

Criminal Procedure Monograph 6: Pretrial Motions—Third Edition

May-August 2009 Updates

Updates have been issued for Criminal Procedure Monograph 6. A summary of each update appears below. The updates have been integrated into the website version of the monograph; consequently, some of the page numbers may have changed. Clicking on the links below will take you to the page(s) in the monograph where the updates appear. The text added or changed in each update is underlined.

[6.19 Motion to Suppress Confession for Violation of Sixth Amendment Right to Counsel](#)

Critical stages of the proceedings, in part, include the preliminary examination, a pretrial lineup, and the entry of a plea. *Duncan v State of Michigan*, 284 Mich App 246, 264 (2009).

A defendant's Sixth Amendment right to counsel is protected by the "three layers of prophylaxis" established by the United States Supreme Court to ensure that a defendant's Fifth Amendment rights are protected. *Montejo v Louisiana*, 556 US ___, ___ (2009).

(*Michigan v Jackson*, 475 US 625 (1986), was overruled by *Montejo v Louisiana*, 556 US ___, ___ (2009); therefore, references to *Michigan v Jackson* have been deleted from the text.)

[6.21 Motion to Compel Discovery](#)

A witness's informal and mutual agreement with law enforcement officials and the prosecution (that charges against the witness would be reduced in exchange for his testimony against the defendant) constituted evidence favorable to the defendant because of its impeachment value and should have been disclosed under *Brady v Maryland*, 373 US 83 (1963). *Akrawi v Booker*, 572 F3d 252, 263-264 (CA 6, 2009).

[6.22 Motion to Disqualify Judge](#)

Judicial disqualification on due process grounds may be warranted when an individual with an interest in the outcome of a case has contributed an extraordinary amount of money to the election campaign of one of the judges who will decide the case. *Caperton v AT Massey Coal Co, Inc*, 556 US ___, ___ (2009).

6.23 Motion to Dismiss Because of Double Jeopardy—Successive Prosecutions for the Same Offense

The United States and other countries are separate sovereigns; therefore, the Double Jeopardy Clause does not bar successive prosecutions for the same course of conduct. *United States v Studabaker*, 578 F3d 423, 430 (CA 6, 2009).

6.32 Motion in Limine—Impeachment of Defendant by His or Her Silence

People v Shafier, 277 Mich App 137 (2007), was reversed by *People v Shafier*, 483 Mich 205 (2009); therefore, the current reference to *Shafier* has been replaced. In *Shafier*, 483 Mich at 215-219, reversal was required because the defendant was prejudiced by the prosecutor’s repeated references to the defendant’s post-arrest, post-*Miranda* silence as evidence of the defendant’s guilt, and to impeach the defendant’s testimony that he was not guilty. Cf. *People v Borgne*, 483 Mich 178, 181 (2009), where the prosecution violated the defendant’s due process rights by referring to his post-arrest, post-*Miranda* silence, but the violation did not amount to plain error requiring reversal.

6.39 Motion for Severance or Joinder of Multiple Charges Against a Single Defendant

Some of the text in this section has been deleted, as it relied on nonbinding cases and former versions of MCR 6.120. MCR 6.120(B) permits joinder if offenses are related, i.e., if they comprise the same conduct or transaction; a series of connected acts; or a series of acts constituting parts of a single scheme or plan. See *People v Williams*, 483 Mich 226, 233 n 5, 235 (2009), where joinder was appropriate because the defendant’s two separate arrests were “ongoing acts constituting parts of his overall scheme or plan to package cocaine for distribution.”

6.43 Motion to Dismiss—Violation of 180-Day Rule

The trial court erred in dismissing the pending charges against the defendant, because the prosecution commenced proceedings against the defendant within 180 days of receiving notice from the Department of Corrections that the defendant was incarcerated, thereby satisfying the requirements of MCL 780.131 (prisoner must be brought to trial within 180 days) and MCL 780.133 (dismissal required only if action has not been commenced within 180 days). *People v Davis*, 283 Mich App 737, 743 (2009).

