

STATE OF MICHIGAN  
IN THE SUPREME COURT

THE PEOPLE OF THE  
STATE OF MICHIGAN,

Plaintiff-Appellee,

vs.

SANDY SEAN HOLT, JR.,

Defendant-Appellant.

SC File No. 128034

COA File No. 250580

Lower Court File No. 02-47915-FC  
Muskegon County Circuit Court

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**PLAINTIFF-APPELLEE'S SUPPLEMENTAL RESPONSE TO  
DEFENDANT-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL**

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**COUNTERSTATEMENT OF THE QUESTIONS PRESENTED**

- I. DID DEFENDANT'S CONVICTION *NOT* VIOLATE THE 180-DAY RULE BECAUSE, INTER ALIA, THE PROSECUTOR NEVER RECEIVED WRITTEN NOTICE BY CERTIFIED MAIL FROM THE DEPARTMENT OF CORRECTIONS THAT WOULD HAVE TRIGGERED THE APPLICATION OF THE STATUTORY 180-DAY RULE?

Plaintiff-Appellee says, "Yes".

Defendant-Appellant says, "No".

The trial court did not address this issue.

The Court of Appeals did not address this issue.

- II. IS THE TIME LIMITATION SET FORTH IN MCL 780.131 SUBJECT TO WAIVER OR EXTENTION BASED UPON MUTUAL AGREEMENT OF THE PARTIES OR AN ADJOURNMENT SECURED BY DEFENDANT?

Plaintiff-Appellee says, "Yes".

Defendant-Appellant says, "No".

The trial court did not address this issue.

The Court of Appeals did not address this issue.

- III. IS THE TIME LIMITATION SET FORTH IN MCL 780.131 SUBJECT TO WAIVER OR EXTENTION BASED UPON TIME ATTRIBUTABLE TO DEFENDANT?

Plaintiff-Appellee says, "No".

Defendant-Appellant says, "No".

The trial court did not address this issue.

The Court of Appeals did not address this issue.

## COUNTERSTATEMENT OF JURISDICTION

The Supreme Court may review by appeal a case after decision by the Court of Appeals. MCR 7.301(A)(2). The procedures for such appeal are outlined in MCR 7.302 *et seq.* The Court of Appeals' opinion was entered on December 21, 2004. (Exhibit A.) An application for leave must be filed within 56 days of an opinion of the Court of Appeals. MCR 7.302(C)(2)(b). Defendant's application was filed on February 15, 2005. Accordingly, his application for leave to appeal is timely, having been filed within 56 days of the Court of Appeals' December 21, 2004, opinion.

## COUNTERSTATEMENT OF THE FACTS

Defendant applies for leave to appeal from the Michigan Court of Appeals per curiam opinion affirming his jury trial conviction of armed robbery, MCL 750.529. *People v Holt*, unpublished per curiam opinion (COA Docket No. 250580, released December 21, 2004); 2004 WL 2952291 (Mich App 2004) (Exhibit A). Defendant was sentenced as a fourth-time felony offender, MCL 769.12, to serve a term of 30 to 90 years' imprisonment.

The issues to be decided in this case involve the correct interpretation of MCL 780.131, *et seq.*, which is known as the 180-day rule. This Court issued an order on September 22, 2006, that directs:

On order of the Court, the application for leave to appeal the December 21, 2004 judgment of the Court of Appeals is considered. We direct the Clerk to schedule oral argument on whether to grant the application or take other peremptory action. MCL 7.302(G)(1). The parties shall submit supplemental briefs within 42 days of the date of this order addressing whether there was a violation of the 180-day rule, MCL 780.131, in this case in light of *People v Williams*, 475 Mich 245; 716 NW2d 208 (2006), and whether the time limitation set forth in MCL 780.131 is subject to waiver or extension for any reason, such as prosecutor good faith, mutual agreement of the parties, or time attributable to the defendant, including requests for adjournment.

The Criminal Defense Attorneys of Michigan and the Prosecuting Attorneys Association of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae. [*People v Sandy Sean Holt, Jr*, 477 Mich 860; 721 NW2d 176 (2006). Exhibit B.]

The People accept Defendant's statement of the facts except as otherwise stated in the Law and Argument section of this response.

**LAW AND ARGUMENT**

I. **DEFENDANT'S CONVICTION DID NOT VIOLATE THE 180-DAY RULE BECAUSE, INTER ALIA, THE PROSECUTOR NEVER RECEIVED WRITTEN NOTICE BY CERTIFIED MAIL FROM THE DEPARTMENT OF CORRECTIONS THAT WOULD HAVE TRIGGERED THE APPLICATION OF THE STATUTORY 180-DAY RULE.**

A. *Standard of Review*

Statutory interpretation is a question of law that is reviewed de novo. *People v Cleveland Williams*, 475 Mich 245, 250; 716 NW2d 208 (2006).

