC TRIAL BY THE ACCUSED—*See*

CONSTITUTIONAL LAW 8

JURIES—*See*

CONSTITUTIONAL LAW 5, 6, 7

JURISDICTION OVER INDIAN CHILDREN—*See*

CHILD CUSTODY 6, 7

JURISDICTION TO ORDER CORRECTIVE ACTIONS—*See*

ENVIRONMENT 3

JURY POOLS—*See*

CONSTITUTIONAL LAW 6

LARCENY—*See*

ROBBERY 1

LIFETIME ELECTRONIC MONITORING—*See*

SENTENCES 1

LIMITATION OF ACTIONS

INSURANCE

1. The tolling provision in MCL 600.5851(1) of the Revised Judicature Act allowing minors and insane persons one year after the removal of that disability to bring an action does not toll the one-year-back rule in MCL 500.3145(1) of the no-fault automobile insurance act, which limits the amount of personal protection insurance benefits recoverable to those losses incurred within the one year immediately before the date on which the action was commenced. *Joseph v Auto Club Ins Ass'n*, 491 Mich 200.

LIMITATION OF REMEDIES BY STATUTE—*See*

INSURANCE 2

LIMITATIONS ON CUSTODY PROCEEDINGS INVOLVING INDIAN CHILDREN—*See*

CHILD CUSTODY 6

MALICE—*See*

HOMICIDE 1, 2

MANSLAUGHTER—*See*

HOMICIDE 1, 2

MARCH BOARDS OF REVIEW—*See*

TAXATION 1

MARIJUANA—*See*

CONTROLLED SUBSTANCES 1, 2

MATERIAL MISREPRESENTATIONS—*See*
INSURANCE 4

MEDICAL MARIJUANA—*See*
CONTROLLED SUBSTANCES 1, 2

MICHIGAN MEDICAL MARIHUANA ACT—*See*
CONTROLLED SUBSTANCES 1, 2

MISREPRESENTATION BY APPLICANTS—*See*
INSURANCE 1, 2, 4

MOTIONS AND ORDERS—*See*
COURTS 1

MOTOR VEHICLES—*See*
CRIMINAL LAW 1

MUNICIPAL CORPORATIONS—*See*
ENVIRONMENT 1, 2, 3

MURDER—*See*
HOMICIDE 1, 2

NATURAL RESOURCES AND ENVIRONMENTAL PROTECTION ACT—*See*
ENVIRONMENT 1, 2, 3

NEGLIGENCE
EMBRYOS OR FETUSES
1. MCL 600.2922a(1) provides that a person who commits a wrongful or negligent act against a pregnant woman is liable for damages if the act results in a miscarriage or stillbirth by that individual or physical injury to or death of a fetus or embryo; liability may be imposed under MCL 600.2922a(1) only for an affirmative act; liability may not be imposed under the statute for an omission or a refusal to act. *Johnson v Pastoriza*, 491 Mich 417.