Burden of Proof: To use in its case-in-chief a confession deliberately elicited following arraignment, the prosecuting attorney must prove that police obtained a voluntary, knowing, and intelligent relinquishment of the Sixth Amendment right to counsel before they interrogated the accused. *Brewer v Williams*, 430 US 387, 410 (1977) (Powell, J, concurring), and *Patterson v Illinois*, 487 US 285, 292 (1988).

Discussion

The Sixth Amendment to the United States Constitution states that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.” The relevant provision of the state constitution is virtually identical. See Const 1963, art 1, § 20. In *Massiah v United States*, 377 US 201, 205-206 (1964), the United States Supreme Court held that the use as substantive evidence of an accused’s confession deliberately elicited by federal agents after the accused had been indicted but in the absence of counsel violated the Sixth Amendment right to counsel.

Rights to counsel are protected under both the Fifth and Sixth Amendments to the United States Constitution. ~~However, those rights are distinct and not necessarily co-extensive. *Rhode Island v Innis*, 446 US 291, 300 n 4 (1980). In *People v Smielewski*, 214 Mich App 55, 60-61 (1995), the Court of Appeals summarized the salient differences between the two rights:~~

~~“A defendant’s invocation of his Sixth Amendment right to counsel during judicial proceedings is distinct from the invocation of his Fifth Amendment right to counsel during custodial interrogation. . . . The Sixth Amendment right, which is offense-specific and cannot be invoked once for all future prosecutions, attaches only at or after adversarial judicial proceedings have been initiated. . . .~~

~~“The Fifth Amendment right to counsel simply refers to the right to have an attorney present at a custodial interrogation; this right is not, therefore, implicated when a defendant requests an attorney at arraignment. . . . One may waive his Fifth Amendment right to counsel by voluntarily waiving his *Miranda* rights after arraignment. . . .~~

~~“In comparison, once the Sixth Amendment right to counsel has been invoked, any subsequent waiver during a police-initiated custodial interview is ineffective with respect to the formal charges filed against the defendant. . . . “Incriminating statements pertaining to other crimes, as to which the Sixth Amendment right has not yet attached, are, of course, admissible at a trial of those offenses.” [*McNeil v Wisconsin*, 501 US 171, 176 (1991)], quoting *Maine v Moulton*, 474 US 159, 180, n 16 (1985). Indeed, a~~

~~defendant’s request for court-appointed counsel at an arraignment does not invalidate a waiver of the defendant’s right to counsel under *Miranda* during a subsequent police initiated interrogation concerning a different and unrelated offense.” (Citations and footnotes omitted.)~~

A defendant’s Sixth Amendment right to counsel is protected by the “three layers of prophylaxis” established by the United States Supreme Court to ensure that a defendant’s Fifth Amendment rights are protected. *Montejo v Louisiana*, 556 US _____, _____ (2009). “[O]nce ‘an accused has invoked his [or her] right to have counsel present during custodial interrogation . . . [he or she] is not subject to further interrogation by the authorities until counsel has been made available,’ unless he [or she] initiates the contact.” *Montejo, supra* at _____, quoting *Edwards v Arizona*, 451 US 477, 484-485 (1981). The prophylactic rule in *Edwards* protects a suspect’s voluntary decision to remain silent when his or her counsel is not present. *Montejo, supra* at _____. Additionally, “no subsequent interrogation may take place until counsel is present, ‘whether or not the accused has consulted with his [or her] attorney.’” *Montejo, supra* at _____, quoting *Minnick v Mississippi*, 498 US 146, 153 (1990). In sum, “[u]nder the *Miranda-Edwards-Minnick* line of cases . . . a defendant who does not want to speak to the police without counsel present need only say as much when he [or she] is first approached and given the *Miranda* warnings. At that point, not only must immediate contact end, but ‘badgering’ by later requests is prohibited.” *Montejo, supra* at _____. “[T]hese cases . . . protect the right to have counsel during custodial interrogation—which right happens to be guaranteed (once the adversary judicial process has begun) by two sources of law,” i.e., the Fifth and Sixth Amendments. *Id.* at _____. Because “the right under both sources is waived using the same procedure . . . doctrines ensuring voluntariness of the Fifth Amendment waiver simultaneously ensure the voluntariness of the Sixth Amendment waiver.” *Id.* at _____, overruling *Michigan v Jackson*, 475 US 625 (1986) (police forbidden from initiating interrogation of a criminal defendant once he or she invoked the Sixth Amendment right to counsel at an arraignment or similar proceeding).