B. *Analysis of the issue*

Defendant contends that his right to trial within 180 days of incarceration in the Department of Corrections was violated pursuant to MCL 780.131. The People disagree.

MCL 780.131(1) provides:

Whenever the department of corrections receives notice that there is pending in this state any untried warrant, indictment, information, or complaint setting forth against any inmate of a correctional facility of this state a criminal offense for which a prison sentence might be imposed upon conviction, the inmate shall be brought to trial within 180 days after the department of corrections causes to be delivered to the prosecuting attorney of the county in which the warrant, indictment, information, or complaint is pending written notice of the place of imprisonment of the inmate and a request for final disposition of the warrant, indictment, information, or complaint. The request shall be accompanied by a statement setting forth the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time or disciplinary credits earned, the time of parole eligibility of the prisoner, and any decisions of the parole board relating to the prisoner. The written notice and statement shall be delivered by certified mail.

“The 180-day-rule statute expressly provides that the Department of Corrections must deliver a written notice of incarceration and request for disposition ‘to the prosecuting attorney of the county in which the warrant, indictment, information, or complaint is pending .... MCL 780.131(1).’ *Cleveland Williams, supra*, 475 Mich at 256. “The statutory trigger is notice to the

prosecutor of the defendant's incarceration and a departmental request for final disposition of the pending charges." *Cleveland Williams, supra*, 475 Mich at 259. "The statute does not trigger the running of the 180-day period when the Department of Corrections actually learns, much less should have learned, that criminal charges were pending against an incarcerated defendant." *Id.*

Accordingly, unless or until the prosecutor receives by certified mail the statutory notice issued by the Department of Corrections as directed by MCL 780.131(1), the 180-day rule is not triggered.

In the instant case, the Department of Corrections never issued the notice as required under the statute. (Exhibit D, 2/20/2007 order of the circuit court; 2/220/2007 Evidentiary Hearing Tr, pp 40-41; Exhibit C, copy of letter from the Department of Corrections confirming that it never sent any notice to the Muskegon County Prosecutor.) As a consequence, the 180-day rule does not apply in this case and Defendant's application for leave should be denied.<sup>1</sup>

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<sup>1</sup> This Court in *People v Cleveland Williams*, 475 Mich 245, 252; 716 NW2d 208, 213 (2006), says that "MCL 780.133 requires dismissal with prejudice if a prisoner is not *brought to trial* within the 180-day time limit set forth in the act:...." (Emphasis supplied.)

The People submit that the phrase "brought to trial" in MCL 780.131(1) should not render meaningless the phrase contained in MCL 780.133, to wit: "In the event that, within the time limitation set forth in section 1 of this act, action is not commenced on the matter for which request for disposition was made."

These two phrases must be read together to understand the meaning of the 180-day rule and whether the draconian remedy of dismissal with prejudice should apply.

The phrase "brought to trial", read in context with the phrase in MCL 780.133, does not mean that *trial* must commence within 180 days of the prosecutor's receipt of the DOC certified letter.

The word "brought" in the statute by definition includes any completed act of bringing (such as the act of an arraignment or preliminary examination or motion or any other act). See, e.g., *The Random House College Dictionary* (rev ed), pp 169, 173, *American Heritage Dictionary* (2nd Col Ed, 1991), pp 209, 905, 908, *Black's Law Dictionary* (6th ed, 1990), pp 192, 194. Thus, under the statute, the phrase "brought to trial", when read together with the phrase in

II. THE TIME LIMITATION SET FORTH IN MCL 780.131 IS SUBJECT TO WAIVER OR EXTENTION BASED UPON MUTUAL AGREEMENT OF THE PARTIES OR AN ADJOURNMENT SECURED BY DEFENDANT.

A. Standard of Review

See Argument I.

B. Analysis of the issue

“Deviation from a legal rule is ‘error’ *unless the rule has been waived.*” *People v Carter*, 462 Mich 206, 214; 612 NW2d 144 (2000) (emphasis supplied), quoting *United States v Olano*, 507 US 725, 732-733; 113 S Ct 1770, 1777; 123 L Ed 2d 508 (1993).