NEW TRIAL—*See*
CRIMINAL LAW 4, 5

NEWLY DISCOVERED EVIDENCE—*See*
CRIMINAL LAW 4, 5

NO-CONTEST PLEAS—*See*
CRIMINAL LAW 6
SENTENCES 1

NO-FAULT—*See*
INSURANCE 1, 2, 3, 4
LIMITATION OF ACTIONS 1

NONTESTIMONIAL STATEMENTS—*See*
CONSTITUTIONAL LAW 3, 4

NOTICE-OF-CLAIM PROVISIONS IN UNINSURED-MOTORIST COVERAGE—*See*
INSURANCE 5

NOTICE OF SUSPENSION OR REVOCATION OF DRIVER'S LICENSES AS NONTESTIMONIAL STATEMENTS—*See*
CONSTITUTIONAL LAW 4

NOTICE TO INDIAN TRIBES—*See*
CHILD CUSTODY 2, 4, 5

NOTICE VIOLATIONS UNDER INDIAN CHILD WELFARE ACT—*See*
CHILD CUSTODY 8

OFFENSE VARIABLE 3—*See*
SENTENCES 2

OMISSIONS OF DUTIES TO PREGNANT WOMEN—*See*
NEGLIGENCE 1

ONE-YEAR-BACK RULE—*See*
LIMITATION OF ACTIONS 1

ORDERS OF THE SUPREME COURT—*See*
COURTS 1

OTHER-ACTS EVIDENCE—*See*
CRIMINAL LAW 2, 3
PERPETRATORS AS VICTIM FOR PURPOSES OF SENTENCING GUIDELINES SCORING—*See*
SENTENCES 2
PERSONAL PROTECTION INSURANCE BENEFITS—*See*
LIMITATION OF ACTIONS 1
PHYSICAL INJURY TO VICTIM—*See*
SENTENCES 2
PHYSICIAN STATEMENTS CONCERNING MEDICAL USE OF MARIJUANA—*See*
CONTROLLED SUBSTANCES 1
PLEA PROCEEDINGS—*See*
CRIMINAL LAW 6
SENTENCES 1
PREGNANCY—*See*
NEGLIGENCE 1
PREJUDICE TO INSURER BY LACK OF NOTICE—*See*
INSURANCE 5
PREJUDICIAL EFFECTS OF OTHER-ACTS EVIDENCE—*See*
CRIMINAL LAW 3
PRIMA FACIE CASE OF VIOLATION OF RIGHT TO TRIAL BY IMPARTIAL JURY—*See*
CONSTITUTIONAL LAW 5
PROBATIVE VALUE OF OTHER-ACTS EVIDENCE—*See*
CRIMINAL LAW 3
PROCEDURAL PROTECTIONS FOR INDIAN CHILDREN—*See*
CHILD CUSTODY 7

PROCEDURAL RULES OF EVIDENCE—*See*
CRIMINAL LAW 2

PROPERTY TAX—*See*
TAXATION 1, 2

PROVOCATION—*See*
HOMICIDE 1

PUBLIC TRIALS—*See*
CONSTITUTIONAL LAW 8, 9

RAPE—*See*
CRIMINAL LAW 2, 3
SENTENCES 1

REASONABLE DILIGENCE IN DISCOVERING EVIDENCE—*See*
CRIMINAL LAW 5

REBUTTABLE PRESUMPTIONS OF VIOLATIONS OF ENVIRONMENTAL STATUTES—*See*
ENVIRONMENT 1

REMEDIES FOR FRAUD—*See*
INSURANCE 1, 2, 3

REMEDIES FOR VIOLATIONS OF NOTICE REQUIREMENTS OF INDIAN CHILD WELFARE ACT—*See*
CHILD CUSTODY 8

REQUIREMENTS FOR NOTICES TO INDIAN TRIBES—*See*
CHILD CUSTODY 5

RESISTING AND OBSTRUCTING PERSONS PERFORMING LAW-ENFORCEMENT DUTIES—*See*
CRIMINAL LAW 7

RETROACTIVITY OF STATUTES—*See*
CONTROLLED SUBSTANCES 2
STATUTES 1

REVISED JUDICATURE ACT—*See*

LIMITATION OF ACTIONS 1

REVOKED DRIVER'S LICENSES—*See*

CRIMINAL LAW 1

RIGHT OF CONFRONTATION—*See*

CONSTITUTIONAL LAW 3, 4

RIGHT TO PUBLIC TRIAL—*See*

CONSTITUTIONAL LAW 8, 9

RIGHT TO TRIAL BY IMPARTIAL JURY—*See*

CONSTITUTIONAL LAW 5, 6

RISK ASSESSMENT—*See*

INSURANCE 3

ROBBERY

ATTEMPTS TO COMMIT LARCENY

1. A person who, in the course of committing a larceny of any money or other property that may be the subject of larceny, uses force or violence against any person who is present, or who assaults or puts the person in fear, is guilty of robbery; the phrase "in the course of committing a larceny" includes acts that occur in an attempt to commit the larceny, during commission of the larceny, or in flight or attempted flight after the commission of the larceny or in an attempt to retain possession of the property; a completed larceny is not necessary to sustain a conviction for the crime of robbery or armed robbery (MCL 750.529, 750.530). *People v Williams*, 491 Mich 164.

SECOND-DEGREE CRIMINAL SEXUAL CONDUCT—*See*

SENTENCES 1

SECOND-DEGREE MURDER—*See*

HOMICIDE 1, 2

SELF-DEFENSE—*See*

HOMICIDE 2

SENTENCES

FIRST-DEGREE CRIMINAL SEXUAL CONDUCT

1. If mandatory lifetime electronic monitoring is required by the statutory provisions prescribing the punishment for first- or second-degree criminal sexual conduct and the defendant is sentenced to prison, lifetime electronic monitoring is a direct consequence of a guilty or no-contest plea to a charge of first- or second-degree criminal sexual conduct, and due process requires that the trial court inform the defendant at the time of the plea hearing that he or she will be subject to lifetime electronic monitoring (MCL 750.520b[2][d], MCL 750.520c[2][b], MCL 750.520n). *People v Cole*, 491 Mich 325.

SENTENCING GUIDELINES

2. Offense variable (OV) 3 considers physical injury to a victim, and a victim is required in all cases in which points are assessed for OV 3; the term "victim" means any person who is harmed by the defendant's criminal actions, including a coperpetrator; 100 points must be assessed for OV 3 when a victim was killed, the death resulted from the commission of a crime, and homicide is not the sentencing offense; the defendant must have been the factual cause of the victim's death in order to assess 100 points for OV 3 (MCL 777.33). *People v Laidler*, 491 Mich 339.