The Sixth Amendment right to counsel attaches at the initiation of adversarial judicial criminal proceedings against a defendant, i.e., at the first appearance before a judicial officer at which the defendant is told of the formal accusation against him or her, and restrictions are imposed on his or her liberty (e.g., formal charge, preliminary hearing, indictment, information, or arraignment). *Rothgery v Gillespie Co*, 554 US _____, _____ (2008). See also *Duncan v State of Michigan*, 284 Mich App 246, 264 (2009) (critical stages, in part, include the preliminary examination, a pretrial lineup, and the entry of a plea). The Sixth Amendment right to counsel attaches without regard to whether a public prosecutor is aware of the initial proceeding or is involved in its conduct. *Rothgery, supra* at _____.

*See Section 6.23, below, for discussion of the *Blockburger* case.

“[W]hen the Sixth Amendment right to counsel attaches, it . . . encompasses offenses that, even if not formally charged, would be considered the same offense under . . . *Blockburger* [*v United States*, 284 US 299 (1932)]. . . .”^{*} *Texas v Cobb*, 532 US 162, 173 (2001).

~~Where an accused requests counsel before an arraigning magistrate, the police may not conduct further interrogations if counsel is not present, unless the accused initiates further communications, exchanges, or conversations with the police. *People v Bladel (After Remand)*, 421 Mich 39, 66 (1984), *aff’d sub nom Michigan v Jackson*, 475 US 625 (1986) (relying on *Edwards v Arizona*, 451 US 477 (1981)), and *People v Anderson (After Remand)*, 446 Mich 392, 402 (1994).~~

Where police officers initiated contact with the defendant regarding a polygraph examination after the defendant was arraigned and appointed counsel and while the defendant remained in custody, the defendant’s statements were obtained in violation of his Sixth Amendment right to counsel and should have been suppressed. *People v Harrington*, 258 Mich App 703, 706-707 (2003).

**People v Frazier (Frazier I)*, 270 Mich App 172, 179-180 (2006).

Although the Michigan Supreme Court was bound by the federal district court’s habeas corpus decision concerning the defendant’s ineffective assistance of counsel claim, the Court discussed “the correctness of this analysis” because the Court of Appeals endorsed the federal court’s decision in a published opinion.* *People v Frazier (Frazier II)*, 478 Mich 231, 242 (2007). The Supreme Court determined that the federal court wrongly determined that the defendant’s confession was inadmissible because the federal court incorrectly considered the defendant’s ineffective assistance claim under the standard in *United States v Cronic*, 466 US 648 (1984), rather than under the test in *Strickland v Washington*, 466 US 668 (1984). *Frazier II*, *supra* at 245-246.

In *Frazier I*, the Court of Appeals agreed with the federal district court’s conclusion that “the prosecution could not use defendant’s custodial statements in its case-in-chief because counsel had abandoned defendant at a critical stage of the proceedings (the police interrogation),” and that counsel’s conduct constituted a violation of the defendant’s Sixth Amendment right to counsel under *Cronic*. *Frazier II*, *supra* at 239. In *Frazier II*, *supra* at 244, the Supreme Court concluded that the federal district court’s *Cronic* analysis was improper because “[t]he *Cronic* test applies when the attorney’s failure is *complete*, while the *Strickland* test applies when counsel failed at specific points of the proceeding.” According to the *Frazier II* Court, “[b]ecause counsel consulted with defendant, gave him advice, and did nothing contrary to defendant’s wishes, counsel’s alleged failure was not complete.” *Frazier II*, *supra* at 244-245.

Even though the *Frazier II* Court could not disturb the federal court’s ruling under *Cronic*—that defense counsel’s conduct violated the defendant’s constitutional right to counsel, the Court pointed out that the exclusionary rule

Bell v Bell, 512 F3d 223, 233 (CA 6, 2008). Upon the defendant’s request, disclosure of an “agreement for testimony in connection with the case” is required under MCR 6.201(B)(5).