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MCL 780.133, means the presentment of the matter to the Judicial Branch so that the latter will docket the matter and protect the inmate’s constitutional and statutory rights, including his right to counsel, as the matter proceeds (under this Court’s rules of practice and procedure) to trial. This is why the phrase “in the event action is not commenced” within 180 days is used in MCL 780.133. If a trial had to be commenced, the Legislature certainly would have used the five-letter word “*trial*” rather than the six-letter word “*action*” in MCL 780.133. In addition, the definite article “the” is not used before the word “action” in MCL 780.133. Instead the definite article “the” is used as follows: “within *the* time limitation set forth in section 1 of this act”. Thus, MCL 780.133 is referring to “the time” (i.e., 180 days) expressly “set forth in section 1 of this act”. Thus, the Legislature certainly expressed itself in specifics when it wanted to in this statute. It thus could have easily used the word “trial” in place of “action” (if it specifically meant that a trial had to commence within 180 days) *or* it could have said, “within the time limitation set forth in section 1 of this act” “*the* action described in section 1 of this act must commence”.

In short, the 180-day rule is not a super speedy-trial rule, which is otherwise available by the United States and Michigan Constitutions, US Const, Am VI and Const 1963, art 1, § 20, as well as by statute, MCL 768.1.

Finally, why would the Legislature intend to create a constitutional crisis by giving to the Judicial Branch the unfettered ability to reject the Executive Branch’s exclusive charging discretion? In other words, if a court were to disagree with the prosecutor’s charge, all a court would have to do is use its control over its docket to schedule a trial outside the 180 days. The case would then be dismissed with prejudice, frustrating the Executive Branch’s authority and discretion. Is that what was meant by the statutory 180-day rule? Such a crisis can be avoided by simply reading the 180-day rule as it is written, to wit: If “action is not commenced” within 180 days, then the case is dismissed with prejudice rather than reading it to say “if *a trial* is not commenced within 180 days” the case is dismissed with prejudice.

“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.” *Carter, supra*, 462 Mich at 217, quoting *Olano, supra*, 507 US at 733; 113 S Ct at 1777.

“It is presumed that waiver is available in ““a broad array of constitutional and statutory provisions.”” *Carter, supra*, 462 Mich at 218, quoting *New York v Hill*, 528 US 110, 114; 120 S Ct 659, 663; 145 L Ed 2d 560 (2000), quoting *United States v Mezzanatto*, 513 US 196, 200; 115 S Ct 797; 130 L Ed 2d 697 (1995). Indeed, “[t]he most basic rights of criminal defendants are subject to waiver.” *Peretz v United States*, 501 US 923, 936; 111 S Ct 2661, 2669; 115 L Ed 2d 808 (1991).

1. The 180-day rule is a trial right and, therefore, is waivable

The 180-day rule is akin to a trial right. It establishes a right for an inmate of the Michigan Department of Corrections (“MDOC”) to be brought to trial within 180 days of the MDOC’s written notification by certified mail to the “prosecuting attorney” where a criminal matter is pending “of the place of imprisonment of the inmate and a request for final disposition of the warrant, indictment, information, or complaint.” MCL 780.131(1).

The United States Supreme Court has stated that “the right to trial [established by the Constitution] is waivable”, *Olano, supra*, 507 US at 733; 113 S Ct at 1777. It follows, therefore, that the *statutory* right established by the 180-day rule should also be “waivable”.

2. The Interstate Agreement on Detainers should be applied by analogy and establishes that the rights under the 180-day rule are waivable.

The Interstate Agreement on Detainers (“IAD”) should be viewed as analogous to Michigan’s 180-day rule.<sup>2</sup> The IAD was drafted in 1956 by the Council of State Governments and is a compact entered into by 48 States, including Michigan, MCL 780.601 *et seq.*, the United States, 18 USC app 2, § 1, *et seq.*, the Virgin Islands and the District of Columbia to establish procedures for resolution of one State’s outstanding charges against a prisoner of another State. *Hill, supra*, 528 US at 111; 120 S Ct at 662; *Carchman v Nash*, 473 US 716, 719; 105 S Ct 3401, 3403; 87 L Ed 2d 516 (1985).

Article I to the IAD provides that “the purpose of this agreement [is] to encourage the expeditious and orderly disposition of ... [outstanding] charges [against prisoners] and determination of the proper status of any and all detainees based on untried indictments, informations or complaints.” MCL 780.601.