SENTENCING GUIDELINES—*See*

SENTENCES 2

SEWAGE—*See*

ENVIRONMENT 1, 2, 3

SEXUAL OFFENSES AGAINST MINORS—*See*

CRIMINAL LAW 2, 3

SIXTH AMENDMENT—*See*

CONSTITUTIONAL LAW 1, 3, 4, 5, 6, 7, 8

SOURCES OF DISCHARGE OF POLLUTION—*See*

ENVIRONMENT 1

STATISTICAL TESTS FOR ANALYZING JURY COMPOSITION—*See*

CONSTITUTIONAL LAW 6

STATUTES

See, also, CONTROLLED SUBSTANCES 2

RETROACTIVITY

1. The wrongful-death statute, MCL 600.2922, as amended by 2005 PA 270, may not be applied retroactively. *Johnson v Pastoriza*, 491 Mich 417.

STRUCTURAL ERRORS—*See*

CONSTITUTIONAL LAW 9

SUBSTANTIVE PROTECTIONS FOR INDIAN CHILDREN—*See*

CHILD CUSTODY 7

SUBSTANTIVE RULES OF EVIDENCE—*See*

CRIMINAL LAW 2

SUPREME COURT ORDERS—*See*

COURTS 1

SUSPENDED DRIVER'S LICENSES—*See*

CRIMINAL LAW 1

TAX TRIBUNAL—*See*

TAXATION 2

TAXABLE VALUES—*See*

TAXATION 1, 2

TAXATION

PROPERTY TAX

1. A March board of review may adjust an erroneous taxable value of a property in a subsequent year in order to bring the current taxable value into compliance with the General Property Tax Act, MCL 211.1 *et seq*. (MCL 211.27a; MCL 211.29; MCL 211.30). *Michigan Properties, LLC v Meridian Twp*, 491 Mich 518.
2. The Tax Tribunal has the authority to reduce an unconstitutional previous increase in taxable value for purposes of adjusting a taxable value that was timely challenged in a subsequent year; once its jurisdiction is properly invoked, the Tax Tribunal has the same powers and duties as those assigned to a March board of review,

including the duty to adjust erroneous taxable values to bring the current tax rolls into compliance with the General Property Tax Act, MCL 211.1 *et seq*. (MCL 205.731; MCL 205.732; MCL 205.737[1]). *Michigan Properties, LLC v Meridian Twp*, 491 Mich 518.

TERMINATION OF PARENTAL RIGHTS—*See*

CHILD CUSTODY 6, 8

TESTIMONIAL STATEMENTS—*See*

CONSTITUTIONAL LAW 3, 4

TESTIMONY—*See*

TRIAL 1

TOLLING PROVISION FOR ACTIONS BY MINORS AND INSANE PERSONS—*See*

LIMITATION OF ACTIONS 1

TRIAL

See, also, CONSTITUTIONAL LAW 1

WITNESSES

1. MCR 6.006(C) allows the use of use of two-way, interactive video technology at trials upon a showing of good cause if the parties consent; the use of the technology need not be necessary to further an important public policy or state interest to satisfy the good-cause requirement; any sound reason is sufficient. *People v Buie*, 491 Mich 294.

TRIBAL MEMBERSHIP DETERMINATIONS—*See*

CHILD CUSTODY 1, 2, 4

TRIBAL RIGHTS WAIVER OF TRIBES RIGHTS BY A PARENT—*See*

CHILD CUSTODY 3

TRIBE'S DECLINING JURISDICTION OVER INDIAN CHILDREN—*See*

CHILD CUSTODY 7

TWO-WAY, INTERACTIVE VIDEO TECHNOLOGY—*See*

CONSTITUTIONAL LAW 1

TRIAL 1

UNARMED ROBBERY—*See*
ROBBERY 1

UNAVAILABLE EVIDENCE—*See*
CRIMINAL LAW 5

UNDERSTANDING, VOLUNTARY, AND ACCURATE PLEAS—*See*
CRIMINAL LAW 6

UNINSURED-MOTORIST BENEFITS—*See*
INSURANCE 5

UNLAWFUL ARRESTS—*See*
CRIMINAL LAW 7

VENIRES—*See*
CONSTITUTIONAL LAW 5, 6, 7

VICTIMS OF CRIMES—*See*
SENTENCES 2

VOIR DIRE—*See*
CONSTITUTIONAL LAW 8

VOLUNTARY MANSLAUGHTER—*See*
HOMICIDE 1, 2

WAIVER OF RIGHTS—*See*
CONSTITUTIONAL LAW 1, 9

WATER POLLUTION—*See*
ENVIRONMENT 1, 2, 3

WITNESSES—*See*
CONSTITUTIONAL LAW 1
TRIAL 1

WRONGFUL-DEATH STATUTE—*See*
STATUTES 1