A witness’s informal and mutual agreement with law enforcement officials and the prosecution (that charges against the witness would be reduced in exchange for his testimony against the defendant) constituted evidence favorable to the defendant because of its impeachment value and should have been disclosed under *Brady v Maryland*, 373 US 83 (1963). *Akrawi v Booker*, 572 F3d 252, 263-264 (CA 6, 2009).

Moreover, the defendant has a due-process right to obtain evidence in the prosecutor’s possession if it is favorable to the defendant and material to guilt or punishment. *Brady, supra*. The prosecutor must provide such evidence to the defendant regardless of whether the defendant makes a request. *United States v Agurs*, 427 US 97, 104 (1976). However, withholding inadmissible exculpatory evidence is not necessarily a *Brady* violation. *Wood v Bartholomew*, 516 US 1, 5-6 (1995). To establish a *Brady* violation, a defendant must prove the following four elements. *Strickler v Greene*, 527 US 263, 281-282 (1999), *Lester, supra*, and *Fox, supra*.

- 1) The state possessed the evidence favorable to him or her. A violation does not occur simply because evidence is not disclosed. The undisclosed evidence must truly be favorable to the defendant, which means that it is exculpatory or impeaching. *United States v Bagley*, 473 US 667, 676 (1985), and *People v Elston*, 462 Mich 751, 759-763 (2000). For example, the prosecution has a duty to disclose charges pending against one of its witnesses, but not that a witness is under investigation in an unrelated matter. *People v Brownridge (On Remand)*, 237 Mich App 210, 215 (1999). The prosecutor has an obligation to learn of favorable evidence known to others acting on behalf of the government. *Kyles v Whitley*, 514 US 419, 437 (1995).
- 2) The defendant did not possess the evidence and could not have obtained it through the exercise of reasonable diligence.
- 3) The prosecuting attorney suppressed the favorable evidence, either willfully or inadvertently.
- 4) Had the evidence been disclosed to the defense, there is a reasonable probability that the outcome of the case would have been different. “The question is not whether the defendant would have been more likely than not to have received a different verdict, but whether he received a fair trial in the absence of the evidence, i.e., a trial resulting in a verdict worthy of confidence.” *People v Fink*, 456 Mich 449, 454 (1998), citing *Kyles, supra*.

In *People v Banks*, 249 Mich App 247 (2002), the Court of Appeals, applying the *Brady* standard for discovery violations, found no abuse of discretion in

defendant's profession and has recently been a losing party in a civil rights lawsuit filed by the defendant; or 4) might have prejudged the case because of prior participation in the case as one who personally conducted the initial investigation, amassed evidence, and filed and prosecuted the charges, or as one who made the initial decision which is under review. *Crampton, supra* at 351-355, and *Cain, supra* at 497-502, 514. Due process is violated when full-time law enforcement officials, charged with responsibility for arrest and prosecution of law violators, sit as adjudicators in law enforcement disputes between citizens and police officers. *Crampton, supra* at 356-358.

Judicial disqualification on due process grounds may be warranted when an individual with an interest in the outcome of a case has contributed an extraordinary amount of money to the election campaign of one of the judges who will decide the case. *Caperton v AT Massey Coal Co, Inc*, 556 US _____, _____ (2009). While "[n]ot every campaign contribution by a litigant or attorney creates a probability of bias that requires a judge's recusal," "there is a serious risk of actual bias—based on objective and reasonable perceptions—when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent." *Caperton, supra* at _____. "The inquiry centers on the contribution's relative size in comparison to the total amount of money contributed to the campaign, the total amount spent in the election, and the apparent effect such contribution had on the outcome of the election." *Id.* at _____. In *Caperton, supra* at _____, the chairman of a company contributed \$3 million, more than the total amount spent by all other supporters, to the campaign of a prospective state supreme court justice who, if elected, would hear a major case the company recently lost. *Id.* at _____. Once the justice was elected, the other party in the case moved to disqualify the justice on due process grounds, based on the conflict caused by the chairman's campaign contribution. *Id.* at _____. The justice denied all motions to disqualify himself, and the United States Supreme Court ultimately ruled that due process required recusal because the probability of actual bias on the part of the justice was too high to be constitutionally tolerable. *Id.* at _____.