The 180-day rule represents a similar interest by the Legislature to encourage the expeditious and orderly disposition of outstanding warrants, informations, indictments or complaints against inmates of Michigan correctional facilities. To this end, the 180-day rule serves as a means of having the prosecutor make a decision whether to pursue prosecution on a

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<sup>2</sup> This Court has looked to the Interstate Agreement on Detainers by analogy in applying the 180-day rule in *People v Cleveland Williams*, 475 Mich 245, 256; 716 NW2d 208 (2006), stating:

The first qualifying written notice from the Department of Corrections was received by the prosecutor on July 16, 2001. Cf. *People v Fex*, 439 Mich. 117, 119-123, 479 NW2d 625 (1992), *aff’d* 507 US 43; 113 S Ct 1085; 122 L Ed 2d 406 (1993) (the 180-day period in Article III[a] of the Interstate Agreement on Detainers [IAD], MCL 780.601 *et seq.*, does not commence until the prisoner’s request for final disposition of the charges against him or her has actually been delivered to the court and prosecuting officer of the jurisdiction that lodged the detainer against him or her).

warrant, information, indictment or complaint against an inmate of a Michigan correctional facility.

By analogy, the United States Supreme Court, in interpreting the Interstate Agreement on Detainers (“IAD”),<sup>3</sup> held that defense counsel could agree to a trial date beyond the 180-day period required under Article III of the Interstate Agreement on Detainers (“IAD”). *Hill, supra*, 528 US at 113; 120 S Ct at 663. This recognition that the time limits contained in the IAD for trying a defendant are waivable was due, in part, because “[n]o provision of the IAD prescribes the effect of a defendant’s assent to delay on the applicable time limits.” *Hill, supra*, 528 US at 114; 120 S Ct at 663.

The same is true with respect to Michigan’s 180-day rule. No provision of the 180-day rule prescribes the effect of a defendant’s assent to delay on the applicable time limits.

Accordingly, a defendant may himself or through counsel, or both,<sup>4</sup> waive any action by the prosecutor that would bring him to trial. Cf. *Hill, supra*, 528 US at 113; 120 S Ct at 663.

### 3. The 180-day rule is nonjurisdictional

The 180-day rule is nonjurisdictional. *People v Bulger*, 462 Mich 495, 517, fn 7; 614 NW2d 103 (2000), overruled in part on other grounds sub nom *Halbert v Michigan*, 545 US 605; 125 S Ct 2582; 162 L Ed 2d 552 (2005). As such the rights established by the 180-day rule are waivable. *Id.*

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<sup>3</sup> “Article III(a), requires that a prisoner against whom a detainer has been lodged be tried within 180 days of the prosecuting State’s receipt of the prisoner’s notice requesting speedy disposition of the charges.” *Reed v Farley*, 512 US 339, 346, fn 6; 114 S Ct 2291, 2296, fn 6; 129 L Ed 2d 277 (1994), citing *Fex v Michigan*, 507 US 43; 113 S Ct 1085; 122 L Ed 2d 406 (1993).

<sup>4</sup> See Argument III.B.4, entitled “Informed consent versus valid waivers by counsel”.

4. Informed consent versus valid waivers by counsel

In judging whether the defendant must make an *informed* waiver under the IAD, the United States Supreme Court in *Hill* explained that “[f]or certain fundamental rights, the defendant must personally make an informed waiver.” *Hill, supra*, 528 US at 114; 120 S Ct at 664, citing as examples *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). In this context, waiver is viewed as the intentional relinquishment or abandonment of a known right. *Carter, supra*, 462 Mich at 215 (citations and quotations omitted). It thus applies to fundamental *constitutional* rights and, under those circumstances, courts indulge every reasonable presumption against waiver.

Other rights, however, do not require *informed* consent to be deemed waived. The Court in *Hill* specifically rejected that informed consent was required for a waiver of the 180-day requirement under Article III of the IAD. The Court viewed the timing of trial as a “[s]cheduling matter[.]” which is “plainly among those for which agreement by counsel generally controls” and, therefore, the defendant’s informed waiver of a delay in the trial is not necessary or appropriate.” *Hill, supra*, 528 US at 115; 120 S Ct at 664. “[O]nly counsel is in a position to assess the benefit or detriment of the delay [of trial] to the defendant’s case. Likewise, only counsel is in a position to assess whether the defense would even be prepared to proceed any earlier.” *Hill, supra*, 528 US at 115; 120 S Ct at 664. Accordingly, “[r]equiring express assent from the defendant himself for such routine and often repetitive scheduling determinations would consume time to no apparent purpose.” *Hill, supra*, 528 US at 115; 120 S Ct at 664.

The same reasoning should apply in the context of the 180-day rule. The procedures that occur in court that eventually bring a case to trial are scheduling matters. They are, therefore, properly left to counsel to handle and do not require the informed consent by a defendant.