A defendant is not denied his right to a fair and impartial trial when, after the defendant has interrupted the court proceedings on several occasions, the trial judge threatens to tape the defendant's mouth shut if the defendant continues his disruptive verbal outbursts. *People v Conley*, 270 Mich App 301, 309 (2006).

MCR 2.003(C)(1) states as follows:

"(1) *Time for Filing.* To avoid delaying trial and inconveniencing the witnesses, a motion to disqualify must be filed within 14 days after the moving party discovers the ground for disqualification. If the discovery is made within 14 days of the trial date, the motion must be made forthwith. If a motion is not timely filed, untimeliness,

jeopardy does not bar reinstatement of an original charge following a guilty plea and sentencing on a reduced charge where the basis for the reduction is overturned on appeal. *People v Howard*, 212 Mich App 366, 370 (1995).

Double jeopardy does not bar an appellate court from reversing an order setting aside a guilty verdict and reinstating the conviction. The protection against double jeopardy is not offended because there is no need for a second trial. *People v Jones*, 203 Mich App 74, 78-79 (1993).

The resentencing, upon reversal procured by the prosecution, as an adult of an individual who was originally sentenced as a juvenile and who was discharged from the juvenile system before the reversal does not violate the protection against double jeopardy. *People v Thenghkam*, 240 Mich App 29, 69-71 (2000).

5. Michigan’s “Separate Sovereign” Rules

Two entities seeking to prosecute a defendant for the same offense are separate sovereigns when their authority to prosecute the offense comes from two independent sources; a separate sovereign is not barred by double jeopardy from prosecuting a defendant for a crime resulting from the same conduct for which the defendant was already convicted and sentenced by a different sovereign. *People v Davis*, 472 Mich 156, 158 (2005). In *Davis*, the defendant stole a car in Michigan and drove it to Kentucky where he was apprehended. He pled guilty to Kentucky’s charges for the theft and was sentenced. Michigan charged the defendant for the same conduct, and the defendant argued that double jeopardy principles as explained in *People v Cooper*, 398 Mich 450 (1976), prohibited Michigan from prosecuting him because he had already been punished in Kentucky for the same criminal conduct.

The *Davis* Court expressly overruled the *Cooper* Court’s ruling after finding that ratifiers of Michigan’s constitution intended for Michigan’s double jeopardy clause to be interpreted the same as was the federal double jeopardy clause. United States Supreme Court decisions in *Bartkus v Illinois*, 359 US 121 (1959), and *Heath v Alabama*, 474 US 82 (1985), establish that successive prosecutions by dual sovereigns (whether federal/state or state/state) are not barred by the federal double jeopardy clause provided the entities involved derive their power to prosecute crimes from distinct and independent sources. *Davis, supra* at 162, 166-167.

See also *United States v Studabaker*, ___ F3d ___, ___ (CA 6, 2009) (the United States and other countries are separate sovereigns; therefore, the Double Jeopardy Clause does not bar successive prosecutions for the same course of conduct).

A provision of the Controlled Substances Act, MCL 333.7409, states:

nonresponsive conduct or silence that did not occur during custodial interrogation or in reliance on *Miranda* warnings may be admissible as evidence of consciousness of guilt. *People v Solmonson*, 261 Mich App 657, 664-667 (2004), and *People v Schollaert*, 194 Mich App 158, 160-167 (1992).

~~A prosecutor's deliberate and repeated use of the defendant's post-Miranda silence for impeachment purposes and as substantive evidence of the defendant's guilt amounted to constitutional error. *People v Shafier*, 277 Mich App 137, 140-143 (2007). However, in light of other evidence of the defendant's guilt, the Court concluded that reversal was not required because the prosecutor's improper questions and comments concerning the defendant's silence did not affect the outcome of the lower court proceedings. *Id.* at 143-144.~~

A prosecutor may not “seek to impeach a defendant’s exculpatory story, told for the first time at trial, by cross-examining the defendant about his [or her] failure to have told the story after receiving *Miranda* [v *Arizona*, 384 US 436 (1966)] warnings at the time of his [or her] arrest.” *Doyle v Ohio*, 426 US 610, 611 (1976). “[U]se of the defendant’s post-arrest silence in this manner violates due process,” *Doyle, supra* at 611, and is commonly referred to as “*Doyle error*.” See *People v McReavy*, 436 Mich 197, 202 n 2 (1990).