5. Application of waiver in the instant case

First, the 180-day rule never arose in this case because the prosecutor never received the written notice by certified mail from the MDOC as required under MCL 780.131(1) that would have triggered the application of the 180-day rule. *Cleveland Williams, supra*, 475 Mich at 259. (See Argument I.)

Second, action was taken by the prosecutor in this case. Immediately after Defendant was lodged with the MDOC, the prosecutor had a writ issued that brought Defendant to Muskegon County for arraignment. The case progressed thereafter as any other criminal case would and Defendant was tried before a jury. Accordingly, there is no 180-day rule violation.

Third, while the case was progressing to trial, Defendant sought a polygraph test. Defendant agreed that he wanted a polygraph test and participated in such a test. Scheduling of the test resulted in a delay of the trial. Defendant thus waived any delay in the trial if such delay exceeded the 180-day limit imposed by the statutory 180-day rule. See and compare *Hill, supra*, 528 US at 115; 120 S Ct at 664 (defense counsel can waive a defendant's right to trial within 180-day time limit required under Article III of the IAD without the defendant's consent by agreeing to a trial date beyond the 180-day time period).

III. **THE TIME LIMITATION SET FORTH IN MCL 780.131 IS NOT SUBJECT TO WAIVER OR EXTENTION BASED UPON TIME ATTRIBUTABLE TO DEFENDANT EXCEPT THAT A DOCTRINE OF FORFEITURE BY WRONGDOING SHOULD APPLY IN THE EVENT DEFENDANT IS RESPONSIBLE FOR THE DELAY.**

A. *Standard of Review*

See Argument I.

B. *Analysis of the issue*

Absent a waiver (as discussed under Argument III), there is no exception under the 180-day rule that allows for extending the prosecutor's obligation to take action on a warrant, information, indictment or complaint once the prosecutor receives the statutory notice from the MDOC under MCL 780.131(1). There is no counting-of-days requirement under the 180-day rule, depending on who is responsible for a delay. In other words, there is no need to evaluate whether a defendant is responsible for a delay versus whether the prosecutor is responsible for a delay. The prosecutor is always responsible for a delay in taking action on a warrant, information, indictment or complaint, and, therefore, absent a waiver by the defendant, no time is to be assessed against an inmate of a Michigan correctional facility.

Moreover, the concept of assessing time of a delay to either the prosecutor or to the inmate is foreign to the language of the statute. The only delay that would be attributable to a defendant is if he agreed, and thereby waived, the prosecutor's statutory requirement to take action within the 180 day time limit. (See Argument III.)

On the other hand, a doctrine of forfeiture by wrongdoing should apply in those situations when the inmate is affirmatively responsible for the prosecutor's inability to proceed.

The United States Supreme Court has recently reaffirmed *the doctrine of forfeiture by wrongdoing* that applies against the accused when the accused is responsible for the absence of a

witness under the Sixth Amendment Confrontation Clause. *Crawford v Washington*, 541 U.S. 36, 62; 124 S Ct 1354, 1370; 158 L Ed 2d 177 (2004) (“the rule of forfeiture by wrongdoing [which we accept] extinguishes confrontation claims on essentially equitable grounds; it does not purport to be an alternative means of determining reliability”, citing *Reynolds v United States*, 98 US 145, 158-159; 25 L Ed 244 [1879]).

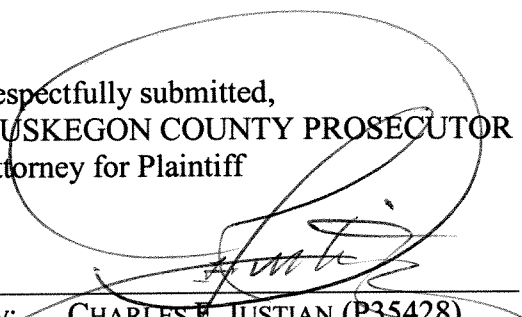
Under the 180-day rule, there could be circumstances when the inmate is responsible for the absence of one or more witnesses that inhibits or precludes the prosecutor’s ability to comply with the 180-day rule. For example, the inmate might threaten a key witness, or the inmate might cause physical injury to a witness, that makes that witness unavailable until after the expiration of the 180-day period. Under such circumstances, the inmate should not be heard to complain that the 180-day rule was violated.

**RELIEF REQUESTED**

For the foregoing reasons, the Court should deny Defendant’s application for leave to appeal.

Respectfully submitted,  
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Dated: February 22, 2007

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