A defendant’s post-arrest, post-Miranda silence may not be used to impeach a defendant’s exculpatory testimony, or as direct evidence of a defendant’s guilt in the prosecution’s case-in-chief. *People v Shafier*, 483 Mich 205, 213-214 (2009). This is because “there is no way to know after the fact whether [the defendant’s post-arrest, post-Miranda] silence was due to the exercise of constitutional rights or to guilty knowledge.” *Shafier, supra* at 214, quoting *People v McReavy*, 436 Mich 197, 218 (1990). However, “in some circumstances a single reference to a defendant’s silence may not amount to a violation of *Doyle* [v *Ohio*, 426 US 610 (1976)] if the reference is so minimal that ‘silence was not submitted to the jury as evidence from which it was allowed to draw any permissible inference’” *Shafier, supra* at 214-215, quoting *Greer v Miller*, 483 US 756, 764-765 (1987).

In *Shafier*, 483 Mich at 215-219, the prosecution violated the defendant’s due process rights by making repeated references to the defendant’s post-arrest, post-Miranda silence as evidence of the defendant’s guilt, and to impeach the defendant’s testimony that he was not guilty. In *Shafier, supra* at 219-220, the defendant had not preserved the issue; therefore, the Court had to apply plain error review: (1) was there error?; (2) was the error plain?; (3) did the error affect substantial rights?; and (4) did the error result in the conviction of an actually innocent defendant or seriously affect the fairness, integrity, or public reputation of judicial proceedings?

In *Shafier*, 483 Mich at 220-221, the Court determined that plain error occurred. In considering whether the error affected substantial rights, i.e., was prejudicial, the Court considered “(1) the extent of the prosecutor’s comments, (2) the extent to which the prosecutor attempted to tie [the]

defendant's silence to his guilt, and (3) the overall strength of the case against [the] defendant when considered in light of the degree to which the jury's assessment of the evidence might have been affected by the prosecutor's references to [the] defendant's silence." The Court noted that "the more extensive a prosecutor's references to a defendant's post-arrest, post-Miranda silence, the more likely it is that the references had a prejudicial effect." *Shafier, supra* at 221-222. The Court further noted that "a prosecutor's references to a defendant's post-arrest, post-Miranda silence are more likely to be prejudicial the more directly or explicitly the prosecutor uses the silence to challenge a defendant's credibility or show a defendant's guilt." *Shafier, supra* at 222.

Applying the considerations to determine whether the *Doyle* error was prejudicial to the defendant in *Shafier*, the Court held that "in light of the prosecutor's extensive references to [the] defendant's silence, the extensive connection of that silence to [the] defendant's guilt, the inconsistencies in the prosecutor's case and the other evidence presented against him, and the nature of [the] defendant's defense—which hinged on his own credibility, [] the error was prejudicial." *Shafier*, 483 Mich at 223. The Court concluded that because "[t]he violation of [the] defendant's due process rights rendered the trial fundamentally unfair and cast a shadow on the integrity of [the] state's judicial processes," all four requirements of plain error review were met, and reversal was required. *Id.* at 224.

Cf. *People v Borgne*, 483 Mich 178, 181 (2009), where a *Doyle* error violated the defendant's due process rights, but did not amount to plain error requiring reversal. Even though the prosecutor made numerous references to the defendant's post-arrest, post-Miranda silence, the references were not pervasive. *Borgne, supra* at 198. Further, even though the prosecutor used the defendant's silence to challenge the credibility of the defendant's exculpatory version of events, the prosecutor did not suggest to the jury, either implicitly or explicitly, that it should infer guilt from the silence. *Shafier*, 483 Mich at 222. Additionally, the prosecutor presented "compelling, largely consistent, untainted evidence to prove th[e] defendant's guilt," and "did not overtly tie [the] defendant's post-arrest, post-Miranda silence to its argument that [the] defendant was guilty of the charged crime." *Borgne, supra* at 199. Finally, the prosecution's case was strong and consisted of untainted evidence independent of the *Doyle* violation. *Borgne, supra* at 199-201. Because the defendant was unable to establish prejudice, his convictions were affirmed. *Id.* at 202-203.

Cross-examination of a defendant concerning his or her prearrest failure to give the police the version of the events in question that the defendant later offers at trial, or concerning omissions within prearrest statements voluntarily given to the police during their investigation, may be admissible if it would have been natural for the defendant to come forward with the story which was later related at trial. *Collier, supra* at 34-36, 39, and *Cetlinski, supra* at 746-747, 760-761.

“(B) Postcharging Permissive Joinder or Severance. On its own initiative, the motion of a party, or the stipulation of all parties, except as provided in subrule (C), the court may join offenses charged in two or more informations or indictments against a single defendant, or sever offenses charged in a single information or indictment against a single defendant, when appropriate to promote fairness to the parties and a fair determination of the defendant’s guilt or innocence of each offense.

(1) Joinder is appropriate if the offenses are related. For purposes of this rule, offenses are related if they are based on

(a) the same conduct or transaction, or

(b) a series of connected acts, or

(c) a series of acts constituting parts of a single scheme or plan.

(2) Other relevant factors include the timeliness of the motion, the drain on the parties’ resources, the potential for confusion or prejudice stemming from either the number of charges or the complexity or nature of the evidence, the potential for harassment, the convenience of witnesses, and the parties’ readiness for trial.

(3) If the court acts on its own initiative, it must provide the parties an opportunity to be heard.

“(C) Right of Severance; Unrelated Offenses. On the defendant’s motion, the court must sever for separate trials offenses that are not related as defined in subrule (B)(1).”

*See Section 6.40, below, for discussion of MRE 404(b).

~~Joinder of related and unrelated charges against a single defendant is permitted. MCR 6.120(A). Upon proper motion, however, a defendant has an unqualified right to severance of unrelated charges. *People v Daughenbaugh*, 193 Mich App 506, 508–510 (1992), modified in part on another gd 441 Mich 867 (1992) and MCR 6.120(C). Severance of unrelated charges upon defense motion is required notwithstanding the possibility that evidence of unrelated offenses may be admissible at separate trials pursuant to MRE 404(b).* *Daughenbaugh, supra* at 510–511. Joinder and severance of related charges, joinder of unrelated charges, and severance of unrelated charges to whose joinder the defendant has not objected, are discretionary with the trial court. MCR 6.120(B). See *People v Duranseau*, 221 Mich App 204, 208 (1997).~~

~~Related offenses, of which a defendant does not have an absolute right to severance, include offenses that are part of a common scheme or plan. MCR 6.120(B)(1)(c). Criminal offenses are related as part of a common plan where~~

the objective of each offense was to contribute to the achievement of a goal not attainable by the commission of any of the individual offenses, based on the theory of the prosecution or the defense. *People v McCune*, 125 Mich App 100, 103–04 (1983).

MCR 6.120(B) permits joinder if offenses are related, i.e., if they comprise the same conduct or transaction; a series of connected acts; or a series of acts constituting parts of a single scheme or plan. See *People v Williams*, 483 Mich 226, 233 n 5 (2009). In *Williams*, *supra* at 228-229, the defendant was convicted of two drug charges, stemming from two separate arrests. The Court determined that “the offenses charged were related because the evidence indicated that [the] defendant engaged in ongoing acts constituting parts of his overall scheme or plan to package cocaine for distribution, and joinder was appropriate.” *Id.* at 235.

“To determine whether joinder is permissible, a trial court must first find the relevant facts and then must decide whether those facts constitute ‘related’ offenses for which joinder is appropriate.” *Williams*, 483 Mich at 231.

See also *People v Girard*, 269 Mich App 15, 17 (2005), where the trial court properly denied the defendant’s request to sever the CSC-I charges from the charges of possession of child sexually abusive material. In *Girard*, *supra* at 18, the evidence showed that the conduct underlying the charges against the defendant was plainly accounted for by the language of MCR 6.120(B)—“offenses are related if they are based on the same conduct or a series of connected acts or acts constituting part of a single scheme or plan.” Testimony at the defendant’s trial established “that defendant used child pornography for stimulation before and during his sexual abuse of the complainant, and, thus, the use of child pornography was part of his modus operandi.” *Girard*, *supra* at 18.

It is permissible to join related felony and misdemeanor charges in circuit court. MCL 767.1; *People v Loukas*, 104 Mich App 204, 207-208 (1981).

6.40 Motion in Limine—Evidence of Other Crimes, Wrongs, or Acts

Moving Party: Prosecutor*

Burden of Proof: The prosecutor must provide reasonable notice of the general nature of the evidence of other crimes, wrongs, or acts that he or she intends to introduce at trial, and the rationale for admitting the evidence. Notice must be given in advance of trial, or during trial if the prosecutor shows good cause for failing to give pretrial notice. MRE 404(b)(2). The prosecutor bears the burden of establishing the relevance of the proffered evidence. *People v Crawford*, 458 Mich 376, 385-386 n 6 (1998).

Discussion

*For a more complete discussion, see *Sexual Assault Benchbook* (MJ, 2002-April 2009), Section 7.3.

The 180-day rule does not require that trial be commenced within 180 days but rather that the prosecutor take good-faith action on the case during the 180-day period and that the prosecutor then proceed promptly to ready the case for trial. *People v Hendershot*, 357 Mich 300, 304 (1959). See also *People v Bradshaw*, 163 Mich App 500, 505 (1987). If the prosecutor takes preliminary action within the 180-day period but the initial action is followed by inexcusable delay that evidences an intent not to bring the case to trial promptly, the court may find the absence of good-faith action and thus may order dismissal. *Hendershot*, *supra* at 303-304.

For example, in *People v Davis*, 283 Mich App 737, 743-744 (2009), the trial court erred in dismissing the pending charges against the defendant, because the prosecution commenced proceedings against the defendant within 180 days of receiving notice from the Department of Corrections that the defendant was incarcerated, thereby satisfying the requirements of MCL 780.131 (prisoner must be brought to trial within 180 days) and MCL 780.133 (dismissal required only if action has not been commenced within 180 days). “The prosecution made good-faith efforts to proceed promptly with pretrial proceedings,” and “[t]here [wa]s no indication that any delay in bringing [the] defendant to trial was inexcusable or demonstrated an intent not to promptly bring the case to trial.” *Davis*, *supra* at 743.

All adjournments without reason and unexplained delays, including docket congestion, are charged to the prosecution. *People v England*, 177 Mich App 279, 285 (1989). Short delays related to exceptional circumstances hampering the normally efficient functioning of the trial court are excusable. *People v Schinzel (After Remand)*, 97 Mich App 508, 511-512 (1980). Delays beyond the 180-day period are not charged to the prosecution if caused by the prosecution’s good-faith action to bring an intervening charge against the defendant promptly to trial and if the prosecution thereafter acted promptly to bring the pending case to trial. *People v Freeman*, 122 Mich App 260, 265 (1982). Delay caused by the prosecution’s interlocutory appeal of a trial court’s ruling is not charged to the prosecution. *Bradshaw*, *supra*. Delay caused by the trial court’s decision to hold in abeyance a ruling on a defense motion pending a Supreme Court decision is charged against the prosecution. *People v Farmer*, 127 Mich App 472, 477 (1983).

Delays attributable to the defendant, including delays resulting from the filing of motions by the defense, are not charged against the prosecution in determining whether the 180-day period has expired. *People v Pelkey*, 129 Mich App 325, 329 (1983). Delays caused by adjournments to which the defendant has stipulated are charged to the defendant, as is a delay occasioned by a defendant’s motion for new counsel. *People v Crawford*, 232 Mich App 608, 614-615 (1998). The running of the 180-day period is tolled during the pendency of a defendant’s appeal or application for leave to appeal. *People v Smielewski*, 235 Mich App 196, 200 (1999).

